SUPREME COURT OF THE UNITED STATES.

No. 353.

THE NEW HAVEN AND NORTHAMPTON COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM HAMERSLEY.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

THE NEW HAVEN AND NORTHAMPTON COMPANY
vs.
WILLIAM HAMERSLEY, ATTORNEY FOR THE State of Connecticut.

The President of the United States of America to the judges of the supreme court of errors of the State of Connecticut, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of errors before you, between William Hamersley, of the town and county of Hartford, in said State of Connecticut, as attorney for the State of Connecticut, plaintiff in a proceeding for a mandamus, and the New Haven and Northampton Company, a corporation organized under the laws of the State of Connecticut, and located and having an office and principal place of doing business at New Haven, in said State of Connecticut, a manifest error hath happened, to the great damage of the said New Haven and Northampton Company as it is claimad, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1877, in the

2 Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 20th day of March, in the year of our Lord eighteen hundred and seventy-seven.

[SEAL U. S. DISTRICT COURT.] LOREN P. WALDO,
Clerk.

Supreme Court of the United States. In error.

THE NEW HAVEN AND NORTHAMPTON COMPANY
vs.
WILLIAM HAMERSLEY, ATTORNEY FOR THE State of Connecticut.

Know all men by these presents, that we, the New Haven and Northampton Company as principal, and Chas. N. Yeamans as surety, are held and firmly bound unto the above named William Hamersley, attorney for the State, defendant in error in the above entitled action, in the sum of two hundred dollars, to be paid to the said William Hamersley, his executors, administrators, or successors. To which payment well and truly to be made we bind ourselves, and each of us

jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Whereas the above-named New Haven and Northampton Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the supreme court of errors of the State of Connecticut:

3 Now, therefore, the condition of this obligation is such that if the above-named New Haven and Northampton Company shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals this 20th day of March, A. D. 1877.

NEW HAVEN AND NORTHAMPTON COMPANY, [L. S.]
By CHAS. N. YEAMANS, *Pres.*
CHAS. N. YEAMANS. [L. S.]

The security of the signers of the foregoing bond is satisfactory.

WILLIAM HAMERSLEY,
Attorney.

The foregoing bond is hereby approved.

JOHN D. PARK,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

Citation.

UNITED STATES OF AMERICA, *ss:*

To William Hamersley, of the town and county of Hartford and State of Connecticut, attorney for the said State of Connecticut, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1877, pursuant to a writ of error filed in the clerk's office of the supreme court of errors of the State of Connecticut, wherein the New Haven & Northampton Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

4 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of March, in the year of our Lord eighteen hundred and seventy-seven.

JOHN D. PARK,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

HARTFORD, CONN.

Service of the foregoing citation is hereby acknowledged, March 26, 1877.

WM. HAMERSLEY,
State Attorney.

5 NEW HAVEN AND NORTHAMPTON COMPANY *vs.* STATE OF CONNECTICUT.

To the sheriff of the county of Hartford, his deputy, and to either constable of the town of Hartford, within said county, greeting:

By authority of the State of Connecticut, you are hereby commanded

to summon William Hamersley, of said Hartford, as attorney for the State of Connecticut, in and for said county of Hartford, to be and appear before the supreme court of errors of the said State, at the session thereof next to be holden at Hartford, within and for the first judicial district of said State, on the second Tuesday of September, A. D. 1876, then and there to hear read the process, record, and judgment of the superior court of said State of Connecticut, holden at Hartford aforesaid on the second Tuesday of March, A. D. 1876, in an action wherein the said William Hamersley, as such attorney for the State, was plaintiff, and the New Haven and Northampton Company, a corporation organized under and by virtue of the laws of the State of Connecticut, and located in New Haven in said State, was defendant, and the errors therein assigned, and to do and suffer what by said supreme court of errors shall be enjoined; whereupon the said plaintiff in error declares and says that the said William Hamersley, as such attorney,
6 brought to the superior court of said State, holden at Hartford, in and for said county, on the third Tuesday of December, A. D. 1875, his action, and the parties interpleaded thereto, which said action and pleadings are as follows, to wit:

Superior court, Dec. term, 1875.

STATE
vs.
NEW HAVEN & NORTHAMPTON COMPANY.

To the Hon. superior court now in session at Hartford, within and for the county of Hartford, comes William Hamersley, the attorney for the State, within and for Hartford County, and respectfully represents:

That the New Haven and Northampton Company is, and for more than thirty years last past has been, a corporation duly created by the laws of this State. And that said corporation has an office for the transaction of business, and is located in the town and county of New Haven, and that said corporation, by an act of the general assembly passed May session, 1846, was duly authorized to construct a railroad from said New Haven northerly along the line of said company's canal to the town of Farmington, in Hartford County aforesaid. And that the charter incorporating and the charter authorizing said company to construct said railroad were granted by the general assembly with the limitation that the same might be amended, altered, or repealed at the pleasure of the general assembly. And that said corporation, in accordance with the terms and provisions of its charter, did construct and put in operation a railroad from said New Haven to said Farmington, passing through the town of Southington, in said Hartford County, which road has been operated by said corporation since the first day of June, 1848, to the present time.

And said attorney further represents that said corporation, in the year 1848, established a station for the purpose of the reception and delivery of passengers and freight, now commonly called "Plantsville," at a point in the village of Plantsville, on and along the line of said
7 railroad, in said Southington. And that said corporation, and all persons operating said railroad, with its consent, have from the first day of July, 1848, to the 10th day of May, 1874, continued said station, so established as aforesaid, and have during all that period received and delivered passengers and freight at said station; and that

on said 10th day of May, 1874, the said corporation discontinued said station.

And said attorney further represents that afterwards the general assembly, upon the petition of Orson W. Stow, Simeon H. Norton and others, of Plantsville, in the town of Southington, by a certain law passed at its May session, A. D. 1875, and approved July 15, 1875, entitled "Establishing a depot at Plantsville," did provide and enact as follows, to wit: "That if at any time within six months after the passage of this act, any of the petitioners and others who may act with them for that purpose, shall erect at Plantsville, contiguous to the railroad, a depot building, and convey the same with the land on which it is situated, and the land reasonably necessary for the approaches thereto by the railroad trains, to the New Haven and Northampton Company, to be used for railroad purposes, it shall, thereupon, become the duty of said company, and it is hereby ordered, to stop at such depot thereafter its regular passenger and freight trains passing over said railroad, for the purpose of receiving and discharging passengers and freight. And all the provisions of the revised statutes applicable to railroad depots and stations, shall be applicable to said depot in the same manner as though said depot had been erected and established by said company.

"SEC. 2. Said order may be enforced by mandamus, by the attorney for the State, for the county of Hartford, or at the relation of any inhabitant of the town of Southington, in said county, and the charter of the New Haven and Northampton Company is hereby amended according to the provisions of this act."

And the said attorney avers that afterwards and within six months after the passage of said act, Orson W. Stowe, one of said petitioners, and Henry D. Smith, Edward W. Twichell, George F. Smith, and
8 Enos E. Stowe, others who acted with said Orson W. Stowe, for the purpose specified in said act, did erect at said Plantsville, contiguous to the railroad, a depot building, at a large expense, to wit, at an expense of ten thousand dollars, and that said Orson W. Stowe and said others herein mentioned as acting with him, within six months after the passage of said act, to wit, on the 2d day of December, A. D. 1875, by a warrantee deed, containing the usual covenants of seizin and clear title duly executed and acknowledged, did convey said depot building, with the land on which it is situated, and the land reasonably necessary for the approaches thereto by the railroad trains to said New Haven and Northampton Company, to be used for railroad purposes, as by said deed ready in court to be shown appears.

And said attorney further avers that the land so conveyed to said corporation is about one-third of an acre, and is situate at said Plantsville, in said town of Southington, and is bounded north on the highway running through said Plantsville to the railroad of said corporation; east on land of E. E. Stowe and George F. Smith; south on land of E. E. Stowe and George F. Smith, and west on land of said corporation; that said depot building is amply sufficient and convenient for purposes of a depot and station, and that said land so conveyed as aforesaid is amply sufficient for the convenient use of said depot building as a station and depot, and for the approaches thereto by the railroad trains of said corporation, and that the title to said land, at the time of said conveyance, was vested in the said grantors above mentioned, and was free from all incumbrances.

And said attorney further avers that the Plantsville mentioned in the said law herein recited is the Plantsville mentioned in this application.

And said attorney further avers that afterwards and within six

months after the passage of said act, to wit, on the 7th day of December, A. D. 1875, said Orson W. Stowe and others herein named as acting with him, the grantors in said deed of conveyance, did deliver said deed to said corporation, and did leave the same with Charles N. Yeamans, the president of said corporation, at the office of said cor-
9 poration at said New Haven, and then and there did deliver to said president and leave with him the keys to said depot building, and did then and there offer to said president to do any and every other act and thing they might be lawfully bound to do to carry out the provisions of said act.

And said attorney further avers that from said 7th day of December, 1875, hitherto said corporation has retained possession of said deed and keys so delivered as aforesaid, and has notified said Orson W. Stowe and others that said deed and keys are held by said corporation subject to their order, and that said corporation has not asked nor required of said Orson W. Stowe and others the performance of any other act or thing on their part to be performed, in order to vest in said corporation the title and possession of said depot building and land in accordance with the description and provisions in said act contained.

And said attorney further avers that the said Orson W. Stowe and others have done and performed all and every act and thing necessary to be done and performed in accordance with the provisions of said act, and therein mentioned as necessary to be done, before it shall become the duty of said corporation to stop at said depot its regular passenger and freight trains passing over said railroad for the purpose of receiving and discharging passengers and freight; and that by virtue of said law, and by reason of the performance by said Orson W. Stowe and others of all and every act and thing mentioned in the condition contained in said act in the manner therein prescribed, the said depot building at Plantsville, on said 7th day of December, A. D. 1875, became, and ever since has continued to be, and now is, a legally established depot and station on the railroad of said corporation, and subject to the provisions contained in the general statutes applicable to railroad depots and stations.

And said attorney further avers that from said seventh day of December, 1875, hitherto the said corporation has neglected and refused, and now does neglect and refuse, to stop at said depot at Plantsville its regular passenger and freight trains passing over said railroad
10 for the purpose of receiving and discharging passengers and freight; and that on the 8th day of December, 1875, the said corporation abandoned said station at Plantsville, and ever since said 8th day of December, 1875, hitherto, has abandoned said station, and has refused to stop its trains running over said road at said station, to the great discomfort, annoyance, and inconvenience of the public.

Wherefore the said attorney moves this honorable court to issue a writ of mandamus, requiring and enjoining the said corporation to discontinue its abandonment of said station, and to stop at said depot hereafter its regular passenger and freight trains passing over said railroad for the purpose of receiving and discharging passengers and freight, or to signify cause to the contrary thereof to this court.

Dated at Hartford the 4th day of January, A. D. 1876.

WILLIAM HAMERSLEY,
Attorney.

Superior court, December term, A. D. 1875.

HARTFORD COUNTY, *ss:*

To the New Haven and Northampton Company, a corporation duly incorporated under the laws of the State, and located and having a place of business in the town and county of New Haven, greeting:

Whereas by act of the general assembly, passed May session, 1846 you were duly authorized to construct a railroad from said New Haven northerly along the line of your canal to the town of Farmington, in Hartford County aforesaid; and whereas your charter of incorporation and the charter authorizing you to construct said railroad were granted by the general assembly with the limitation that the same might be amended, altered, or repealed, at the pleasure of the general assembly; and whereas, in accordance with the terms and provisions of your charter, you did construct and put in operation a railroad from
11 said New Haven to said Farmington, passing through the town of Southington, in said Hartford County, which road has been operated by you from said first day of June, 1848, to the present time, and did establish, in the year 1848, a station for the purpose of the reception and delivery of passengers and freight, now commonly called Plantsville, at a point in the village of Plantsville, on and along the line of said railroad in said Southington, and have from the first day of July, 1848, to the tenth day of May, 1874, continued said station so established, and have during all that period received and delivered passengers and freight at said station, and did, on said tenth day of May, 1874, discontinue said station.

And whereas, the general assembly, upon the petition of Orson W. Stowe, Simeon H. Norton, and others, of Plantsville, in the town of Southington, by a certain law passed at its May session, A. D. 1875, and approved July 15, 1875, entitled "Establishing a depot at Plantsville," did provide and enact as follows, to wit: "That if at any time within six months after the passage of this act any of the petitioners and others who may act with them for that purpose, shall erect at Plants, ville, contiguous to the railroad, a depot building, and convey the same with the land on which it is situated, and the land reasonably necessary for the approaches thereto by the railroad trains, to the New Haven and Northampton Company, to be used for railroad purposes, it shall thereupon become the duty of said company, and it is hereby ordered, to stop at such depot thereafter its regular passenger and freight trains passing over said railroad for the purpose of receiving and discharging passengers and freight. And all the provisions of the revised statutes applicable to railroad depots and stations shall be applicable to said depot in the same manner as though said depot had been erected and established by said company.

"SEC. 2. Said order may be enforced by mandamus by the attorney for the State for the county of Hartford, or at the relation of any inhabitant of the town of Southington, in said county, and the charter of the New Haven and Northampton Company is hereby amended according to the provisions of this act."

12 And whereas, afterwards and within six months after the pa s sage of said act, Orson W. Stowe, one of said petitioners, and Henry D. Smith, Edward W. Twichell, George F. Smith, and Enos E. Stowe, others who acted with said Orson W. Stowe for the purpose specified in said act, did erect at said Plantsville, contiguous to the railroad, a depot building, at a large expense, to wit, at an expense of ten

thousand dollars, and did, within six months after the passage of said act, to wit, on the second day of December, A. D. 1875, by a warrantee deed, containing the usual covenants of seizin and clear title, duly executed and acknowledged, convey said depot building with the land on which it is situated, and the land reasonably necessary for the approaches thereto by the railroad trains, to you, to be used for railroad purposes, as by said deed ready in court to be shown appears.

And whereas said land so conveyed to you is about one-third of an acre, and is situated at said Plantsville, in said town of Southington, and is bounded north by the highway running through said Plantsville to your railroad; east on land of E. E. Stowe and George F. Smith; south on land of E. E. Stowe and George F. Smith; and west on your land. And said depot building is amply sufficient and convenient for the purposes of a depot and station. And said land so conveyed as aforesaid is amply sufficient for the convenient use of said depot building as a station and depot, and for the approaches thereto by your railroad trains, and the title to said land at the time of said conveyance was vested in said grantors above mentioned, and was free from all incumbrances.

And whereas the Plantsville mentioned in said law herein recited is the Plantsville mentioned in this writ.

And whereas, afterwards and within six months after the passage of said act, to wit, on the seventh day of December, A. D. 1875, said Orson W. Stowe and others herein named as acting with him, the grantors in said deed of conveyance, did deliver said deed to you, and did leave the same with Charles N. Yeamans, your president, at your office at said New Haven, and then and there did deliver to said president and leave
13 with him the keys to said depot building, and did then and there offer to said president to do any and every other act and thing they might be lawfully bound to do to carry out the provisions of said act.

And whereas, from said seventh day of December, 1875, hitherto, you have retained possession of said deed and keys so delivered as aforesaid, and have notified said Orson W. Stowe and others that said deed and keys are held by you subject to their order, and have not asked nor required of said Orson W. Stowe and others the performance of any other act or thing on their part to be performed in order to vest in you the title and possession of said depot building and land in accordance with the description and provisions in said act contained.

And whereas said Orson W. Stowe and others have done and performed all and every act and thing necessary to be done and performed, in accordance with the provisions of said act, and therein mentioned as necessary to be done, before it shall become your duty to stop at said depot your regular passenger and freight trains, passing over said railroad, for the purpose of receiving and discharging passengers and freight.

And whereas by virtue of said law and by reason of the performance by said Orson W. Stowe and others of all and every act and thing mentioned in the condition contained in said act, in the manner therein prescribed, the said depot building at Plantsville, on said seventh day of December, A. D. 1875, became, and ever since has continued to be, and now is, a legally established depot and station on your railroad, and subject to the provisions contained in the general statutes applicable to railroad depots and stations.

And whereas from said seventh day of December, 1875, hitherto, you have neglected and refused, and now do neglect and refuse to stop at

said depot, at Plantsville, your regular passenger and freight trains, passing over said railroad, for the purpose of receiving and discharging passengers and freight.

And whereas, on the eighth day of December, 1875, you abandoned said station at Plantsville, and ever since said eighth day of De-
14 cember, 1875, hitherto have abandoned said station, and have refused to stop your trains running over said road, at said station, to the great discomfort, annoyance, and inconvenience of the public, as by the foregoing application of William Hamersley, the attorney for the State, within and for the county of Hartford, it is understood:

Therefore, that due and speedy justice may be done to all persons in this behalf, it is hereby required and enjoined that you, the said New Haven and Northampton Company, do stop at said depot hereafter your regular passenger and freight trains, passing over said railroad, for the purpose of receiving and discharging passengers and freight; and do forthwith discontinue your abandonment of said station, or to signify cause to the contrary thereof to this court, at its present session, on the eleventh day of January, A. D. 1876.

By order of court:

C. W. JOHNSON

Superior court, December term, A. D. 1875.

HARTFORD COUNTY, *ss:*

Ordered, That service of the foregoing writ of mandamus be made upon said New Haven and Northampton Company, by any proper officer leaving with the secretary of said company, or at the office of said company, in said New Haven, a true and attested copy of the foregoing application and writ, and of this order, on or before the sixth day of January, A. D. 1876.

Dated at Hartford this 4th day of January, A. D. 1876.

By order of court:

C. W. JOHNSON, *Clerk.*

15 NEW HAVEN COUNTY, *ss:*

NEW HAVEN, *January* 5, 1875.

Then I left a true and attested copy of the within writ with the secretary of the New Haven and Northampton Company, at their office in New Haven, the within-named respondent.

Attest:

OLIVER D. SEYMOUR,
Sheriff of Hartford County, and Deputy Sheriff of New Haven County.

Fees: One copy, $5.00; two endorsements, .24; one service, .12; travel, 8.00—$13.36.

Defendant's answer.

STATE OF CONNECTICUT
vs.
THE NEW HAVEN AND NORTHAMPTON COMPANY.

To the honorable superior court now in session at Hartford in and for Hartford County:

The New Haven and Northampton Company, in obedience to a rule

of this court entered upon the application of William Hamersley, attorney for the State of Connecticut, within and for Hartford County, to show cause why a writ of mandamus should not issue against them as prayed for in said application, do now appear in court, and for cause show as follows, to wit:

They admit and aver that the said New Haven and Northamp-
16 ton Company is and for more than thirty years last past has been a corporation duly created by the laws of this State, under an act of the general assembly passed at its May session, A. D. 1846, a copy of which said act, being their charter of incorporation, together with the acts passed in amendment thereof, are hereto annexed, and made part of this their return.

And they further admit and aver, that said corporation did in accordance with the terms and provisions of their said charter, construct and put in operation a railroad passing through the town of Southington, in said Hartford County, and that they now continue to operate said railroad.

And the defendants further admit and aver, that said corporation in the year 1848 established three (3) depots or stations on the line of said railroad in said town of Southington, and that one of said stations was located in said village of Plantsville, through which said railroad runs for a distance of about three miles; that on the 18th day of December, 1872, the defendants purchased a piece of land on the line of said road, between the then Southington and Plantsville stations, for the purpose of erecting, and did erect thereon a freight depot, the said land and depot and appurtenance costing about the sum of fifteen thousand dollars. That afterwards, on the twenty-fourth day of November, 1873, said corporation applied to the general railroad commissioners of this State to have the number of stations in said town of Southington reduced to two by the discontinuance of the said Plantsville Station, so called, or the Southington Station, so called, or both of them, and if both of them should be discontinued, to have one other depot, or station, so located as to best promote the common good of all the parties in interest; that in pursuance of said application said commissioners, after legal notice to all parties in interest and after full hearing given to all the parties in interest, on the third day of February, 1874, passed an order for the discontinuance and abandonment of both said stations at Plantsville and Southington, so called, as then located, upon condition that said company should provide and erect a passenger station-house near the new freight depot, as shown on the
17 map exhibited and submitted to them, and after and in compliance with the plans and profiles also submitted for a passenger-station building, and should provide suitable and convenient approaches thereto, and suitable and convenient and easy approaches to its new freight-depot, to the acceptance of said commissioners; and upon the further condition that said corporation should continue the then freighting facilities by car-load to all its patrons; that on the fifth day of November, 1874, said commissioners found, and duly certified, that said conditions so annexed to said order of February third, 1874, as aforesaid, had been fully and satisfactorily complied with, as by the proceedings before said commissioners hereto annexed will fully appear, which acts of the commissioners were based solely upon the general statute laws of this State in force at the time of their said action; that after the passage of said order by said commissioners said corporation proceeded to provide and erect a passenger station near its said new freight depot, as shown on said map, and to provide suitable and convenient approaches thereto, as required by said commissioners in and as a con-

dition to their said order for the discontinuance and abandonment of said stations at said Plantsville and Southington; that in the purchase of land for and erection of said passenger-house and appurtenances and said approaches it expended a large sum of money, to wit, ten thousand dollars ($10,000); that said large sum of money was expended in reliance upon the legal effect of the decision, judgment, and order of said commissioners; and that in like reliance on said judgment and order, and the force thereof, upon completion of said new passenger-station and approaches the old stations at said Plantsville and Southington were discontinued and abandoned, and the buildings forming the same taken away, with the full consent and approval of said commissioners; that by reason of the premises said stations at Plantsville and Southington became and were in all respects legally and in fact discontinued and abandoned, and said new station became, and was, and now is, in all respects, duly and legally established and located.

18 And the defendants further aver that there has been no change of facts or circumstances touching said Plantsville station, or the public convenience, or necessity therefor, since said order and decision of said commissioners.

And the defendants further admit that afterwards the general assembly, upon the petition of Orson W. Stowe, Simeon H. Norton, and others, of Plantsville, in the town of Southington, by a certain act passed at its May session, A. D. 1875, and approved August fifteenth, 1875, entitled "Establishing a depot at Plantsville," did provide and enact as follows, to wit:

"SECTION 1. If at any time within six months after the passage of this act any of the petitioners and others who may act with them for that purpose shall erect at Plantsville, contiguous to the railroad, a depot building, and convey the same, with the land on which it is situated, and the land reasonably necessary for its approaches thereto by the railroad trains, to the New Haven and Northampton Company to be used for railroad purposes, it shall thereupon become the duty of said company, and it is hereby ordered, to stop at such depot thereafter its regular passenger and freight trains passing over said railroad for the purpose of receiving and discharging passengers and freight; and all the provisions of the revised statutes applicable to railroad depots and stations shall be applicable to said depot in the same manner as though said depot had been erected by and established by said company.

"SECTION 2. Said order may be enforced by mandamus by the attorney for the State for the county of Hartford, or at the relation of any inhabitant of the town of Southington in said county; and the charter of the New Haven and Northampton Company is hereby amended according to the provisions of this act."

And the defendants further admit that the said Orson W. Stowe, one of said petitioners named in said act, and with others who acted with him for the purpose specified in said act, did erect at said Plantsville, contiguous to the railroad, a depot building, located upon the site

19 of said discontinued depot and about three-quarters of a mile from the new depot building so built as aforesaid by the respondents; but they deny that the said Orson W. Stowe and said others mentioned in said application for mandamus as acting with him, did within six months, or at any other time after the passage of said act, convey said depot building, with the land on which it is situated, to said New Haven and Northampton Company, in any other way or manner except as is hereinafter stated, to wit, that on or about the seventh day of December, 1875, the said Orson W. Stowe and others did tender to said cor-

poration and to Charles N. Yeamans, the president thereof, at the office of said corporation, a deed of said depot building and of the land on which the same was located, together with the keys of said depot building, which said deed and said keys the said corporation and the said Charles N. Yeamans, its president, did refuse to accept, and did then and there notify the said Orson W. Stowe, who insisted upon leaving the same in said office, that both said deed and said keys would remain subject to his order and the order of those acting with him as aforesaid, and the same have ever since remained, and now are subject to the order of the said Orson W. Stowe and others as aforesaid.

And the defendants deny that by virtue of said act and by reason of said doings of said Orson W. Stowe and others, under the same, the said depot building at Plantsville became on the said seventh day of December, 1875, and ever since has continued to be, or now is, a legally established station and depot on the railroad of said corporation, and subject to the provisions contained in the general statutes applicable to railroad stations and depots.

And the defendants further aver that said act of the general assembly passed at its May session, 1875, and approved August 15, 1875, entitled "An act establishing a depot at Plantsville," is in violation of the constitution of this State and against law, and is inoperative and void; and they further aver that by a public law of the State of Connecticut, passed by its general assembly at its May session, 1845, which law has ever since remained, and now is unrepealed and in full force and effect, it was and is enacted in section four of chapter first of title seventeen, relating to "private corporations," as follows:

"SECTION 4. When any amendment or alteration of the charter of any corporation shall be made, if it be not otherwise specially provided in the resolution making such alteration or amendment, it shall not become operative unless within six months after its passage it shall be accepted at a meeting of said corporation legally warned for that purpose, and unless a copy of such acceptance shall be lodged on file in the office of the secretary of this State, to be recorded by him in a book kept for that purpose, and such acceptance shall operate to make the original charter, and all resolutions amending and altering the same, subject to amendment, alteration, and repeal at the pleasure of the general assembly."

And they further aver that said act entitled "An act establishing a depot at Plantsville" has never been accepted by said corporation as an amendment to its charter, but, on the contrary, has been, and on the day of , A. D. 1875, was at a legal meeting duly warned and held for the purpose of taking action in reference to the acceptance or rejection of said act, expressly and by a unanimous vote rejected and repudiated by said corporation, by reason whereof, and for the other reasons herein mentioned, said resolution is not and never has been legally an amendment to its charter, or in any way or manner a part thereof, and is not and never has been binding on it, or of any binding or operative force whatever against it, or in favor of these applicants or of any other person or persons whatever either as amendment of its charter or as law of this State; and they further aver that said act of the general assembly of this State is in violation of the Constitution of the United States and of the tenth section of the first article thereof, as it is a law which impairs the obligation of the contract between the State of Connecticut and said corporation under its aforesaid charter, and under the law of the land as it existed when said charter was granted, and as it has ever since existed and now remains, and also im-

pairs the obligation of the contract between said State and said
21 corporation arising out of the facts herein set forth relative to the abandonment and erection of said stations. And they further aver that said act of the general assembly of this State is also in violation of the Constitution of the United States and of the fourteenth article thereof, because it undertakes to abridge the immunities of said corporation, and to deprive it of its property without due process of law, and denies to the said corporation, being within the jurisdiction of said State, the equal protection of the laws of said State, and is therefore null and void.

Wherefore for each and all of the causes and reasons in this their return set forth the said defendants insist that said writ of peremptory mandamus should not issue as prayed for in said application, and they pray the judgment of the court thereon, and that they may be hence dismissed.

NEW HAVEN AND NORTHAMPTON COMPANY,
By EDWARD A. RAY, *Sec'y.*

NEW HAVEN COUNTY, *ss:*

NEW HAVEN.

On the 20th day of January, A. D. 1876, personally appeared Edward A. Ray, secretary of said New Haven and Northampton Co., and made oath to the truth of the matters set forth in the foregoing return, to his best knowledge and belief, before me.

JOHN P. STUDLEY,
Commissioner of the Superior Court for New Haven County.

An act relating to railroad near Farmington Canal.

SECTION 1. Resolved by this assembly, That the New Haven and Northampton Company be, and the said company is hereby, authorized and empowered to make, construct, and finally complete, a railroad or way, with single or double track, from some convenient point on
22 or near the canal basin, in the city of New Haven, through said city of New Haven, through Union street in said city, northerly to Court street, in said city, and thence northerly along or near the northeasterly margin of the canal, through said city, and thence northerly along or near the line of the Farmington Canal to some convenient point in the town of Farmington, with liberty to extend the same on or near the line of said canal to the north line of this State, and to construct a branch from some convenient point in the town of Canton, and to transport, take and carry property and persons upon said railroad, or way, by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them, which said company may choose to apply. And for the purpose of constructing said railroad or way, the said company is hereby authorized to lay out their road, not exceeding six rods wide, through the whole length, and for the purposes of cuttings and embankments, and for the purpose of necessary turn-outs, and obtaining stone and gravel, may take as much more land as may be necessary for the proper construction and security of said road: Provided, That all damages that may be occasioned to any person, or corporation, by the taking of any such land or materials aforesaid, for the purpose aforesaid, shall be paid for by said company, in manner hereinafter provided.

SEC. 2. Said company is hereby authorized and empowered to add to the capital stock thereof, by increasing the nominal or par value of the

present shares from twenty-five to one hundred dollars each share. And said company is hereby vested with all powers, privileges, and immunities which are or may be necessary to carry into effect the purposes and objects of this act, as herein set forth: Provided, That said capital stock shall be increased two hundred thousand dollars, before said company shall commence operations under this act, by subscriptions to the acceptance of the commissioners on said road.

SEC. 3. That the directors shall have full power to make and prescribe such further by-laws, rules, and regulations as they shall deem
23 needful and proper, touching the disposition and management of the stock, property, estate, and effects of said company, not contrary to their charter, or the laws of this State, or of the United States; the transfer of shares, the duties and conduct of their officers, and their servants; touching the election of and meeting of the directors, and all matters whatsoever, which may appertain to the concerns of said company. Said company is also hereby empowered to purchase, receive and hold such real estate as may be necessary and convenient in accomplishing the object for which this grant is made; and may by their agents, surveyors, engineers, and servants, enter upon such route or places to be designated by the directors, and approved by the three commissioners, to be appointed by the general assembly for that purpose, who shall have no interest in said railroad, after such notice given as the commissioners shall deem reasonable, to the persons whose lands may have been taken, and after hearing all objections which may by such persons be made to the location made by the said directors, as to the location line, course, road, or way, whereon to construct said railroad or way. And it shall be lawful for said company to enter upon and use all such lands and real estate as may be necessary for them, in the manner and for the purposes set forth in the first section hereof. And said company shall be holden to pay all damages that may arise to any person or persons. And if the person or persons to whom damages may so arise and said company cannot agree as to the amount of such damages, it shall be the duty of said company to apply to the superior court of the county in which the real estate damaged may be situated, and to cause notice to be given to the adverse party of such application; and thereupon said superior court shall appoint three disinterested and judicious freeholders, to assess the amount of such damages; and said freeholders, after being sworn, shall give notice to the parties of the time and place of their meeting, on the business of their appointment; at which time and place they shall proceed to hear the parties, and to enquire into the extent of the damages, and shall assess just dam-
24 ages to the person or persons, whose real estate may be taken and injured; which assessment shall be in writing, under the hands of said freeholders, and the same shall be returned to the clerk of said superior court, who shall record it; and when so returned and recorded, such assessment shall have the effect of a judgment, and execution may issue at the end of sixty days from the time when such assessment shall be so returned, in favor of the persons respectively to whom damages may be assessed for the amount so to them assessed: Provided, That such railroad shall not be worked upon, or opened across the land of any person, until the damage assessed to such person shall have been paid, or secured to be paid to his satisfaction. And that the said damages shall be so paid, or deposited with the treasurer of the county, within sixty days after the matter shall have been finally determined: Provided, That it shall not be necessary, in order to the location of said road by the directors, and the approval thereof by the commissioners,

that the width thereof shall be definitely established by said directors or commissioners previous to said location; but before the damages shall be assessed to any landholder by the said appraisers, the width of said railroad shall be definitely fixed and established by said directors over and across the land so taken, upon one or both sides of the line of the road so located. And said company may, at any time before the completion of said road, alter and change any part of the location thereof, or discontinue such part thereof, as in their opinion convenience or necessity may require to be changed or discontinued, subject to the approval of the commissioners on said road, and the other requirements of this act: Provided further, That in case the persons required by this section to be notified, shall have no place of residence in this State, known to the occupant of the land over which said road passes, or to any of the directors or commissioners of said company, then a notice published for six weeks successively, in two newspapers, printed in New Haven, stating what proceedings are intended by said company to be instituted, shall be sufficient notice to such non-resident landholder.

25 And when the place of residence of any such landholder is known to the occupant of the land, or any director or commissioner aforesaid, and is out of this State, then a duplicate original notice, or a true and attested copy of the original notice, deposited in the post-office, post paid, directed to such person, eight weeks before the hearing is to be had, shall be sufficient notice, according to this act; or any judge may give an order of notice, as in case of a bill in equity, in any of the cases aforesaid.

SEC. 4. That when the lands or other property, or estate of any femme-covert, infant or person non compos mentis, shall be necessary for the construction of said railroad, said lands may be taken, notice being given to the husband of such femme-covert, and the guardian of such infant or person, non compos mentis, and they may respectively after the appraisal thereof, and payment of the same, release all such damages for any lands or estate, taken and appropriated as aforesaid, as they might do if the same were holden in their own right respectively.

SEC. 5. That said company is hereby authorized to construct, erect, build, make, and use a single or double railway or road, of suitable width and dimensions, to be determined by the directors of said company, on the line or course by them designated, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, and shall have full power to erect and maintain toll-houses and other buildings, for the accommodation of their concerns as they may deem suitable for their interest. Provided, the said company shall construct and use that part of said road within the limits of the city of New Haven, in such manner, and subject to such rules and regulations as the common council of said city shall prescribe.

SEC. 6. That whenever it shall be necessary for the construction of their single or double railroad or way, to intersect, or cross any stream of water or water course, or any road or highway, it shall be lawful for said company to construct said railroad across or upon the same,

26 but the said company shall restore the said stream or water-course, or road, or highway thus intersected, to its former state, or in sufficient manner not to impair its usefulness; and in all cases where any road or public highway is so located that said railroad cannot be judiciously laid out and constructed across or upon the same without interfering therewith, in such case or cases, said corporation may, by their engineers, cause such road or roads to be changed or altered in

such manner that said railroad may be made on the best site of ground for that purpose. Provided, said corporation shall put such road in as good repair as at the time of changing or altering the same, and further provided that said railway shall be so located, that in the construction, comp... thereof, it shall not in any way interfere ... as to obst... thereon, a... court, wh... given, ma... said corp... approved

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such manner that said railroad may be made on the best site of ground for that purpose. Provided, said corporation shall put such road in as good repair as at the time of changing or altering the same, and further provided that said railway shall be so located, that in the construction, completion, use and occupations thereof, it shall not in any way interfere with the turnpike road of the Cheshire Turnpike Company, so as to obstruct, impede, or endanger the safety of the public in traveling thereon, and said corporation may apply to any judge of the superior court, who may by law judge between the parties, who, after notice given, may appoint three disinterested persons to determine whether said corporation have complied with the provisions aforesaid, and if approved by them, their decision shall be final.

SEC. 7. That it shall be lawful for said company from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation of persons or property on their single or double railroad or way aforesaid, hereby authorized to be constructed, erected, built, or used, or upon any part thereof.

SEC. 8. That if any person shall wilfully do, or cause to be done any act or acts whatever, whereby any building, construction, or works of said company, or any engine, machine, or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending shall be deemed guilty of a misdemeanor, and shall forfeit and pay to said corporation, double the amount of damages sustained by means of such offence or injury, to be recovered in the name of said corporation, with costs of suit, by action of debt.

27 SEC. 9. The directors of said company may, from time to time, call for, and require the payment of the increased capital hereinbefore authorized, by installments at such times, and in such proportions, and upon such conditions as they may deem fit, and each stockholder on the payment, by him or her of such installment, on his or her share or shares, as shall be first required as aforesaid, within sixty days after the same shall have been made payable by the directors, shall thereupon become entitled to receive a certificate signed by the treasurer of said company, that such stockholder has standing, in his or her name, on the books of said company, the number of shares on which said installment has been paid as aforesaid. And in case any such stockholder shall refuse or neglect to make payment of any future installments pursuant to the requisition of the board of directors, the stock of such stockholder, or so much thereof as shall be necessary, may be sold by the directors of said company, at public auction, after the lapse of sixty days from the time when the payment became due; and the surplus money, the avails of such sale, after deducting the payments due, and interest thereon, and the necessary expenses of sale, shall be paid over to such negligent stockholder.

SEC. 10. If any of the stockholders of said company shall neglect or refuse to pay such installment on his shares as shall be first required to be paid as aforesaid, within sixty days after the same shall be made payable by the directors, and notice duly given thereof, such stockholder so neglecting or refusing shall, at the expiration of said period of sixty days, cease to have any right thereafter to pay such installment, or any future installments, which may be required on the stock of said company, and shall not be entitled to any dividend or dividends, which shall accrue to the stockholders of said company, by reason of the railroad or way, or branch thereof, herein authorized to be constructed as aforesaid; but such stockholder so neglecting or refusing, as aforesaid,

and his assigns shall be, and remain entitled to receive such proportion of the net income of said company only, as shall accrue from the
28 capital and business thereof, as authorized prior to the passage of this act, as the number of shares by him or her held, and on which such installment has been so neglected or refused to be paid, bears to the whole number of the shares of said company; until the stockholders, who shall have paid the installment required, on their shares, shall have received from the income of said company, a reimbursement thereof, with six per cent. interest on the same.

SEC. 11. It is, however, provided nevertheless that in case it shall appear that any stockholder, or stockholders, of said company shall so neglect or refuse to pay such installment, so first required by the directors, within sixty days after the same shall be made payable as aforesaid, it shall thereupon be the duty of the commissioners on said road, having given reasonable notice to the parties of the time and place of their meeting for that purpose, to estimate and appraise the entire capital stock and franchises of the New Haven and Northampton Company, having reference as well to its intrinsic value for the purposes to which it has heretofore been applied as to its value for the purposes to which it is hereby authorized to be used and applied in connection therewith, over and above the indebtedness of said company, and to ascertain the fair and just value of the shares therein of the stockholder or stockholders so neglecting or refusing, and every such stockholder shall thereupon be at liberty at any time within sixty days after such appraisal shall be made and returned to the secretary's office, and notice thereof given by said company to him or her, to demand of said company the payment in money of the value of his said shares, so ascertained; and the same, on payment being made, shall thereupon be transferred to, and shall forever belong to said corporation and its assigns.

SEC. 12. That if said company shall not expend the sum of one hundred thousand dollars upon said railroad or way, within eighteen months after the rising of this assembly, or if they shall not construct and complete and put in operation a single or double railroad or way, as hereinbefore authorized, within three years after the passage of this act, then the rights, privileges, and powers of said corporation, conferred by this act, shall be null and void.

29 SEC. 13. That the capital stock, hereby created, of said company shall be assessed at its just value in money, and taxed at the same rate as personal estate.

SEC. 14. Resolved further, That these resolutions shall not take effect till at a legal meeting called for that purpose, by order of the directors, the stockholders of said company shall have assented thereto.

SEC. 15. Resolved, further, That this act may be altered, amended, or repealed at the pleasure of the general assembly. It being further understood that said railroad may at any time be intersected or joined by other railroads, under such regulations as the general assembly may from time to time prescribe.

To the honorable railroad commissioners of the State of Connecticut:

The petition of the New Haven and Northampton Company respectfully showeth that there are, upon the line of their railroad, in the town of Southington, three stations at which trains are stopped, viz: Southington, Plantsville, and Hitchcock's; that public convenience does not require there should be three stations in said town, but that two stations, properly located, would amply accommodate the public; that

there is a difference of opinion among those interested as to the proper locality of such two stations.

Your petitioners, therefore, ask your honorable board to inquire into the matter, and to discontinue, if deemed advisable, either or both of the aforesaid first-mentioned stations—Southington and Plantsville—to the end that there may be thereafter two stations, and two stations only, on said railroad in said town of Southington; such two stations to be so located as to best promote the common good of all the parties in interest.

Dated at New Haven this 12th day of Nov., A. D. 1873.

NEW HAVEN AND NORTHAMPTON COMPANY,
By CHARLES M. YEAMANS,
Vice-President.

30 Upon the petition of the New Haven and Northampton Company to the general railroad commissioners of the State of Connecticut, for their approval of the discontinuance of the Southington and Plantsville stations, upon their railroad, for reasons therein set forth:

It is hereby ordered, and public notice is hereby given, that a hearing will be held at the Plantsville station, on Tuesday, the 6th day of January, A. D. 1874, at one o'clock p. m., and at Southington station at two o'clock p. m. on the same day, at which times and places all parties in interest may appear and be heard in relation thereto.

Dated at Hartford this 18th day of Nov., A. D. 1873.

ANDREW NORTHROP,
CHARLES W. SCOTT,
GEORGE W. ARNOLD,
Railroad Commissioners.

I hereby certify that on the third day of December, A. D. 1873, I posted a copy of the above notice in each of the depots or stations at said Southington and Plantsville.

RICHARD L. WILLIAMS,
An Indifferent Person.

SOUTHINGTON, *Dec.* 3, 1873.

Upon the foregoing petition of the N. H. and N. Co., asking the general railroad commissioners to discontinue one or both of the stations upon the line of their railroad, known as Southington and Plantsville, in the town of Southington, if after due inquiry they shall deem it advisable, to the end that there may be established one station in place of said two discontinued stations, so located as best to promote the common good of all the parties in interest,

The railroad commissioners appointed a public hearing for the examination of the locality and surroundings of Southington and Plantsville stations, and the consideration of the matter in question, on Tuesday, the 6th day of January,
31 A. D. 1874, at one o'clock p. m., at the Plantsville Station, and at two o'clock p. m., at Southington, on the same day, and gave due notice thereof (as required by statute) one month previous to the time appointed for said hearing; and at the time and places appointed all the railroad commissioners were present. The places named not being convenient to accommodate all interested, the two hearings were adjourned to the town hall in said town of Southington, from which, on account of the unpleasant state of the weather and the absence of coun-

sel, the hearing was further adjourned to Friday, January 16th, 1874, at nine o'clock in the forenoon, at said town hall, at which time and place all of the railroad commissioners were present and proceeded with the hearing, Wm. C. Case and Charles E. Perkins, esq'rs., attorneys, appearing for the petitioners, and H. C. Robinson and Simeon E. Baldwin, esq'rs, attorneys, appearing in the interest of the parties opposed to the granting of said discontinuance as asked for in said petition.

After a careful and full examination of the locality and business surroundings of the present located stations, and an extended hearing of all the appearing parties in interest, with their evidence and arguments of counsel, the railroad commissioners do find and approve, and do hereby order that the New Haven and Northampton Company may discontinue and abandon the present stations of Southington and Plantsville, as at present located, under and by complying with the following provisions and conditions, viz:

The New Haven and Northampton Company shall provide and erect a passenger station house near their new freight depot, as shown on the map exhibited and submitted, and after and in compliance with the plans and profiles also submitted for said passenger station building, and provide suitable and convenient approaches thereto; also suitable, convenient and easy approaches to their new freight depot; all of which shall be done to the acceptance of the railroad commissioners. Said company shall also continue the same facilities for receiving and shipping freight by the carload and unbroken as at present enjoyed
32 to each and all of the parties who patronize their railroad by receiving and shipping freight thereby.

Dated at Hartford this 3d day of Feb., A. D. 1874.

ANDREW NORTHROP,
CHARLES W. SCOTT,
GEORGE W. ARNOLD,
Railroad Commissioners.

EDWARD A. RAY, Esq.,
Secretary New Haven and Northampton Co.:

In accordance with the finding and decree of the railroad commissioners in relation to the petition of the New Haven and Northampton Company for the approval by said commissioners of the intention of said company to abandon the said stations of Southington and Plantsville, in the town of Southington, made on the 3d day of February, 1874, in which were certain conditions to be performed by said company, to the acceptance of the railroad commissioners:

Now, therefore, be it known, that upon the 18th day of May, 1874, said railroad commissioners did, upon the application of C. N. Yeamans, president of said company, examine said depot and surroundings, and found that said company had fully and satisfactorily complied with the conditions contained in said finding and decree.

Dated at Hartford this 5th day of Nov., 1874.

ANDREW NORTHROP,
GEORGE W. ARNOLD,
Railroad Commissioners.

The above and foregoing is a true copy of the record.
Attest:

GEORGE T. UTLEY,
Clerk R. R. Com'rs.

33 Superior court, Hartford County, Dec. term, 1875.

STATE
vs.
NEW HAVEN & NORTHAMPTON CO.

And now the said William Hamersley, attorney for the State within and for said Hartford County, here in court moves for a concilium to quash said return of the said New Haven and Northampton Company to said alternative writ of mandamus, that said return be set down for argument upon its validity in law, and that a peremptory mandamus do issue.

WILLIAM HAMERSLEY,
State's Attorney.

The court declined to entertain the above motion and ordered the attorney to answer further.

Hartford County superior court, Dec. term, A. D. 1875.

STATE
vs.
NEW HAVEN & NORTHAMPTON CO.

And now the said William Hamersley, attorney for the State in and for said county, saith that the said return of the said New Haven and Northampton Company to said alternative writ of mandamus and the matters therein contained are not sufficient in law to answer the premises above charged upon said respondent in said writ, and that said attorney need not plead thereto; wherefore for want of a sufficient return to said writ the said attorney prays that a writ of peremptory mandamus issue according to law.

WILLIAM HAMERSLEY,
State's Attorney.

34 *Reservation.*

Superior court Hartford County, Dec. term, A. D. 1875.

STATE
vs.
NEW HAVEN AND NORTHAMPTON CO.

The court reserves the question of law as to what judgment should be rendered upon the foregoing record for the advice of the supreme court of errors for the first judicial district, next to be holden at Hartford in said county on the fourth Tuesday of February, A. D. 1876.

CULVER, *J.*

And said cause by legal continuance came to the said term of said superior court, holden at Hartford, in and for said county of Hartford, on the second Tuesday of March, A. D. 1876, when and where the said court rendered the following judgment, to wit:

Upon reading the writ of alternative mandamus heretofore issued, and the return thereto in this proceeding, and on demurrer of the State's attorney, alleging that said return and the matters therein contained are not sufficient in law to answer the premises charged upon said respondent in said writ, and praying for a peremptory mandamus as on file: It is ordered and adjudged that the return of respondent is insufficient, and that a peremptory writ of mandamus do now issue, directed to the respondent named in said alternative writ, commanding it forthwith on service thereof to stop at said depot mentioned in said alternative writ hereafter its regular passenger and freight trains passing over

said road of the respondent for the purpose of receiving and discharging passengers and freight, as by the files and records of said court ready in court to be produced fully appears.

And now the said plaintiff in error complains and says that the court, in proceeding to and rendering said final judgment, manifestly erred and mistook the law in this, to wit: in holding that the said special plea or answer so filed in said cause was not sufficient in the law to answer the premises charged upon the said defendant in the said writ of the said plaintiff, and in sustaining the said demurrer of the plaintiff, and rendering judgment thereon as aforesaid.

Whereupon, and for other errors apparent upon the said record, this plaintiff in error prays that said erroneous judgment may be reversed and set aside, and he be restored to all he has lost thereby, which he says is ten thousand dollars, and to recover said damages and reverse said judgment, the said plaintiff in error brings this suit; and Charles E. Perkins is recognized in the sum of one hundred dollars to pay all damages, if the said plaintiff in error shall fail to prosecute this action to effect.

Dated at Hartford this 20th day of May, A. D. 1876.

C. W. JOHNSON, *Clerk.*

HARTFORD COUNTY, *ss:*

HARTFORD, *May 19th*, 1876.

Then I left a true and attested copy of this writ with Wm. Hamersley, attorney for the State of Connecticut for Hartford County.

Attest:

OLIVER D. SEYMOUR,
Sheriff.

Fees: 1 copy, $1.75; 2 end., .24; 1 service, .12; travel, .20—$2.31.

Supreme court, Hartford County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said supreme court.

Attest:

C. W. JOHNSON, *Clerk.*

At a supreme court of errors holden at Hartford, within and for the first judicial district of the State of Connecticut, on the 2d Tuesday of January, in the year of our Lord one thousand eight hundred and seventy-seven.

Present: Chief justice, honorable John D. Park; associate judges, honorables Elisha Carpenter, Dwight W. Pardee, Dwight Loomis, Miles T. Granger.

The New Haven & Northampton Company, a corporation organized under and by virtue of the laws of this State, and located in New Haven, in New Haven County in this State, plaintiff, versus William Hamersley, as attorney for the State of Connecticut, in and for said county of Hartford, defendant in a writ of error, as by said writ on file, dated the 20th of May, 1876, will fully appear.

Said action was brought to this term of this court, and now the defendant moves to erase said cause from the docket of this court.

Said motion and said cause having been fully heard, this court adjudges that there is no error in the judgment complained of, and also denies the motion to erase said cause from the docket; and further ad-

judges that the defendant recover of the plaintiff costs of suit, taxed and allowed to be , and that execution issue accordingly.

38 State of Connecticut, supreme court of errors, first judicial district, ss:

CLERK'S OFFICE.

The above and foregoing are true copies of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Hartford, in said district and State, this 10th day of November, A. D. 1877.

[SEAL.] C. W. JOHNSON, *Clerk.*

39 *Reasons in error.*

Supreme Court of the United States.

THE NEW HAVEN AND NORTHAMPTON COMPANY
vs.
WILLIAM HAMMERSLY.

And now the New Haven and Northampton Company, the plaintiff in error in the above-entitled cause, for reasons of error assigns the following, to wit:

First. That the said supreme court of errors of the State of Connecticut erred in this, that said court adjudged that there was no error in the judgement complained of, whereas said court should have held that there was error in said judgement.

Second. That said court erred in this, that said court should
40 have held that the acts and doings of the railroad commissioners of the State of Connecticut and of the said New Haven and Northampton Railroad done in pursuance thereof, in erecting a new depot at Southington and abandoning the old depots at said Southington and Plantsville, constituted a contract between the State of Connecticut and said New Haven and Northampton Company, and that the act of the general assembly of said State passed at its May session, 1875, impaired the obligation of said contract and was therefore void as contrary to the provisions of the Constitution of the United States, whereas said court held that said act was not so void.

Third. That said court erred in this, to wit, that said court
41 should have held that said act was void as being contrary to the Constitution of the United States, and especially of the tenth section of the first article thereof, and also of the fourteenth article amendatory thereof, as is set out in the answer of the said plaintiffs in error in said record, whereas said court held that said act was not so void.

Hartford, Conn., Nov. 14, 1877.

CHA'S E. PERKINS,
Of Counsel for Plaintiff in Error.

(Indorsed:) Supreme Court of the United States. Reasons of error. New Haven & Northampton Co. vs. Wm. Hamersley.

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BRIEF

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Counsel for Plaintiff in Error.

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THE

NEW HAVEN AND NORTHAMPTON C[redacted]

Plaintiffs in Error,

vs.

WILLIAM HAMERSLEY,

Attorney for the Sole Defendant in Error.

[redacted]

No. 98.

OCTOBER TERM, 1880.

[redacted]

In Error from the Supreme Court of Errors of the State of Connecticut.

[redacted]

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Supreme Court of the United States.

OCTOBER TERM, 1880.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

THE NEW HAVEN AND NORTHAMPTON COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM HAMERSLEY, ATTORNEY FOR THE STATE, DEFENDANT IN ERROR.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error from a final judgment of the Supreme Court of Errors of the State of Connecticut, deciding that there was no error in the judgment of the court below, which awarded a final mandamus to issue commanding the plaintiff in error, a railroad company in that State, to stop its trains at a certain station called Plantsville, in the town of South ington, Connecticut.

STATEMENT OF FACTS.

The New Haven and Northampton Company is a railroad corporation organized by the State of Connecticut under the charter printed on pages 12 to 16 of the record, and running through the town of Southington, in said State.

In 1848 the company established three depots or stations in said town on the line of the road, one of which was in the village of Plantsville, one in the village of Southington, and the third in another part of the town. The first two depots were within a short distance of each other, and in 1873 the company desired to abandon them both and erect a new and larger depot at a point intermediate, which would accommodate both villages and render two stoppages of trains unnecessary. By its charter the company had the right to erect and change depots as it pleased, but in 1873 a law was in existence as follows: Rev. Stat. 1875, p. 327, § 50. "No railroad company shall abandon any station on its road in this State after the same has been established for twelve months, except by the approval of the Railroad Commissioners given after a public hearing at such station, notice of which shall be posted conspicuously in said station for one month previous to the hearing." Pursuant to this statute the company applied to the Railroad Commissioners of the State for permission to abandon both stations. Notice was given and a hearing had, the proceedings upon which appear upon pages 16, 17, and 18 of the record. Counsel appeared for each side, and an extended hearing was had, upon which the commissioners ordered that the two stations might be abandoned on condition that the company should erect a new station at the intermediate place proposed according to certain plans, provide proper approaches thereto, and also to a new freight depot theretofore built, and continue certain privileges to freighters.

The company, relying upon this decision, expended upwards of ten thousand dollars in complying with the conditions above stated, and the commissioners certified their approval of such performance, and the company thereupon abandoned the two former stations.

The Supreme Court of the State, in the case of State vs. New Haven & Northampton Company, 42 Conn., p. 56, held that this approval of the Commissioners was valid.

In 1875, there having been no change of facts or circumstances, or the public convenience, or necessity for a new depot at Plantsville, the Legislature of the State passed the act, printed on page 10 of the record, providing that if certain persons should erect a new depot building at Plantsville, the company should thereafter stop its trains there.

These buildings were so erected, and as the company refused so to stop its trains this action of mandamus was brought in the State Court in the name of William Hamersley as attorney for the State, to compel them so to stop.

The company set up the foregoing facts as a return, to which the plaintiff demurred.

The question of the sufficiency of the return was reserved for the advice of the Supreme Court of Errors, according to a practice in Connecticut, and that Court advised the Supreme Court that the return was insufficient. This decision is reported in 43 Conn. Reports, p. 351; and the Supreme Court thereupon issued a peremptory mandamus. From this judgment a writ of error was taken to the Supreme Court of Errors, which affirmed the judgment, and from their decision this writ of error was brought to this Court. The latter decision is reported 44 Conn. Rep., p. 376.

Assignment of Errors.

In the State Courts several claims were made, some of which arose under the provisions of the Constitution of the United States, and some did not. The latter do not arise here.

The errors claimed here are set out in an assignment of errors found on page 21 of the record, and are as follows:

1. The general assignment.

2. That the proceedings of the Railroad Commissioners, and of the company referred to, constituted a contract between the State and the company, and the act of 1875 impaired the obligation of that contract, and was therefore void.

3. That said act was also void as contrary to the tenth and fourteenth sections of the Constitution of the United States.

These questions were all made in the Court below, and were specially set up in the return of the defendants as printed on pages 11 and 12 of the record; but the first and third will not be relied upon here.

Points.

I.

The proceedings referred to between the Railroad Commissioners and the company, and the acts of the company thereunder, constituted a contract between the State and the defendants.

It is not claimed that the Legislature has not the power to provide that this Railroad Company should establish stations wherever it may be deemed necessary.

It might be questioned whether, under the charter, the State would have had this power, except for the clause allowing amendments to be made to it; but with such clause doubtless, in the absence of any contract, the Legislature has such power.

The question here is outside of the charter. It is alleged in the return of the defendants, and admitted by the demurrer, that after the acts which we claim constituted a contract between the State and the defendant, and up to the passage of the act of 1875 no new circumstances or facts had arisen to alter the condition of things; and no new or different public necessities existed. Record, page 10. If such new circumstances had arisen, under the power of eminent domain, all public needs could have been supplied.

We claim that the State has, for a sufficient consideration, authorized the Railroad Company to *abandon this station*, and that it cannot thereafter, by a mere legislative act, violate that agreement and require the Railroad Company to reinstate that station as if nothing had ever been done in relation to it.

All arguments then as to the general power of the legislature to cause the defendant to build or use additional stations have no bearing on the case. If there was a contract here the State cannot break it. If there was not, we admit the act is valid.

The real question then is, was there, upon the facts found, a contract between the State and the Railroad Company that this station at Plantsville might be abandoned.

A contract requires a subject matter, a consideration, and two parties making an agreement in relation thereto.

1st. As to the subject matter, that is undoubtedly sufficient.

The company had two stations in the town of Southington which it desired to give up, and replace them by another, in this manner avoiding two stoppages of its trains, two ticket offices, depot buildings, and many other burdens.

It had not the power so to do without the consent of the State, as expressed by its railroad commissioners, to whom, as will hereafter appear, great powers were given by the State in this regard.

The company desired to obtain this authority from the powers authorized by the State to give it, and what they desired was not permission to abandon these stations until the State or the Railroad Commissioners directed them again to stop there, not a temporary disuse, but a right to abandon these stations permanently, to give them up and replace the two with one.

Here was a valuable right they wished to obtain, for which they were willing to pay largely, and it was clearly sufficient to be the subject matter of a contract.

2d. There was also a good consideration. If the condition of abandonment had been that ten thousand dollars should be paid to the State, or to some public charity, there can be no doubt but that the payment would have been a valid consideration, but it is well settled that the expenditure of money by one party is as sufficient a consideration as its receipt by the other, and erecting a new depot, etc., at a cost of ten thousand dollars, is clearly sufficient for an agreement.

3d. The only remaining question is as to whether there was here an agreement between two parties.

Now it would not be questioned but that if the company had brought a petition to the Legislature asking to have the privilege of forever abandoning these two stations and substituting one in its place, and the Legislature had passed an act granting the petition on condition that the company should erect the new depot according to certain plans, at a cost of ten thousand dollars, and that when so erected the company should never thereafter be obliged to stop its trains at the old depots, that a contract would have been made, which could not be broken by the State.

The real question in the case is whether what was done was equivalent to this.

A contract may be made by a general statute, and acts done under it as well as by a special act.

New Jersey *vs.* Yard, 95 U. S., 114.

In this case a general law provided that no railroad should abandon a station without the consent of the Railroad Commissioners, upon an application and hearing, as provided by the act. This is clearly equivalent to a direct provision that any railroad *might* abandon with such consent, or, to make it

apply to this case, it is the same thing as if the act provided that the New Haven and Northampton Company might abandon the station at Plantsville, with the consent of the Commissioners.

Their consent was substituted for the approval of the Legislature, and when given, was the approval of the Legislature.

All the acts of a State have to be done by agents. The State itself is an impersonal, imaginary body, and can act only through agents. The Legislature itself is merely one of the agents of the State, and as it could not itself well hear all such applications, it could give the power to hear and act upon them to such persons as it deemed best.

In this case it gave this power in question to the railroad Commissioners, whose decision was to be final, as no appeal was given from their determination.

There can be no question but that if the Commissioners approved the abandonment of a station, the railroad would have the right to abandon it, and no power but that of the state could make them resume it. This shows clearly that the act of the Commissioners is that of the State.

In many cases the exercise of such delegated power has been held to be that of the State.

In Bradley *vs.* R. R. Co., 21 Conn., 305, the court in speaking of the power of eminent domain, and the exercise of such power, say, "The defendants in that case would have acted merely as the constituted agents or instrumentality of the legislature which would itself have been only the representative or instrumentality, so to speak, of the people or sovereign power of the State, *and, within the scope of the authority conferred by the law under which they thus acted, would be invested with all the rights and powers of the State.*"

In Commonwealth *vs.* Essex Co., 13 Gray, 239, it was provided in the defendants' charter that they should build their dam "in the manner provided by the County Commissioners," and the court says, "We believe it has been usual in such acts of legislation to *delegate an authority* to a committee or committees, to see that certain provisions are specifically carried into effect, *and we have never known the legality of such delegation of power questioned.*"

In State *vs.* N. H. & N. R. R. Co., 37 Conn., 153, a case in relation to abandonment of depots, the court says of this statute on page 165, "The statute refers all questions of public and private interest connected with the continuance and abandonment of railroad stations to the Railroad Commissioners."

In Waterbury *vs.* H. P. & F. R. R. Co., 27 Conn., 154, the court says, in speaking of the location of a railroad track, by the Railroad Commissioners, "The mile of the old highway taken became, as is agreed, a part of the established railroad track, *and this was done by the legislature itself, for it was done by the Commissioners who represented the legislature.*"

Nor was this consent of the Railroad Commissioners a merely formal one. When application was made to them for the abandonment of a depot, they were to give special notice to every one concerned, have a full hearing, and give a judgment upon full consideration, and by a law passed since an appeal can now be taken from their decision to the Superior Court of the State, which shall hear it as a petition in equity, like any contested action. Statutes of Conn., p. 327, § 52.

These Railroad Commissioners have had great powers given to them by the State. They decide as to the laying out of railroads, taking of real estate by them, crossing highways, streams, and other railroads, altering highways when necessary, and many other most important matters. They are perhaps within their sphere the most powerful agents of the State, and it is reasonable to conclude that the legislature

intended that their consent should be the consent of the State itself, and that they should have full power to do in the matter of abandonment of stations whatever the State could do.

When the Commissioners therefore, after a full hearing, gave their consent to the abandonment of these two stations on condition that the defendant should build a new depot, and perform the other acts required, it was the same as if the legislature had passed a special act to the same effect. And when the defendant accepted such consent, and expended ten thousand dollars in reliance upon it, we submit there was an *agreement* between two parties, the State by its agents, and the defendant.

We find then this condition of things: The defendant by law was required to stop at the Plantsville depot, it desired to be relieved from that duty, it applied for that purpose to the agents, who were appointed by the State to give such consent, and those agents agreed for the State that the defendant should have the desired right, if it would do certain acts. These the defendant did at great expense.

Surely we have here two parties, a subject matter, an agreement relating thereto, and a consideration.

The same principle is to be applied in construing contracts made by the State as those made by individuals.

In Hartford Bridge Co. *vs.* Union Ferry Co., 29 Conn., 210, page 221, speaking of the claim that legislative contracts are to be construed with extraordinary strictness in favor of the State the court says: "We doubt very much the propriety of any such general rule of law. We know not why such stringency is to be applied to a legislative grant more than to any other grant. In every other case where we look to a contract to learn what are the rights of the parties, we seek to know what the contracting parties intended by the contract,

or what the language and scope of the instrument mean to express, and it is the same *whether it is a public or a private agreement.*" This case settles the rule of construction in Connecticut, and the State certainly cannot complain if the rules of construction of its own courts are applied. In cases of taxation sometimes a more rigid rule has been applied, but for special reasons, and we submit that the rule is substantially the same in this court.

Now can it be doubted, but that between two individals such facts would establish a contract? If my neighbor has a right of way across my land and I want it to be abandoned by him; he says he will abandon it if I will build him a road elsewhere, and I do so, is not that a contract binding upon him? Can he say, Oh, I meant that I would abandon it for a little while; a month has passed, I have abandoned the old road and now I will resume it again.

If a railroad company has agreed with me to erect and maintain a depot on my land, and I agree that it may abandon that one if it will build and maintain another one in another place, and it does so, is not that a contract binding on me?

If such contracts would be binding between individuals, and they clearly are, why should they not be equally binding upon a State.

II.

We have presented the reasons why we consider that a contract was made in this case. Now let us consider the claims of the other side, so far as we can foresee them.

1. The learned court below (43d Conn. Report, p. 380), if we understand their decision, place it in part on the ground that the defendant after obtaining the approval of the commis-

sioners was not bound to accept it; they could abandon the station or not, as they thought proper. The court says, p. 381, "After the approval the defendants sustained the same relation to the State and the public that they did before, *except that they had the privilege desired.*" That is exactly what we claim, that the railroad company *had* this privilege.

The court goes on to say, "In erecting a new station and abandoning the Plantsville station, they acted entirely upon their own volition, whatever they did, they did voluntarily and in their own interest, and not in the interest of the State."

It seems to us rather a novel objection to the force of a contract that because a person who has bought and paid for a privilege, has his volition whether he will use it or not, therefore he has not got it.

It is usually the case that a party need not make a contract unless he pleases, and when he has made it, and paid the consideration, he need not exercise the right unless he pleases. If I buy a right of way, and pay for it, I need not cross it except "upon my own volition," but that does not prevent my owning it.

So here, when the Railroad Company had bought, and as the court say "had" the privilege desired, they were not obliged to exercise it, they could stop at Plantsville or not, as they thought best, but the very thing that they now complain of is, that that volition is taken away from them, the State has taken away the privilege that the company had.

The learned Court does not seem to appreciate the force of our claim, that what the company obtained was this very *right* to abandon, that is to abandon *permanently*.

The opinion seems to be based upon the idea that this consent to the abandonment of the Plantsville station was really of no effect whatever, but that the day after it was given the

legislature, or the Commissioners themselves could order the company to resume its stoppages there as before; and this it seems to us is the real question here; was this approval a mere license, lasting until it was revoked, or was it an approval of a *permanent* abandonment?

This is a question of construction by this court, and is to be decided upon the presumed intention of the parties.

No one can suppose that the Railroad Company expected that after building the new depot, they might the next week be obliged again to stop at the other two and thus have *three* places where they would be obliged to stop.

Nor can it be supposed that the Railroad Commissioners, or State which they represented had any such an idea.

If the whole proceeding was merely temporary, why require public notice to be given for a month, a hearing and so much formality, and why is it now provided that an appeal can be had to the Superior Court, and a judgment rendered there.

We submit that the claim that "abandon" here only means abandoning until the State sees fit to make the company stop again is a most forced unreasonable construction, contrary to the clear intent of the parties.

In Home of the Friendless *vs.* Rouse, 8 Wall., 437, it was held that a provision that the property of a corporation should be "exempt from taxation" meant that it should be "forever" exempt. The Court say "To add the word "forever," after the word "taxation" could not make the meaning any clearer. It was undoubtedly the purpose of the legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the legislature without taking any direct action on the subject could at its will resume the power of taxation.

So in the similar case of Nichols *vs.* N. H. & N. Company, 42 Conn., 103, the court says, on p. 124, "The State can no more be guilty of fraud in making contracts, and justify itself, than can individuals, and how could it escape the imputation of bad faith, should it seek to tax the company under such circumstances."

"Can it be believed that it was intended by either party to this contract, that after it was signed by both parties, one was bound for ever, and the other only for a day. That it was intended to be a part of the contract that the State of New Jersey was at her option to be bound or not."

New Jersey *vs.* Yard, 95 U. S., 104 (116).

The State, by its agent, the legislature, had power to authorize such abandonment, either absolutely or upon terms. We presume it will not be denied that if the legislature had authorized the defendants to abandon these two depots upon the substitution of a third, that a contract would have been implied which the legislature could not destroy, although the act itself did not say in terms, that "if the Railroad Company would build a new station, the legislature does hereby contract and agree that they shall never be obliged to stop at the other two stations."

The mere fact of giving the right for a valuable consideration makes a contract which courts will enforce.

This has been the case in all of the decisions relating to taxation. The fact of the grant was found, and the existence of a consideration, and from those two facts this court has inferred a contract in all the cases from the Dartmouth College case down to the latest decision.

Now, suppose that, in those cases, the State, through its legislature, had given the power of exempting from taxation to a Tax Commission, and that Commission, instead of the legislature, had granted an exemption for a sufficient considera-

tion, exactly as the legislature did, would not the State be bound as much by the doings of the Tax Commission as by the precisely similar doings of the legislature. Even if in the act giving power to the Tax Commission, it was not said in terms that they might make contracts for *perpetual* exemptions?

Both the legislature and the Commission would be agents of the State. The legislature is not the State, it is only one of its agents, other agents may be made to whom the legislature may delegate the powers which, by the constitution of the State are given to it. The only question is to what extent it has delegated its powers.

Now we submit that if the legislature has given to the Railroad Commission "all the rights and powers of the State relating to the abandonment of railroad stations," if it has given to it concurrent powers with itself on that subject, then certainly that commission has the same power to grant its approval of an abandonment on terms that the legislature has, and if those terms are such that doing them constitutes a good consideration, and are complied with, there is a grant from the State through its duly authorized agents for a good consideration.

The fallacy of the claim of the attorney for the State is, that he considers the legislature to be the State, while it is only one of its agents. The act of any other agent binds the State as much as the act of the legislature, provided that agent acts within the scope of the authority conferred upon him.

Now, if this court follows the Supreme Court of Connecticut in its views of the powers of the Railroad Commission, and holds that it had the same power to approve the abandonment of this station on terms, as the legislature had, and further, if it holds that an approval by the legislature on conditions, similar to those in this case, and complied with by the

company, would make a contract, it seems to us that it must also hold that the Commissioners being also agents of the State, having the same power to grant as the legislature, the grant by them on similar terms will be a contract as much as a similar grant by the legislature would be.

2d. The learned court further say that the Railroad Commissioners "had no power whatever to contract on the part of the State."

It will be admitted that the Legislature did not in terms give the Railroad Commissioners power to make any contract. The power is implied from the fact that the State substituted the approval of the commissioners for its approval. It made them its agents as to this matter. As is said heretofore, citing Bradley *vs.* R. R. Co., 21 Conn., 305, the Commissioners, within the scope of the law under which they acted, were "invested with all the rights and powers of the State," and again in State *vs.* R. R. Co., 37 Conn., 153, and Waterbury *vs.* R. R. Co., 27 Conn., 154.

The whole power of the State relating to abandoning rail road stations was given to the Railroad Commissioners, and it was, we submit, clearly within the apparent and real scope of their authority to fix and prescribe the terms and conditions of such abandonment.

To hold otherwise would be attributing to the State a course of conduct which between private persons would be fraud, and the foundation of an estoppel.

The statute, as interpreted by the Supreme Court of Connecticut, 37 Conn., 153, on p. 165, provides that *all questions of public and private interests* connected with the continuance or abandonment of railroad stations are to be determined by the Railroad Commissioners. Can any more power on the subject be given to them? After having given them such power can the State say, we gave them full power to authorize you to abandon two stations but not to fix the terms on which

you might abandon them, and we are not bound by those terms?

No! The State gave the Commissioners full power in the matter, and it cannot now, after the expenditure of these large sums of money by the defendant, disavow that power, and take away those rights for which the defendants have paid so much.

3d. It may be claimed that the Legislature under the reserved right to alter or amend the charter of the company has a right to impose this additional burden on them, and the act itself endeavors to shelter itself under this claim by saying that it shall be an amendment to its charter.

But this contract was not made by the charter of the Company, and has no relation to it. It was entirely outside of the charter as much as a legislative grant of land for a consideration would be.

The farthest that this court has ever gone on this point is to hold that anything given by the charter, where the power to amend, etc., is reserved, is to be taken as if such a clause was annexed to it, and as if the Legislature distinctly said, we give you this right now, but we reserve the right to take it away again whenever we please.

But in all the cases it is expressly stated that this principle does not apply to contracts made outside of the charter.

"Rights and interests acquired by the company not constituting a part of the contract of incorporation stand upon a different footing. Railroad Co. *vs.* Maine, 96 U. S., p. 511.

See New Jersey *vs.* Yard, 95 U. S., 104 (116).

Tomlinson *vs.* Jessup, 15 Wall, 454.

Commonwealth *vs.* Essex Co., 13 Gray, 239 (253).

City of Detroit *vs.* Plank Road Co., Wisconsin Supreme Court; Albany Law Journal, Vol. 22, No. 5, p. 95 (July 31, 80).

Sinking Fund Cases, 99 U. S., p. 700.

Albany Co. *vs.* Brownell, 24 N. Y., 345.

4th. It may be said that there are many cases where Legislatures have imposed additional burdens upon corporations by virtue of this clause, and have been sustained by the Courts, as in Com. *vs.* Eastern R. R. Co., 103 Mass., 254 ; Mayer *vs.* Norwich & Worcester Co., 109 Mass., 103, and others.

We do not dispute the doctrine laid down by these cases, but in none of them was there a contract outside of the charter.

In fact the very existence of a *contract* implies something binding. If it is a mere grant or license at the pleasure of the State, which it can revoke at will, there is no contract about it.

5th. It may be claimed that this provision comes under the police power of the Legislature, or some general power relating to corporations.

It is not a question here whether in the absence of any contract the Legislature might provide at what stations a railroad should stop its trains, or what the exercise of such a power, if it exists, shall be called.

The limits to this kind of power are well stated by Cooley in his work on Constitutional Limitations, p. 577: "The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society, they must not be in conflict with any of the provisions of the charter, *and they must not under pretence of regulation* take from the corporation any of the essential rights and privileges which the charter confers."

See cases there cited.

The State may direct a railroad company to erect stations or stop its trains at particular places, if there be no special circumstances in the case, but if for a good consideration it has granted to the company the *right* to abandon a station, it cannot under the pretence of the police power, or a general power relating to railroads, take away that right.

The proper line of distinction is this. Under the police power the Legislature may direct what shall be done by railroads for the *safety* of the public, but not what shall be done only for their *convenience*.

Railroads may be compelled to erect fences or cattle-guards, the speed of trains may be regulated, they may be compelled to use proper brakes, couplings, or platforms, but the place where a particular depot should be established, or where special trains shall stop, has nothing to do with the *safety* of the passengers or of the public.

This principle is most clearly expressed in the case of State *vs.* Noyes, 47 Maine, 189, where in a very elaborate opinion it was held that an act requiring a railroad to stop its trains at an intersection of its road with another, *merely* to make connection with and so accommodate the passengers of another road, was not within the police powers of the State, and on p. 215 the court says, "It would certainly be convenient for the travellers leaving in a country thickly settled with inhabitants to be able to find stations where they can take passage within the shortest distance of each other, and have the train come to a stand against the dwelling of every one living near the railroad track, that he might be accommodated, in taking his passage with greater convenience to himself than if he were obliged to take another mode to reach a station. *No one would probably contend that this should be done*, and thereby subject the proprietors to burdens against which they were protected by the act of incorporation, and if allowed might be attended with ruinous results."

Nor is there anything in the act itself which shows that the Legislature intended this as an exercise of the police power; on the contrary, it is passed solely as an amendment of the charter.

It has been often held that, under pretence of exercising the police power, States cannot impair the obligation of contracts.

See Cooley on Constitutional Limitations, page 574, et sequem, and cases there cited.

6th. But it may be said, is there no means by which the State can oblige this railroad company to stop its trains at Plainville if in its opinion the needs of the public require it?

It is not necessary to consider this question, because it is admitted that in this case no new circumstances have arisen which require any such change.

If they should arise, we may assume that under the power of eminent domain almost any right of a railroad company or any one else may be taken by the State, but it must then be by making proper compensation for the rights so taken.

The very thing of which we complain is that the legislature is attempting here to take away without compensation the rights which we have purchased at so large a price.

We submit, then, that there is here a valid contract between the State and the defendant that the old station at Plantsville may be *permanently abandoned*, and that the act requiring the defendant to again stop its trains there is void.

III.

It requires no argument to show that if such a contract was made the act in question impairs its obligation. It does more than impair, it destroys it.

The obligation of a contract is the law which binds the parties to perform it; and if, under a contract of exemption from taxation, a law taxing the property impairs its obligation, certainly under a contract that a Railroad Company should not be required to stop its trains at a station, a law requiring them to do so, impairs the obligation of that contract.

We submit that there is error in the judgment of the Court below.

R. D. HUBBARD,
C. E. PERKINS,
Of Counsel for the Plaintiff in Error.

Supreme Court of the United States.

No. 93.

THE

NEW HAVEN & NORTHAMPTON CO.

vs.

WILLIAM HAMERSLEY.

In Error to the Supreme Court of Errors of the State of Connecticut.

BRIEF

OF DEFENDANT IN ERROR.

IN THE

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THE NEW HAVEN AND NORTHAMPTON COMPANY, PLAINTIFFS IN ERROR

vs.

WILLIAM HAMERSLEY.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

BRIEF OF DEFENDANT IN ERROR.

Statement.

The New Haven & Northampton Company is a railroad corporation. Its line of road extends from New Haven, in the State of Connecticut, to a point in the State of Massachusetts, and passes through the village of Plantsville, which is situated in the town of Southington, in said State of Connecticut.

The plaintiffs in error obtained their charter from the General Assembly of the State of Connecticut, in 1846.

This charter, among other powers, granted the power to said company "to erect and maintain toll-houses and other

buildings (depots), for the accommodation of their concerns as they may deem suitable for their interests." Record, page 14, Sect 5.

It also had the following limitation.

"Resolved further, That this Act may be altered, amended, or repealed at the pleasure of the General Assembly.

The plaintiff in error, in 1848, established a station at Plantsville for the accommodation of its business and of the public, and continued to use said station for said purpose until May 10, 1874.

In 1866 the legislature of the State passed an act containing the following provision relative to the abandonment of stations:

"SEC. 50. No railroad company shall abandon any station on its road in this State after the same has been established for twelve months, except by the approval of the Railroad Commissioners, given after a public hearing held at said station, notice of which shall be posted conspicuously in said station for one month prior to the hearing."

Stat. 1875, page 326.

Under this act the plaintiff in error, on the 24th day of November, 1873, applied to the Railroad Commissioners of the State for permission to abandon said station, and on the 3d day of February, 1874, the Commissioners gave the plaintiff permission to "discontinue and abandon" the station at Plantsville.

Having obtained this permission, the company abandoned the station.

The General Assembly of the State at its May Session, 1875, upon the petition of Orson W. Stowe, and other citizens of Plantsville, passed the following act:

SEC. 1. That if at any time within six months after the passage of this act, any of the petitioners and others who may act with

them for that purpose shall erect at Plantsville, contiguous to the railroad, a depot building, and convey the same, with the land on which it is situated, and the land reasonably necessary for the approaches thereto by the railroad trains, to the New Haven & Northampton Company, to be used for railroad purpose, it shall thereupon become the duty of said company, and it is hereby ordered to stop at such depot thereafter, its regular passenger and freight trains passing over said railroad, for the purpose of receiving and discharging passengers and freight. And all the provisions of the Revised Statutes, applicable to railroad depots and stations, shall be applicable to said depot in the same manner as though said depot had been erected and established by said company.

SEC. 2. Said order may be enforced by mandamus by the attorney for the State, for the county of Hartford, or at the relation of any inhabitant of the town of Southington, in said county, and the charter of the New Haven & Northampton Company is hereby amended according to the provisions of this act.

The petitioner and others acting with him erected a depot, and in all respects complied with the provisions of said act.

The company having refused to comply with the provisions of said act, the defendant in error as attorney for the State, applied for a writ of mandamus, to compel the company to stop its trains at said depot.

The case was reserved for advice of the Supreme Court of Errors of the State of Connecticut by the Superior Court, where said proceeding was first had. The Supreme Court having advised the Superior Court that the answer of the plaintiff in error was insufficient, the Superior Court passed the following order:

"It is ordered and adjudged that the return of the respondent is insufficient, and that a peremptory writ of mandamus do now issue, directed to the respondent named in said alternative writ, commanding it forthwith on service thereof to stop at said depot mentioned in said alternative writ, hereafter its regular passenger and freight trains passing over said road of the respondent, for the purpose of receiving and discharging passengers and freight."

The case was then taken to the Supreme Court of Errors by the plaintiff in error, and that court reaffirmed its former decision, and adjudged "that there is no error in the judgment complained of."

State *vs.* New Haven & Northampton Co., 43 Conn., 351.

The case comes to this court by a writ of error to the Supreme Court of Errors of the State of Connecticut.

The plaintiff's counsel having abandoned any claim under the first and third assignments of error, the question is confined to the second assignment.

This assignment is based on the claim of the plaintiff, that the Railroad Commissioners, in permitting the plaintiff to abandon its station at Plantsville, acted as the agents of the State, and that their action together with the action of the railroad company in abandoning said station, constituted a a contract between the State and the plaintiff in error, the obligations of which are impaired by the act of 1875, providing for the establishment of a new station at Plantsville.

Record, page 21.

I.

The plaintiff claims a contract from the action of the Railroad Commissioners, to which contract the State and the plaintiff are parties, and according to the claim of the plaintiff the construction of that contract is, that the State of Connecticut has agreed for a valid consideration, that the plaintiff may forever abandon the station at Plantsville.

Under the law of 1866, already quoted, the Commissioners granted permission to the plaintiff to abandon the station, and the plaintiff having voluntarily acted under the permission the contract is claimed to be complete.

Under the law the power to abandon stations is still left

with the plaintiff. The act of 1866, above referred to, only regulates that power. The only power which the Commissioners had in the premises was the power to permit the plaintiff to abandon or retain the station as it should deem best.

A contract is an agreement the parties to which are under some obligation. A simple definition of a contract is "A compact between two or more persons." Each party is bound to do certain things in consideration of the things to be done by the other party to the contract.

Allowing the Commissioners to have been the agents of the State, what contract has the plaintiff entered into?

What has it bound itself to do? It certainly has not agreed to abandon the station.

Prior to 1866 the plaintiff, with all other railroad companies, had the power to abandon or establish stations without restriction or regulation.

The law of 1866 simply regulated that power. The Commissioners had no power to order the station abandoned. They could only permit the plaintiff to exercise the power which had never been taken from it.

Having obtained permission to abandon, the plaintiff was under no obligation to use it. It still had the power of choice.

It was optional with the plaintiff whether to abandon or retain the station, *after* the approval of the Commissioners. It could do either, and it chose to abandon.

What new obligations was the plaintiff under after the alleged contract was made, that it was not under before?

In the assignment of errors the plaintiff complains that the court erred because it did not hold "that the acts and doings of the Railroad Commissioners and of the said New Haven & Northampton Railroad done in pursuance thereof, constituted a contract, etc."

Now the plaintiff was under no obligation to do anything "in pursuance of" the acts of the Commissioners. It was a voluntary action.

The plaintiff complains that the obligations of this alleged contract have been violated.

Is the plaintiff under any obligation, by virtue of this act of the Commissioners? It was not obliged to abandon the station either before or after the approval, and as to the establishment of the new station, the Railroad Commissioners had no power in the premises. That act was purely voluntary, and the plaintiff so understood it, since the record shows that it expended large sums of money in the purchase of land, and in the erection of a freight-house, before the Commissioners were called out. This money must have been expended with a view to the final establishment of a new station at the same point. Record, pages 9 to 10.

The plaintiff had no right to rely on the order of the Commissioners in expending money for the above purpose, since the Commissioners had no authority to act in regard to the establishment of the new station.

It was not obliged to abandon the old station at Plantsville, nor to establish the new one at Southington, by virtue of any act of the Commissioners. Hence its action was voluntary in both cases.

After the permission had been given to abandon the station the company went forward and erected a passenger-depot near the new freight-depot, and on land already purchased for that purpose. It must be remembered that the Commissioners had no jurisdiction to act in regard to the new station.

The company cannot complain of having expended money in reliance upon an act of the Commissioners unwarranted by law. The building of the freight-house and the establishment of the depot at Southington was within the power and discretion of the company, it was under no obligation to do so by reason of anything to be found in the action of the Commissioners. The company did not ask the Commissioners to pass upon the question of a new station at all. The language of the application is as follows:

"Your petitioners therefore ask your honorable board to inquire into the matter, and to discontinue, if deemed advisable, either or both of the aforesaid first-mentioned stations—Southington and Plantsville—to the end that there may be thereafter two stations and two stations only on said railroad in said town of Southington; such two stations to be so located as to best promote the common good of all the parties in interest." Record, p. 17.

The plaintiff in error says:

"That in the purchase of land for the erection of said passenger depot and appurtenances, and said approaches, it expended a large sum of money, to wit, ten thousand dollars, and that said large sum of money was expended in reliance upon the legal effect of the decision, judgment, and order of said commissioners."

In other words, the company relied upon that portion of the decision of the commissioners which they were not asked by the company to make, and which was in relation to a subject-matter over which the commissioners had no jurisdiction in that proceeding.

The money which the company expended, and about which it complains, was expended for its own benefit; for a building standing on its own land, and to be used for its own purposes. The company has parted with nothing under this alleged contract. The contract which they say binds the State, does not bind the company.

In their argument before the Supreme Court of Errors of the State, the learned counsel for the plaintiff claimed, that if the State had so amended the charter of the company as to permit it to abandon the station on condition that it would pay into the State treasury the sum of ten thousand dollars, and if the company had fulfilled the condition, that then the facts would be analagous to the proceedings disclosed by the record, and would establish a contract which the legislature cannot impair, etc.

There can be no analogy between the case at bar and the supposed case. In the former, the company is investing its

own funds, and in its own way, and for its own profit; in the latter, the company pays out for the benefit of the other contracting party—the State—the sum of ten thousand dollars.

The counsel for the plaintiff has relied upon a decision rendered in the case of Commonwealth *vs.* Essex Co., 13 Gray, 239, to sustain their position. But on examination of that case it will be seen that it does not sustain the claim of the plaintiff.

The charter of the Essex Co. gave power to construct a dam across the Merrimac river, for manufacturing and mechanical purposes, and required the company to construct and maintain fishways in said dam.

In 1848, the legislature of Massachusetts granted an amendment to their charter, allowing them to increase their capital stock on condition "that said company shall be liable for all damages which shall be occasioned to the owners of fish-rights existing above said company's dam, by the stopping or impeding the passage of fish up and down the Merrimac river by the said dam."

The company accepted of the amendment to their charter, and subsequently paid $26,000 to various owners of fish-rights on the stream above.

After this the legislature required them by another act to maintain fishways for the free passage of fish as before.

The court held, that the company having paid the money to the parties claiming damage, and so performed their contract, the legislature could not, under their authority to amend the charter of the company, pass a law requiring the company to do acts from which by the terms of such contract (the amended charter) they had been exempted.

The company had been authorized by their charter to obtain certain privileges upon payment of a certain sum. And the court held that they could not be disturbed in the enjoyment of those privileges after the payment had been made. If the legislature of Connecticut had sought to confiscate the depot at Southington and the land on which it stood, the plaintiff might have some ground to stand upon, some cause

of complaint. But the act does not deprive the plaintiff of any property. In fact it compels the people of Plantsville to erect a new depot-building at that place and present it to the plaintiff. And it seems by the record that the building, costing $10,000, has been properly deeded to the company by the people of Plantsville. (Record, p. 4.)

There is therefore no contract the obligation of which has been violated by this act.

II.

This court has held that a contract, within the meaning of the tenth section of the first article of the United States Constitution, includes an agreement entered into by a State with its citizens.

Aside from the provisions of this clause of the Constitution as construed by this court, an agreement of a State with its citizens is not a contract, within the legal meaning of the word. Such an agreement has no obligation, i. e., there is no law that binds the State to the performance of its agreement. But the court has held that the framers of the Constitution intended to include within the operation of the obligation clause any agreement by a State of such a nature as, if entered into by an individual, would be a civil contract. That, by force of the United States Constitution, the moral obligation on the part of a State to carry out its agreement becomes *pro hac vice* a legal obligation, the equivalent to the law which binds the citizen entering into a similar agreement. And that this moral obligation binding the State cannot be impaired by legislation any more than the legal obligation binding the citizen.

But in including agreements by a State within the operation of the obligation clause, the Constitution has not otherwise altered the character of the contracts to which the clause applies. This clause of the Constitution does not undertake to enforce all the moral obligations of a State, but only the

moral obligation of such agreements as would be proper civil contracts and subject to the obligation of municipal law, if entered into by an individual.

And in determining whether a State law impairs the obligation of an agreement entered into by the State itself, we must be guided by the same rules of construction as if a similar agreement had been entered into by an individual.

In other words, the contract must be in all respects, except the character of the party, a civil contract. Its subject-matter must be the subject-matter of a legal contract. It must have a valid consideration. There must be a complete, definite agreement between the parties.

The contract claimed in the case at bar as entered into by the State has none of the requisite elements of a civil contract within the meaning of the obligation clause.

It is not claimed that there was any verbal agreement, but that an agreement resulted by operation of law from the acts of the parties.

What were these acts?

What did the State do?

The State gave the corporation permission to abandon a station it had used for twenty-five years.

The abandonment of the station without permission was illegal.

"No railroad company shall abandon any station on its road in this State after the same has been established for twelve months, except by the approval," etc. Gen. Stat. Conn., p. 327.

The State licensed the corporation, at its own request and for its own benefit, to cease the performance of a public duty.

But the plaintiff in error claims that the State did more —that it ordered the corporation to erect a new passenger station in a particular manner.

This claim is not true.

The State acted through its agents, the Railroad Commissioners.

Those agents had no authority, except that conferred by law. Their powers are defined by Statute.

They had no power to order the establishment of a new station in the manner claimed.

They had no power to order the building of a new station-house.

They had no power to order a station-house built in a particular manner.

The whole power of Railroad Commissioners relating to stations, is contained in the section 50, cited supra page 2, and in section 47, which is as follows:

SEC. 47. When the business center of any village containing two hundred inhabitants is more than one and a half miles from the nearest station on a railroad, and not more than one-third of a mile from said road, the Railroad Commissioners, upon the petition of twenty of said inhabitants, after due inquiry, may make such orders in regard to the stoppage of any of the trains upon said railroad, at or near said village, for the purpose of receiving and discharging passengers and freight, as they shall deem just and reasonable, and no railroad company, whose trains may be thus required to stop, shall charge more than five cents for each mile and fraction of a mile for transporting passengers between such stopping place and the next station.

General Statutes 1875, p. 326.

The only power of the Railroad Commissioners relative to station-houses, is to "make such rules as to platforms and out-buildings at stations, as are for the public interest;" to "make necessary orders for compelling companies to furnish comfortable seats for passengers."

Gen. Stat. Conn., p. 320.

If the action of the Railroad Commissioners relative to the Plantsville station is to be construed as an order to erect a station-house at Southington, the order was entirely void. It

was not the act of the State, and was no more binding on the State than if the Commissioners had ordered the corporation to build a new town hall in Southington.

The only act of the State, therefore, was a license to the corporation to abandon the existing stations at Plantsville and Southington. A license, *not an order*. The corporation being free to act under the license or not.

What did the corporation do?

It established a new station in Southington, and expended ten thousand dollars in the building of the necessary station-house.

The plaintiff claims that from these two acts, the law infers a contract with a binding obligation on the State.

What is this contract?

How can it be expressed in definite terms?

Whatever may be its terms its substance is a promise on the part of the State to refrain from exercising its power to compel the corporation to furnish necessary facilities to the public in the use of the road.

In other words, it is a barter by the State, not of a property right, but of a governmental right.

A barter of this kind is beyond the power of the Legislature. The subject matter will not support a valid contract.

The courts have held that the power of taxation may be bargained away to a limited extent. But this court, in Stone *vs.* Miss., 116, p. 820, distinguished between the power of taxation and the power of governing, and says, "But the power of governing is a trust, committed by the people to the government, no part of which can be granted away. * * * The contracts which the constitution protects are those that relate to property rights, not governmental."

Several State courts have held that contracts between railroad corporations and individuals, to locate the road upon a certain line,—to build a depot at a certain place,—to leave a

certain distance along the line of road destitute of depots,—are against public policy and void.

Holliday *vs.* Patterson, 5 Oregon, 177.
The Pacific Railroad Co. *vs.* Seely, 45 Mo., 212.
St. Jos. & Denver City Railroad Co. *vs.* Ryan, 11 Kansas, 602.

But even if the subject matter were such as to support a valid contract the terms of the contract are too indefinite.

Is it a promise not to compel the establishment of new stations at the sites of the old stations at Plantsville and Southington for ever, or for a reasonable time, or until public necessities have altered?

Is it a promise not to establish a new station at, or at any place between, the sites of the old stations? Or is it a promise not to establish a new station at either of the old stations, or at any place between them, or at any place within a reasonable distance from them?

The only promise claimed is the result of a deduction. We submit that if any promise can be deduced from the facts, no process of reasoning can determine what is the real promise.

But this contract of deduction is subject to the further infirmity, of want of consideration.

The only act of the State, is granting the railroad company a license to narrow its duties to accommodate the public. No inference of perpetuity follows such a license. Like every other privilege or exemption, it must be accepted subject to *law*, i. e., to the operation of any law the legislature may, in the exercise of its legitimate authority, deem necessary for the public good.

But the plaintiff claims that its establishment of a new station in Southington, and its expenditure of ten thousand dollars in station buildings, furnish a consideration sufficient to support the contract claimed.

We have already shown that the establishment of the new station was the voluntary act of the plaintiff in error. That the State had no part nor lot in it. That the Railroad Commissioners could not order it and could not prevent it. That whatever the railroad commissioners did or said in reference to it was entirely outside of the limits of their agency and in no way binding on the State.

But assuming that the Railroad Commissioners acted within the limits of their agency, still there is no consideration for any promise on the part of the State.

What is the consideration? The building a station at Southington for the plaintiff's own use.

The consideration, to be valid, must be either a benefit to the State or an injury to the plaintiff.

It is not a benefit to the State. The State had the right not only to refuse but to command the plaintiff to build the station, and if the State commanded the plaintiff to build the station it immediately became the legal duty of the plaintiff to build it. The performance of such a legal duty is not a valid consideration.

It is not an injury to the plaintiff.

The station is for its own use. Its tolls, by presumption of law, are full compensation for the expense. For this reason the courts have held that a law compelling a railroad corporation to build a station is not taking property without consideration.

If it is claimed that the expense of the Southington depot is in excess of what the public needs require, and that this excess of expenditure is the consideration of the State's promise, the answer is that no such fact appears upon the record, and the Court cannot presume a fact not apparent, especially one of such an improper if not illegal character.

We claim, therefore, that the facts disclosed in the record, considered from any point of view, do not establish the implied promise as claimed by the plaintiff in error. Because

First. The governmental powers of the State cannot be made the subject of a civil contract.

Second. No definite promise can be implied from the facts. If there is any promise, it cannot be made certain what that promise is. To establish a certain promise requires not legal but mechanical construction. The court is asked not to construe, but to build.

Third. There is no consideration for any promise on the part of the State.

The acts of the State throughout the whole proceeding, appearing upon the record, had no reference to a civil contract, had no reference to a bargain of any kind. They are throughout purely acts of government over a subject matter within the legitimate power of the State.

The plaintiff in error overlooks entirely the material and significant fact, *that the State has the legal right to compel it to establish a station and to build a station house at any point on its road, and the State is the judge of the public necessity.*

This power may be abused. It may be abused so grossly as to violate some of the fundamental principles of the State constitution. It has not been abused in this case, but has been exercised most wisely and justly. But no abuse of this power can build up a contract between the State and a railroad corporation nor be charged as violating the obligation clause of the United States Constitution.

The existence of this power in the State has been fully established. The cases cited upon the question from the Massachusetts reports and from 4 Otto, make further argument useless.

Now what has the State done in the exercise of this power, as detailed in the record, and admitting the acts of the Railroad Commissioners to have been as the plaintiff in error claims, and to have been the acts of the State.

In February, 1874, it compelled the plaintiff in error to establish a new station, and build a station house in Southington.

In May, 1874, it permitted the plaintiff in error to abandon two stations, one at Plantsville and one in Southington.

In December, 1875, the citizens of Plantsville having built a station-house and offered it for the use of the public, it compelled the plaintiff in error to stop its trains at the new station at Plantsville.

Every one of these acts is an exercise of legitimate power on the part of the State. The fact that they were done in succession is immaterial.

The net result of this series of acts is, that the plaintiff in error, having a station in Southington and at Plantsville, has abandoned the station in Southington and established a new station in the same town and built a station-house there. Suppose that, instead of the series of acts that produced this net result, the State had by a single act amending the charter of the plaintiff in error, compelled it to establish the new station in Southington, and build the station-house there, permitting it at the same time to abandon the old Southington station. The power of the State is equally clear whether the result is accomplished by a single act, or by successive acts.

In all these acts, where is the civil contract?

Where is there any contract whose obligation has been violated?

We see a series of legitimate governmental acts; not a single element of any private contract.

III.

The passage of the act complained of, was clearly within the the power of the legislature, as it is the imposition of an additional burden which the plaintiff agreed might be imposed when it received its charter.

It was a part of the contract which the plaintiff made with the State when corporate life was given it, that it would submit to and comply with just such an act as this.

The State grants extraordinary powers to the company, including the power of eminent domain, with the privilege of levying toll for passengers and freight. It is true that the corporation agrees to do but little, compared with the benefit received, but the significant part of this charter is the agreement to submit to amendment, alteration, or repeal, at the pleasure of the General Assembly.

In the case of English *vs.* New Haven & Northampton Company (32 Conn., 240), the plaintiffs constructed a bridge described as "a new, wider, and more substantial bridge, with stone abutments," over their track in the city of New Haven. This bridge was built under the supervision, and to the acceptance of the city, by virtue of a clause in the charter of the company.

Subsequently, under authority conferred by the Legislature, the city rebuilt the bridge, and charged the expense to the company.

In giving the opinion of the court, Judge Butler says:

"The grant to the defendants contains an express reservation of the right to alter, amend, or repeal, at the pleasure of the General Assembly, and whatever might be true if the charter was a close one, the General Assembly could impose upon the defendants *any additional condition or burthen*, connected with the grant, which they might deem necessary for the protection or welfare of the public, and which they might originally, and with justice, have imposed."

The restoration of an abandoned station by legislative enactment, is within the reserved power to amend, alter, or repeal, because it is an additional burden, which the Legislature might have originally imposed.

"When such a provision (of repeal or amendment) is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the constitution." CLIFFORD, *J.*

Pennsylvania College Case, 13 Wall., 213.
See also Miller *vs.* State, 15 Wall., 488.
See also Commonwealth *vs.* Fayette Co. Railroad Co., 55 P. St., 452.
Hyatt, Receiver, *vs.* McMahon, 25 Bar, 457.
Fitchburg Railroad Co. *vs.* Grand Junction Railroad and Depot Co., 4 Allen, 198.

"That the Legislature of Wisconsin may alter or repeal the charter granted to the Sheboygan & Fond du Lac Railroad Company is certain. This is a power reserved by the Constitution. The railroad can, therefore, be controlled and regulated by the State. Its use can be defined; its tolls and rates for transportation may be limited."

Olcott *vs.* Supervisors, etc., 16 Wall., 694.
Commissioners, etc., *vs.* Holyoke Water Power Co., 104 Mass., 446.
State *vs.* Mayor, etc., of Jersey City, 31 N. J. L., 580.
Sherman *vs.* Smith, 1 Black, 598.
People *vs.* Hills, 46 Barb., 848.

This power of amendment has been frequently exercised to compel railroad corporations to assume additional burdens for the accommodation of the public. In Massachusetts it has been exercised to compel them to construct stations, and cause their trains to stop at them.

In the case of Commonwealth *vs.* Eastern Railroad Company, 103 Mass., 254, the defendant corporation was required, by a special act, to establish a station on its road, and erect

a station-house. The statute was not complied with, the railroad company claiming it was unconstitutional. Chapman, C. J., in referring to the clause reserving to the legislature the power to alter, amend, and repeal, says:

"This clause constitutes a part of the express contract between the legislature and the corporation." "If they (the railroad company) refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute."

A leading case on this subject is the case of the Mayor and Aldermen of Worcester *vs.* Norwich & Worcester Railroad Company, 109 Mass., 103. The special statute under consideration was the statute of 1871, c. 343, which provided that the Boston and Albany, the Norwich and Worcester, the Providence and Worcester, the Worcester and Nashua, and the Boston, Barre, and Gardiner Railroad Companies may and shall unite in a station in the city of Worcester, for the accommodation of the passenger trains of all said corporations.

The corporations affected by the act refused to regard its provisions, and suit was brought to compel compliance. The court say:

"One of the most obvious reasons for reserving to the legislature the right to alter, amend, or repeal such charters is to enable it to compel an unwilling corporation to perfect and extend its connection with other railroads, as the convenience of the public may from time to time require. At any rate, the legislature was the exclusive judge as to that matter, and an amendment of the several charters so as to secure such an object was a reasonable exercise of their reserved right. The power to alter a charter includes the right to take away some of the powers granted by it, or to add new powers, without which improvements of the greatest importance would be *ultra vires*. Their compensation for the outlay is in the tolls they receive from travelers or others."

See also the case of the Attorney General *vs.* Railroad Companies, 35 Wis., 425.

The plaintiff seems to be under the impression that the permission granted it by the Commissioners to abandon the station was a vested right to *forever* abandon it.

This is not so, because the law of 1866 conferring this power on the Commissioners only gave them power to permit the company to abandon the station. It did not delegate to them the reserved power to impose additional burdens whenwere the legislature might see fit to do so. No act of the Commissioners could affect this reserved power, and the legislature was the sole judge as to when and how it should be exercised. The legislature must determine for itself what state of facts call for their interference, and the courts are bound to acquiesce in that determination.

Crease *vs.* Babcock, 23 Pick, 344.
Story *vs.* Jersey City, etc., 16 N. J., Eq. 22.
State *vs.* Miller, 30 N. J. law, 373.
Miners' Bank *vs.* United States, 1 Geo. Green, 563.
Erie Railroad *vs.* Casey, 26 Penn. Stat., 300.

The legislature has made no contract, either by itself or by its agents which prevents it from exercising this reserved power. The use of it has often been opposed and questioned by the corporations on which it has been exercised, but the courts have uniformly sustained the claim made here by the defendant in error.

In the case of Mun *vs.* Illinois, 4 Otto, 113, the court in alluding to the fact that the plaintiffs in error had built certain warehouses, and established their business before the statute regulating the tolls connected with their business was passed, say,

"What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon this business, and provided themselves with the means to carry it on, subject to this condition."

The claim which we make in regard to the construction of the contract contained in the plaintiffs' charter, and in regard to the power of the legislature to impose additional duties and burdens, is sustained by the following authorities :

Proprietors, etc., *vs.* Haskell, 7 Maine, 474.
Read *vs.* Frankfort Bank, 23 Maine, 318.
Roxbury *vs.* B. & P. R. R., 6 Cush, 424.
Fitchburg Railroad Co. *vs* Grand Junc. Railroad Co., 4 Allen, 198.
Com. *vs.* Easton Railroad Co., 130 Mass., 254.
Application of Henry B. Gibson *vs.* Oliver Lee & Co's Bank, 21 N. Y., 9.
Matter of the Reciprocity Bank, 22 N. Y., 9.
White *vs.* Syracuse & Utica Railroad Co., 14 Barbour, 559.
Story *vs.* Jersey City & Bergen Point Plank Road Co., 16 N. Y. Eq., 13.
State *vs.* Miller, 30 N. J. law, 368 affirmed in
State *vs.* Mayor, 31 N. J. law, 575.
Perrin *vs.* Oliver, 1 Minn., 202.
Madison Railroad Co. *vs.* Reynolds, 3 Wis., 258.
Whiting *vs.* Sheboygan Railroad Co., 25 Wis., 167.
Sherman *vs.* Smith, 1 Black, 587.
Pennsylvania College Cases, 13 Wallace, 191.
Tomlinson *vs.* Jessup, 15 Wallace, 454.
State *vs.* Harflinge, 31 Wis., 262.
Chicago, Burlington & Quincy Railroad Co. *vs.* Iowa, 4 Otto, 155.
Peik *vs.* Chicago & Northwestern Railway Co., 4 Otto, 164.
Chicago, Milwaukee & St. Paul Railroad Co. *vs.* Ackley, 4 Otto, 179.
Wino & St. Peter Railroad Co. *vs.* Blake, 4 Otto, 180.
Stone *vs.* Wisconsin, 4 Otto, 181.

We conclude, therefore,

First. That there was no contract at all between the State and the plaintiff in error growing out of the action of the Commissioners.

Second. That the charter of the company is the contract between the State and the company, and by its terms the legislature had the right to impose upon the plaintiff the duty of stopping its trains at the Plantsville station.

WILLIAM HAMERSLEY,
JOHN R. BUCK,
Counsel for Defendant in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~502.~~ 830

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE W. KOONTZ, ADMINISTRATOR OF WILLIAM A. WEIGHTMAN, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED OCTOBER 4, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 502.

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IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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1 To the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States.

The petition of the Baltimore and Ohio Railroad Company respectfully represents:

That a final judgment has been rendered by the supreme court of appeals of Virginia, in a suit therein pending, wherein Geo. W. Koontz, administrator of William A. Wightman, deceased, is plaintiff, and the Baltimore and Ohio Railroad Company is defendant.

That the supreme court of appeals aforesaid is the highest court of law in the State of Virginia in which a decision in the said suit could be had.

That in said suit there is drawn in question the validity of a statute of, and of an authority exercised under, the United States, and the decision is against the validity of such statute and of such authority.

That in said suit there is drawn in question the validity of a statute of, and of an authority exercised under, the State of Virginia, on the ground of such statute and authority being repugnant to the constitution and laws of the United States, and the decision is in favor of such statute and authority.

2 That in said suit a right and privilege are claimed under the Constitution and statutes of the United States, and the decision is against the right and privilege set up and claimed by your petitioner under such constitution and statutes.

All of which appears on the face of the record accompanying this application.

Wherefore, to the end that the said judgment may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, your petitioner prays that a writ of error may be allowed, and that a citation may issue in the same manner as if the said judgment had been rendered in a circuit court of the United States.

JNO. H. B. LATROBE,
Counsel for B. & O. R. R.

The above petition is granted, and a writ of error is allowed as therein prayed.

M. R. WAITE,
Chief Justice Sup. Ct. U. S.

26th JANUARY, 1878.

(Indorsed:) Filed January 28th 1878. Jos. A. Waddell, clerk of supreme court of appeals of Virginia, at Staunton.

3 VIRGINIA:

In vacation.

In the clerk's office of the supreme court of appeals of Virginia, at Staunton, on the 11th day of December, in the year 1877.

Be it remembered that heretofore, to wit, on the day of , in the year 1877, came the Baltimore and Ohio Railroad Company, by Williams & Bro., its counsel, and presented to one of the judges of said court, in vacation, its petition for a supersedeas to a judgment of the circuit court of Shenandoah County, rendered on the 3rd day of May, 1877, in a suit at law therein depending in which George W. Koontz, administrator of William A. Wightman, dec'd, was plaintiff, and said Baltimore and Ohio Railroad Company was defendant; which petition with the endorsement thereon, and the transcript of the record accompanying the same and therein referred to, is in the words and figures following, to wit.

Petition.

To the judges of the supreme court of appeals of Virginia:

The petition of the Baltimore & Ohio Railroad Company respectfully represents: That it is aggrieved by a final judgment of the circuit court of Shenandoah County, rendered on the day of May, 1877, in an action of trespass on the case, wherein George W. Koontz, adm'r
4 William A. Wightman, dec'd, was plaintiff, and the said company was defendant.

A transcript of the record of the judgment complained of is herewith presented.

Your petitioner assigns the following errors in the said judgment:

1. The court erred in refusing to remove the said cause to the United States court, held at Harrisonburg, in accordance with the prayer of the petition of the defendant, filed under the provisions of the act of Congress 1874–'5 (p. 470). The record (p. 24) shows that at the August term of the year 1876 of said court the defendant filed its petition, praying for the removal of said cause to the United States court.

The petition, in all respects, conformed to the statute. It was filed at the first term at which said cause could be tried, and was accompanied by a bond as required by law, duly acknowledged and accepted.

The petition recites as the ground of removal as following:

That the said pl'ff was at the time of the institution of said suit, and at the time of the filing of said petition, a citizen of the State of Virginia, and the defendant, the petitioner, at said time was a corporation duly incorporated under and by virtue of the laws of the State of Maryland, and as such was a citizen of said State; that the amount in controversy exceeded the sum of $500.

5 At the hearing of said motion, the evidence taken and heard was certified and is found in bill of exception No. 1, p. 31.

The def't introduced its act of incorporation by Maryland legislature. The pl'f also admitted that the def't was at the time suit was brought, and at the time of said motion, duly incorporated under the laws of the State of Maryland (p. 45), but proved that it (the def't) was the lessee of the W. C. V. M. & G. S. R. R. Co. (a Virginia road), or so much as was between the towns of Strasburg and Harrisonburg.

That the def't was a citizen of the State of Maryland was admitted, and the only matter, so far as the evidence shows, that was urged against the motion was that the def't was a lessee of a part of a Virginia road, and ran cars from Baltimore to Harrisonburg.

Upon this showing, the def't was entitled to have its case removed, and it was error to refuse it.

It may be claimed that the B. & O. R. R. Co. is a corporation of Virginia, by virtue of an act of assembly, passed March, 1827, as construed by our court of appeals in B. & O. R. R. Co. v. Gallaher's adm'r.

We reply, that the Supreme Court of the United States, in 12 Wall., Railroad Company vs. Harris, hold that this action was but a license, not an act of incorporation.

Again, we reply, this license was to operate or construct a road through certain counties, in what is now West Virginia, and not
6 one foot of the road of said company is in the limits of Virginia, and no license was given or claimed to build or operate a road in the present limits of the State of Virginia.

One might as well claim that A. B., who was or became in the year 1860, a citizen of Ohio County, Virginia (being then and there naturalized), and who now lives there, is still a citizen of the State of Virginia

by virtue of the process of naturalization, and for that reason could not sue a citizen of Virginia in the United States courts.

Whatever might have been the case prior to the division of the State or may be now true in West Virginia (although the State courts uniformly remove causes on application), surely the B. & O. Co. is not now a citizen of Virginia.

The prayer of the petition should have been granted, and this cause removed. (See Ohio & Miss. Railroad vs. Wheeler, 1 Black, 286.)

The court erred in overruling the def't's demurrer—

II. 1. Because in 1st and 2nd counts there is not a sufficient description of the def't. The Baltimore & Ohio Railroad Company is named as the def't, but whether it is a corporation or a partnership, or if a corporation, where created, is not stated, and thus no opportunity (by reason of lack of averment), was given to file an affidavit under our statute and put the pl't' to proof. (Code 1873, p. 1094, § 40.)

7 2. Because this company in 3d and 5th counts is described as a corporation doing business in Virginia, and in the 4th and 6th courts as a corporation of the State of Virginia. There is thus joined in these counts the company, be it whatever it is, with corporations that are not set out by averment to be the same persons. In fact, different persons are sued in different counts, and there is an improper joinder of parties.

3d. The declaration fails to aver that the deceased left a family or next of kin, or, in their absence, a creditor. The loss to be estimated and compensated by damages is purely a pecuniary one, and the measure of damages varies, as those sharing the recovery are next of kin, creditors, or the State. The loss varies with the next of kin as the same are near or remote.

Primarily, the recovery is for the benefit of wife, husband, parent, and child; in next place, it is assets in the hands of the personal representative, to be disposed of according to law.

Can there be a recovery where the loss is not averred and by whom sustained? The averment here is, "the pl't' (adm'r), is entitled to recover damages against the said def't to the amount of $10,000, under and by virtue of the laws of Virginia" (see the Chicago & Rock Island R. R. Co. vs. Morris, 26 Ill., 400.)

The court say: Before recovery under this statute, it must be averred and proved that the deceased left a widow or next of kin, to whom damages can be distributed. There may be persons, isolated or

8 unknown, who do not and would not afford any support to their relatives; in the case of the death of such, there would not be any next of kin sustaining a pecuniary loss.

The damage is exclusively for a pecuniary loss, not as a solace (see also 1 Add. Torts, § 575, p. 621–2, § 594, p. 638.)

III. The court erred in not continuing the case, bill No. 8, page 72.

The addendum made to the bill of exceptions, by the court, of what occur'ed, days after the refusal to continue and after the case had progressed for days, is referred to in proof of the fact that as an original question it needed strengthening. The def't, by no fault of its own, was forced into trial without the benefit of a most material witness.

IV. The court erred in not sustaining the objections to the questions as set forth in bills No. 2, 3, 4, and 5, pages 62, 63–4, 65–66.

The pl't' was allowed to go into the question of family, wife, children, ages—value of life distroyed to them. There was no averment of family, mar'iage, or anything of the kind.

Not the value of the life in the abstract, but the pecuniary loss to the

family, or the creditor, or the State was the question. This loss varies with the beneficiaries, and is not proper to be proved without averment. (See authorities quoted as to demurrer.)

V. The court should have allowed the def't to ask and have
9 answered the question as to the policies of life insurance—what sum was received by wife and children by reason of Wm. A. Wightman's death. So held by Lord Campbell, the author of the English act.

VI. The court erred in granting the pl'ff instructions. We instance the fourth instruction, page 52, where the jury are told that negligence that may have occasioned the intestate's death will justify a recovery. The negligence, we say, must have caused the injury; at least, the jury must have so believed. This was not the case for a "may be," or a "may have been occasioned."

For these and other reasons and errors apparent of record, your petitioner prays a writ of supersedeas of said judgment, and 'at the same may be reviewed and reversed.

THE BALTIMORE & OHIO RAILROAD COMPANY,
By WILLIAMS & BRO.

I am respectfully of opinion that the judgment in the foregoing rec ord is erroneous and should be reversed.

JAS. H. WILLIAMS,
Counsel Practising in the Court of Appeals.

VIRGINIA:

Pleas at the court-house of Shenandoah County, before Hon. Mark Bird, judge of the 18th judicial circuit of Virginia, on the 3d day of May, 1877.

10 GEORGE W. KOONTZ, ADMINISTRATOR of William A. Wightman, deceased, plaintiff,
against
BALTIMORE AND OHIO RAILROAD COMPANY, def't.
} Trespass on the case.

Be it remembered that on the 24th day of April, 1876, came the plaintiff by his attorney and sued out of the clerk's office of said court a summons against said defendant, which was returned duly executed by Peter Houshour, deputy for William H. Rice, sheriff of said county.

And at rules held in the clerk's office of said court, on the 1st day of May, 1876, the plaintiff by his attorneys filed the following declaration against the defendant, to wit:

STATE OF VIRGINIA,
Count' of Shenandoah, to wit:

In the circuit court of said county.

George W. Koontz, administrator of William A. Wightman, dec'd, plaintiff, complains of the Baltimore and Ohio Railroad Company, which has been duly summoned to answer the plaintiff in this action of a plea of trespass on the case, for this: That the defendant before and at the time of the committing of the grievances hereinafter mentioned was the owner and proprietor of a certain railway know' and called the Railway of the Valley Division of the Baltimore and Ohio Railroad

11 Company, running through, operated in, and doing business in the counties of Frederick, Shenandoah, Rockingham, and Augusta, in the State of Virginia and in the State of West Virginia, and was the owner and proprietor of certain other railways connected therewith as hereinafter stated, and of certain steam engines, cars and carriages, used by the said defendant in, upon, and along said railway in the transaction of the said business of defendant, and in the operation of the same for the transportation and conveyance of passengers and their baggage upon and along said railways from a certain place, to wit, the city of Staunton, in Augusta County, State of Virginia aforesaid, to the town and station of Harper's Ferry, in West Virginia, and from and to all the intermediate stations between said city of Staunton and town and station of Harper's Ferry; and thereupon plaintiff's intestate heretofore, in his lifetime, to wit, on the 6th day of March, 1876, at the request of the said defendant, became and was a passenger in one of the said carriages of said defendant, to be by the said defendant safely and securely carried therein and thereby, in a certain journey along said railway, to wit, from the town and station of Edinburg, in said county of Shenandoah and State of Virginia, a station on the line of the said railway known as the Valley Division of the Baltimore and
12 Ohio Railroad Company as aforesaid, to Charlestown and the station upon the line of said railway in the State of West Virginia aforesaid; that the said defendant then, to wit, on the 6th day of March, 1876, at the said town and station of Edinburg, received the said plaintiff's intestate as such passenger as aforesaid, from said town and station to said station at Charlestown, in West Virginia, and thereupon it became and was the duty of the defendant to use all due and proper care that the said plaintiff's intestate should be safely and securely carried and conveyed by said defendant, by, upon, and along said railway as aforesaid, from the said town and station of Edinburg aforesaid, in said county of Shenandoah and State of Virginia aforesaid, to said town and station of Charlestown, in West Virginia aforesaid; but the said plaintiff says and avers that the said defendant did not use due care in that behalf, and that by reason of the negligence, default, and wrongful act of the said defendant, the said William A. Wightman, the plaintiff's intestate, while being so carried upon said railway, was so greatly wounded and injured, to wit, at the county of Shenandoah, State of Virginia aforesaid, to wit, on the said 6th day of March, 1876, that he then and there, to wit, at the time and the place last aforesaid, died, and that the death of said William A. Wightman was caused by said wrongful act, neglect, and default of the said railroad company as afore-
13 said; wherefore the said plaintiff, administrator as aforesaid of said William A. Wightman, says that he is entitled to recover damages against the said defendant to the amount of ten thousand dollars, under and by virtue of the laws of the State of Virginia for such cases made and provided, and therefore he brings suit, &c.

II COUNT.—For this, that the defendant, before and at the time of the committing of the grievance hereinafter mentioned, was the owner and proprietor of a certain railway known as and called the Railway of the Valley Division of the Baltimore & Ohio Railroad Company, running through, operated in, and doing business in the counties of Frederick, Shenandoah, Rockingham, and Augusta, in the State of Virginia and in the State of West Virginia, and was the owner and proprietor of certain other railways connected therewith as hereinafter stated, and of certain steam-engines, cars, and carriages used by the said defendant in, upon, and along said railway in the transaction of the said business of

defendant and the operation of the same for the transportation and conveyance of passengers and their baggage upon and along said railway from a certain place, to wit, the city of Staunton, in Augusta County, State of Virginia, aforesaid, to the town and station of Harper's Ferry, in West Virginia, and from and to all the intermediate stations between said city of Staunton and town and station of Harper's Ferry;
14 that thereupon plaintiff's intestate, heretofore in his lifetime, to wit, on the 6th day of March, 1876, at the request of the said defendant, became and was a passenger in one of the said carriages of said defendant, to be by said defendant safely and securely carried therein and thereby in a certain journey along said railway, to wit, from the town and station of Edinburg, in said county of Shenandoah, and State of Virginia, a station on the line of the said railway, known as the Valley Division of the Baltimore and Ohio Railroad Company, as aforesaid, to Charlestown and the station upon the line of the said railway, in the State of West Virginia aforesaid; that the said defendant then, to wit, on the 6th day of March, 1876, at the said town and station of Edinburg, received the said plaintiff's intestate as such passenger, as aforesaid, from said town and station to said station at Charlestown, in West Virginia, and thereupon it became and was the duty of the defendant to have and use good and safe engines, cars, and carriages for the conveyance of passengers; to have the same well and carefully managed, and a good and safe tract and bridges upon said road upon which to run and operate said engines, cars, and carriages for the conveyance of passengers, and to use due and proper care that plaintiff should be safely and securely carried and conveyed by the said defendant by, upon, and along said railway as aforesaid, from
15 the said town and station of Edinburg, in Shenandoah County, Virginia, on the line of said railway, to the town and station of Charlestown, in West Virginia aforesaid; but the defendant did not have good and safe engines, cars, and carriages for the conveyance of passengers, and have the same well and carefully managed, and a good and safe track and bridges upon said road upon which to run and operate said engines, cars, and carriages for the conveyance of passengers; did not use due and proper care that plaintiff should be safely and secur'ly carried and conveyed by the said defendant by, upon, and along said railway as aforesaid, from said town and station of Edinburg, in said county of Shenandoah, State of Virginia, to said town and station of Charlestown in West Virginia aforesaid; but on the contrary thereof had and then run engines, cars, and carriages that were not good and safe, and upon and over a track and bridges of said railway that were not good and safe, and run said engines, cars, and carriages so negligently, carelessly, wilfully, and recklessly upon said track and bridges upon said railway, so defective and unsafe as aforesaid, from said town and station of Edinburg aforesaid, upon the line of said road to the town and station of Charlestown aforesaid, that certain bridge thereon and over which the said track and the said engines, cars, and carriages of said road ran, called and known as "Narrow Passage bridge,"
16 constructed over a stream called and known as "Narrow Passage Creek," in said county of Shenandoah aforesaid, that by reason of the wrongful act, neglect, and default of said defendant, broke and fell down while the said engine, cars, and carr ages thereto attached, in and upon which the said plaintiff's intestate was riding as a passenger as aforesaid were passing upon and over the same, whereby and by reason whereof the said engine and cars and carriages thereto attached as aforesaid, were precipitated and fell with great force and violence a

great distance, to wit, 114 feet, and were thereby greatly wrecked and damaged and the plaintiff's intestate greatly hurt, injured, maimed, disfigured, and wounded in his limbs and body, by reason whereof the said plaintiff's intestate suffered greatly for a long time, and finally died, and that the death of the *death of the* said William A. Wightman was caused by said wrongful act, neglect, and default of the said railroad company as aforesaid, whereof the said plaintiff, administrator as aforesaid of said William A. Wightman, says that he is entitled to recover damages against the said defendant to the amount of $10,000.00, under and by virtue of the laws of the State of Virginia for such cases made and provided, and therefore brings suit, &c.

WALTON & WALTON & RIDDLEBARGER,
Att'ys for Plaintiff.

17 III COUNT.—George W. Koontz, administrator of William A. Wightman, dec'd, complains of the Baltimore and Ohio Railroad Company, a corporation doing business in the State of Virginia, which has been duly summoned, &c., to answer the plaintiff in this action of a plea of trespass on this case, for this, that the defendant, before and at the time of the committing of the grievances hereinafter mentioned, was the owner and proprietor of a certain railway known as and called the Railway of the Valley Division of the Baltimore and Ohio Railroad Company, running through, operated in, and doing business in the counties of Frederick, Shenandoah, Rockingham, and Augusta, in the State of Virginia and in the State of West Virginia, and was the owner and proprietor of certain other railways connected therewith, as hereinafter stated, and of certain steam-engines, cars, and carriages used by the said defendant in, upon, and along said railway in the transaction of the said business of the defendant and the operation of the same for the transportation and conveyance of passengers and their baggage upon and along said railway from a certain place, to wit, the city of Staunton, in Augusta County, State of Virginia aforesaid, to the town and station of Harper's Ferry, in West Virginia, and from and to all the intermediate stations between said city of Staunton and
18 town and station of Harper's Ferry.

That thereupon plaintiff's intestate heretofore, in his lifetime, to wit, on the 6th day of March, 1876, at the request of the said defendant, became and was a passenger in one of the carriages of said defendant to be by the said defendant safely and securely carried therein and thereby in a certain journey along said railway, to wit, from the town and station of Edinburg, in said county of Shenandoah, and State of Virginia, a station on the line of said railway, *who*wn as the Valley Division of the Baltimore and Ohio Railroad Company as aforesaid, to Charlestown, another station upon the line of said railway in the State of West Virginia aforesaid; and the said defendant then, to wit, on the 6th day of March, 1876, at the said town and station of Edinburg, received the said plaintiff's intestate as such passengers as aforesaid from said town and station at Charlestown, in West Virginia; and thereupon it became and was the duty of the defendant to use all due and proper care that the said plaintiff's intestate should be safely and securely carried and conveyed by said defendant, by, upon, and along said railway as aforesaid, from the said town and station of Edinburg aforesaid, in said county of Shenandoah, and State of Virginia, to said town and station of Charlestown, in West Virginia aforesaid;
19 but the said plaintiff says and avers that the said defendant did not use due care in that behalf, & that by reason of the negligence,

default, and wrongful act of the said defendant, the said William A. Wightman, the plaintiff's intestate, while being so carried upon said railway, was so greatly wounded and injured, to wit, at the county of Shenandoah, State of Virginia aforesaid, to wit, on the 6th day of March, 1876, that he then and there, to wit, at the time and place last aforesaid, died, and that the death of the said William A. Wightman was caused by the wrongful act, neglect, and default of the said railway company as aforesaid. Wherefore, the plaintiff, administrator of said William A. Wightman, says that he is entitled to recover damages against the said defendant to the amount of ten thousand dollars, under and by virtue of the laws of the State of Virginia for such cases made and provided, and therefore he brings suit, &c.

IV COUNT.—George W. Koontz, administrator of William A. Wightman, dec'd, plaintiff, complains of the Baltimore and Ohio Railroad Company, a corporation of the State of Virginia, which has been duly summoned, &c., to answer the plaintiff in this action of a plea of tres. pass on this case, for this, that the defendant before and at the time of the committing of the grievances hereinafter mentioned was
20 the owner and proprietor of a certain railway known as and called the Railway of the Valley Division of the Baltimore and Ohio Railroad Company, running through, operated in, and doing business in the counties of Frederick, Shenandoah, Rockingham, and Augusta, in the State of Virginia and in the State of West Virginia, and was the owner and proprietor of certain other railways connected therewith as hereinafter stated, and of certain steam-engines, cars, and carriages used by said defendant, in, upon, and along said railway, in the transaction of the business of defendant and the operation of the same for the transportation and conveyance of passengers and their baggage upon and along said railways, from a certain place, to wit, the city of Staunton, in Augusta County, State of Virginia aforesaid, to the town and station of Harper's Ferry, in West Virginia, and from and to all intermediate stations between said city of Staunton and town and station of Harper's Ferry.

That thereupon plaintiff's intestate heretofore in his lifetime, to wit, on the 6th day of March, 1876, at the request of the said defendant, became and was a passenger in one of the said carriages of said defendant, to be by the said defendant safely and securely carried therein and thereby in a certain journey along said railway, to wit, from the town and station of Ed-
21 inburg, in said county of Shenandoah, and State of Virginia, a station on the line of said railway known as the Valley Division of the Baltimore and Ohio Railroad Company, as aforesaid, to Charlestown, another station upon the line of said railway, in the State of West Virginia, aforesaid; that the said defendant then, to wit, on the 6th day of March, 1876, at said town and station of Edinburg, received the said plaintiff's intestate as such passenger as aforesaid, from said town and station to said station at Charlestown, in West Virginia, and thereupon it became and was the duty of the defendant to use all due and proper care that the said plaintiff's intestate should be safely and securely carried and conveyed by said defendant by, upon and along said railway as aforesaid, from the said town and station of Edinburg, aforesaid, in said county of Shenandoah and State of Virginia, aforesaid, to said town and station of Charlestown, in West Virginia, aforesaid, but the said plaintiff says and avers that the said defendant did not use due care in that behalf, and that by reason of the negligence, default and wrongful act of the said defendant, the said William A. Wightman, the plaintiff's intestate, while being so carried upon said railway, was

so greatly wounded and injured, to wit, at the county of Shenandoah,
State of Virginia, aforesaid, to wit, on the 6th day of March,
22 1876, that he than and there, to wit, at the time and place last
aforesaid, died; and that the death of said William A. Wightman was caused by said wrongful act, neglect and default of the said railroad company as aforesaid. Wherefore the said plaintiff, administrator as aforesaid of said William A. Wightman, says that he is entitled to recover damages against the said defendant to the amount of ten thousand dollars, under and by virtue of the laws of the State of Virginia for such cases made and provided, and therefore he brings suit, &c.

V COUNT.—Geo. W. Koontz, administrator of William A. Wightman, complains of the Baltimore & Ohio Railroad Company, a corporation doing business in the State of Virginia, which has been duly summoned, &c., to answer the plaintiff in this action of a plea of trespass on the case, for this, that the defendant before and at the time of the committing of the grievances hereinafter mentioned was the owner and proprietor of a certain railway, known and called the Railway of the Valley Division of the Baltimore & Ohio Railroad Company, running through, operated in, and doing business in the counties of Frederick, Shenandoah, Rockingham and Augusta, in the State of Virginia and in the State of West Virginia, and was the owner and proprietor of
certain other railways connected therewith, as hereinafter stated,
23 and of certain steam engines, cars and carriages used by the said
defendant in, upon, and along said railway, in the transaction of the said business of defendant, and the operation of the same for the transportation and conveyance of passengers and their baggage upon and along said railways to a certain place, to wit, the city of Staunton, in Augusta County, State of Virginia, aforesaid, to the town and station of Harper's Ferry, in West Virginia, and from and to all the intermediate station, between said city of Staunton and town and station of Harper's Ferry.

That thereupon plaintiff's intestate beretofore in his lifetime, to wit, on the 6th day of March, 1876, at the request of said defendant, became and was a passenger in one of the said carriages of said defendant, to be by the said defendant safely and securely carried therein and thereby in a certain journey along said railway, to wit, from the town and station of Edinburg, in said county of Shenandoah, and State of Virginia, a station on the line of the said railway known as the Valley Division of the Baltimore & Ohio Railroad Company as aforesaid, to Charlestown, another station upon the line of said railway, in the State of West Virginia; that the said defendant then, to wit, on the 6th day of March, 1876, at the said town and station of Edinburg, received the said plaintiff's intestate as such passenger as aforesaid from said town and
24 station to said station at Charlestown, in West Virginia, and thereupon it became and was the duty of the defendant to have and use good and safe engines, cars and carriages for the conveyance of passengers, to have the same well and carefully managed, and a good and safe tract and bridges upon said road upon which to run and operate said engines, cars and carriages for the conveyance of passengers, and to use due and proper care that plaintiff should be safely and securely carried and conveyed by the said defendant, by, upon and along said railway as aforesaid, from the said town and station of Edinburg, in Shenandoah County, Virginia, on the line of said railway, to the town and station of Charlestown, in West Virginia, aforesaid, but the defendant did not have good and safe engines, cars and carriages for the conveyance of passengers, and have the same well and carefully managed and a good safe track

and bridges upon said road upon which to run and operate said engines, cars and carriages for the conveyance of passengers, did not use due and proper care that plaintiff should be safely and securely carried & conveyed by the said defendant, by, upon and along said railway as aforesaid, from said town and station of Edinburg in said county of Shenandoah, and State of Virginia, to said town and station of Charlestown, in West Virginia aforesaid, but on the contrary thereof had and then
25 run engines, cars, and carriages that were not good and safe, and upon and over a track and bridges of said railway that were not good and safe, and run said engines, cars, and carriages so negligently, carelessly, wilfully, and recklessly upon said tract and bridges upon said railroad, so defective and unsafe as aforesaid from said town and station of Edinburg aforesaid, upon the line of said road to the town and station of Charlestown aforesaid, that a certain bridge thereon and over which the said track, and the said engines, cars, and carriages of said road ran, called and known as the Narrow Passage Bridge, constructed over a stream called and known as Narrow Passage Creek, in said county of Shenandoah aforesaid; that by reason of the wrongful act, neglect, and default of said defendant broke and fell down while the said engine, cars, and carriages thereto attached, in and upon which the said plaintiff's intestate was riding as a passenger as aforesaid were passing upon and over the same, whereby and by reason whereof the said engine and cars and carriages thereto attached as aforesaid were precipitated and fell with great force and violence a great distance, to wit, 114 feet, and were thereby greatly wrecked and damaged, and the plaintiff's intestate greatly hurt, injured, maimed, disfigured, and wounded in his limbs and body, by reason whereof the said plaintiff's intestate suffered
26 greatly for a long time, and finally died, and that the death of said William A. Wightman was caused by said wrongful act, neglect, and default of the said railroad company as aforesaid. Whereupon the said plaintiff, administrator as aforesaid of said William A. Wightman, says that he is entitled to recover damages against the said defendant to the amount of *two* thousand dollars under and by virtue of the laws of the State of Virginia for such cases made and provided, and therefore he brings suit, &c.

VI COUNT.—Geo. W. Koontz, administrator of William A. Wightman, "dec'd," plaintiff, complains of the Baltimore and Ohio Railroad Company, a corporation of the State of Virginia, which has been duly summoned, &c., to answer the plaintiff in this action of a plea of trespass on the case for this, that the defendant, before and at the time of the committing of the grievance hereinafter mentioned, was the owner and proprietor of a certain railway known as and called the Railway of the Valley division of the Baltimore and Ohio Railroad Company, running through, operated in, and doing business in the counties of Frederick, Shenandoah, Rockingham, and Augusta in the State of Virginia, and in the State of West Virginia, and was the owner and proprietor of certain other railways connected therewith, as hereinafter stated, and of certain steam-engines, cars, and carriages used by the said de-
27 fendant in, upon, and along said railway in the transaction of the said business of defendant and the operation of the same for the transportation and conveyance of passengers and their baggage upon and along said railways from a certain place, to wit, the city of Staunton, in Augusta County, State of Virginia aforesaid, to the town and station of Harper's Ferry, in West Virginia, and from and to all the intermediate stations between said city of Staunton and town and station of Harper's Ferry.

That thereupon plaintiff's intestate heretofore in his lifetime, to wit, on the 6 day of March, 1876, at the request of the said defendant, became and was a passenger in one of the said carriages of said defendant, to be by the said defendant safely and securely carried therein and thereby in a certain journey along said railway, to wit, from the town and station of Edinburg, in said county of Shenandoah and State of Virginia, a station on the line of said railway known as the Valley Division of the Baltimore and Ohio Railroad Company as aforesaid, to Charlestown, another station upon the line of said railway, in the State of West Virginia aforesaid; that the said defendant then, to wit, on the 6 day of March, 1876, at the said town and station of Edinburg, received said plaintiff's intestate as such passenger as aforesaid from said town and station to said station at Charlestown in West Virginia, and thereupon it became and was the duty of the defendant to have and
28 use good and safe engines, cars, and carriages for the conveyance of passengers, to have the same well and carefully managed and a good and safe track and bridges upon said road, upon which to run and operate said engines, cars, and carriages for the conveyance of passengers, and to use due and proper care that plaintiff should be safely and securely carried and conveyed by the said defendant by, upon, and along said railway as aforesaid from the said town and station of Edinburg in Shenandoah County, Virginia, on the line of said railway, to the town and station of Charlestown, in West Virginia aforesaid; but the defendant did not have good and safe engines cars, and carriages for the conveyance of passengers, and have the same well and carefully managed, and a good and safe track and bridges upon said road, upon which to run and operate said engines, cars, and carriages for the conveyance of passengers, did not use due and proper care that plaintiff should be safely and securely carried and conveyed by the said defendant by, upon, and along said railway as aforesaid from said town and, station of Edinburg, in said county of Shenandoah, State of Virginia, to said town and station of Charlestown in West Virginia aforesaid; but, on the contrary thereof, had and then ran engines, cars, and carriages that were not good and safe, and upon and over a track and bridges of said railway that were not good and safe, and ran said engines,
29 cars and carriages so negligently, carelessly, willfully, and recklessly upon said track and bridges upon said railway, so defective and unsafe as aforesaid, from said town and station of Edinburg aforesaid, upon the line of said road, to the town and station of Charlestown aforesaid; that a certain bridge thereon and over which the said track and said engines, cars, and carriages of said road ran, called and known as the Narrow Passage Bridge, constructed over a stream called and known as Narrow Passage Creek, in said county of Shenandoah aforesaid; that by reason of the wrongful act, neglect, and default of said defendant, broke and fell down while the said engine, cars, and carriages thereto attached, in and upon which the said plaintiff's intestate was riding, as a passenger as aforesaid, were passing upon and over the same, whereby and by reason whereof the said engine and cars and carriages thereto attached as aforesaid were precipitated and fell with great force and violence a great distance, to wit, 114 feet, and were thereby greatly wrecked and damaged, and the pl'ff's intestate greatly hurt, injured, maimed, disfigured, and wounded in his limbs and body, by reason whereof the said plaintiff's intestate suffered greatly for a long time, and finally died, and that the death of the said William A. Wightman was caused by said wrongful act, neglect, and default of the said railroad company as aforesaid, whereof the said plaintiff

30 administrator as aforesaid of said William A. Wightman, says that he is entitled to recover damages against the said defendant to the amount of five thousand dollars, under and by virtue of the laws of the State of Virginia for such cases made and provided, and therefore he brings suit, &c.

WALTON AND WALTON & REDDLEBARGER,
Attorneys for Pl'ff.

And the defendant not appearing, on the motion of the plaintiff, it is ordered that judgment be entered for the plaintiff against the defendant for what damages the plaintiff ought to recover.

And at another day, to wit, at rules held in said office on the 5th day of June, 1876, the defendant still failing to appear, on the motion of the plaintiff by his attorneys, it is ordered that the conditional judgment entered in this action at the last rules stand confirmed, and that the plaintiff's damages be ascertained by a jury at the next term.

And at a circuit court continued and held for the county of Shenandoah, on Saturday, the 2d day of September, 1876.

Present, Hon. Mark Bird, judge of the 18th judicial circuit of Virginia.

31 GEO. W. KOONTZ, ADM'R OF WM. A. Wightman, dec'd, plaintiff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, defendant. } In case.

The defendant, by its counsel, moved the court to remove this cause to the circuit court of the United States for the western district of Virginia, upon the grounds that the defendant is a corporation under the laws of the State of Maryland.

Petition for removal.

GEO. W. KOONTZ, ADM'R OF WM. A. WIGHTman, dec'd,
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

To the honorable the circuit court of Shenandoah County, State of Virginia:

The petition of Baltimore and Ohio Railroad Company, of the State of Maryland, respectfully shows that your petitioner is the defendant in this suit, and that the same was brought by George W. Koontz, administrator of Wm. A. Wightman, dec'd, plaintiff, on or about the 24th day of April, 1876, in the circuit court of Shenandoah County, Virginia (the said county being in the 18th judicial circuit of said State); that the said plaintiff is now and was at the time of bringing this suit a
32 citizen of the State of Virginia, and that your petitioner is now and was at the time of the bringing of this suit a corporation duly incorporated under and by virtue of the laws of the State of Maryland, and as such corporation is now and was at the time of the bringing of said suit a citizen of said State of Maryland.

And that your petitioner further represents that this suit is brought

to recover damages in the sum of ten thousand dollars by said plaintiff against the defendant for the alleged killing of his intestate while being carried as a passenger by the said defendant from the said county to Charlestown, West Virginia, and that the amount in controversy exceeds the sum of five hundred dollars, exclusive of costs.

Petitioner further avers that this the August term, 1876, of this said circuit court is the first term of this court at which this said cause could be tried, if indeed it can be tried at this term of said court, and your petitioner is ready now to give such good and sufficient surety as this court may require for its doing all acts required to be done by the provisions of the acts of Congress in such cases made and provided, and hereby offer its bond, with good and approved security in the penal sum of two hundred and fifty dollars, conditioned according to law
33 upon application for removal of causes to the next circuit court of the United States, which said bond your petitioner prays may be accepted as good and sufficient.

And your petitioner therefore prays that the same may be removed to the circuit court of the United States for the western district of Virginia, held at Harrisonburg, pursuant to the statute of the United States in such cases made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, &c.

BALTIMORE & OHIO RAILROAD COMPANY,
By WILLIAMS & BROTHER,
Its Attorney.

Bond.

Know all men by these presents that we, the Baltimore & Ohio Railroad Company, J. P. Nelson, James H. Williams, and W. T. Williams, are held and firmly bound unto George W. Koontz, administrator of William A. Wightman, dec'd, in the just and full sum of two hundred and fifty dollars, to the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, our executors, administrators and assigns, jointly and severally, firmly by these presents, and we each hereby waive the benefit of our homestead exemption as to this obligation. Witness the following signatures and seals this 2nd day of September, 1876.

34 The condition of the above obligation is such, that whereas the said Baltimore and Ohio Railroad Company, defendant in a certain action at law pending in the circuit court of Shenandoah, State of Virginia, brought against it by said George W. Koontz, administrator of William A. Wightman, dec'd, for damages in the sum of ten thousand dollars, proposes to file a petition in the said court for the removal of said cause to the circuit court of the United States for the western district of Virginia, at Harrisonburg, under and by virtue of the act of Congress in such cases made and provided, and approved March 3d, 1875, and entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," with which said petition this bond is to be filed and tendered as a part thereof.

Now, if the said above bound defendant, Baltimore and Ohio Railroad Company, shall on the first day of the next term of said circuit court of the United States for the western district of Virginia, at Harrisonburg, enter or cause to be entered, or shall enter or cause to be entered on the first day of the term of said court next ensuing the de-

termination of the said application for said removal by the said
35 circuit court of Shenandoah County, a copy of the record of said suit of George W. Koontz, administrator William A. Wightman, dec'd, vs. Baltimore & Ohio Railroad Company, including the process, declaration, papers, and evidence filed or read in the said cause, and all proceedings had in the said suit, and pay all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, and to do or cause to be done all such other acts appropriate to be done in pursuance of said act of Congress aforesaid, and the law in such cases made and provided, then the above obligation to be void, otherwise to remain in full force and virtue.

THE BALTIMORE & OHIO RAILROAD COMPANY,
By JOHN KING, JR.,
[BALTIMORE & OHIO RAILROAD.] *Its Vice-President.*
J. P. NELSON. [SEAL.]
JAMES H. WILLIAMS. [SEAL.]
W. T. WILLIAMS. [SEAL.]

Teste:
W. H. IJAMS, *Tr.*

And at a circuit court continued and held for said county of Shenandoah, on the 9th day of September, 1876.

WM. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE & OHIO RAILROAD COMPANY. } Motion for removal.

36 The motion of the defendant for a removal to the circuit court of the United States for the western district of Virginia, held at Harrisonburg, Virginia, made at a former day of this term, came on to be heard this 9th day of September, 1876, upon the petition of the said defendant, then filed, together with the bond of said defendant, with approved security, in the penalty of two hundred and fifty dollars (the amount fixed by the court), acknowledged before and accepted by the court at the time said petition was filed, to wit, on the 2d of September, 1876, the answer of the plaintiff to said petition admitting the fact that the said defendant was a corporation duly incorporated under and by virtue of the laws of the State of Maryland, but averring that it was also a corporation of the State of Virginia, duly incorporated under and by virtue of the laws of said State of Virginia, and was at the time of the institution of said suit and is now lessee of that part of the Washington City, Virginia Midland and Great Southern Railroad, from the town of Strasburg, in Shenandoah County, to Harrisonburg, in Rockingham County, Virginia, replication thereto, and the evidence offered by the said defendant, and by the court admitted; and after argument by counsel, the court overruled said motion, and refused to grant
37 said removal as prayed for, and to said ruling of the court, in refusing to grant said removal, the def't, by its counsel, excepted and tendered a bill of exceptions, which, as prayed by the defendant, was signed, sealed, enrolled, and made part of the record, and which is in the words and figures following, to wit:

Bill of exception No. 1.

WM. A. WIGHTMAN'S ADM'R
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Motion for removal.

Be it remembered that the defendant, in support of its motion of removal of this cause to the circuit court of the United States for the western district of Virginia, made in pursuance of a formal petition filed in this cause, accompanied by a bond required by law, duly acknowledged and by the court accepted, offered in evidence the charter of incorporation of the defendant, being an act of the legislature of the State of Maryland, which appeared in the public laws of said State, and which was read to the court without objection or exception, and which is in the words and figures following, to wit:

AN ACT to incorporate the Baltimore and Ohio Railroad Company. Passed Feb'y 28th, 1827.

SECTION 1. Be it enacted by the general assembly of Mary-
38 land, That Isaac McKim, Thomas Ellicott, Joseph W. Patterson, John McKims, jr., Wm. Stewart, Talbot Jones, Roswell L. Colt, Geo. Brown, and Evan Thomas be, and they are hereby, appointed commissioners, under the direction of a majority of whom subscriptions may be received to the capital stock of the Baltimore and Ohio Railroad hereby incorporated; and they, or a majority of them, may cause books to be opened at such times and places as they may direct, for the purpose of receiving subscriptions to the capital stock of said company, after having given such notice of the times and places of opening the same as they may deem proper, and that upon the first opening of said books they shall be kept open for at least ten successive days, from 10 o'clock a. m. until 2 o'clock p. m.; and if at the expiration of that period such a subscription to the capital stock of said company as is necessary to its incorporation shall not have been obtained, the said commissioners, or a majority of them, may cause the said books to be opened from time to time, after the expiration of said ten days, for the space of twelve months thereafter, or until the sum necessary to the incorporation of the said company shall be subscribed, if sooner subscribed; and if any of the said commissioners shall die, resign, or refuse to act during the continuance of the duties devolved upon them by this act, an-
39 other may be appointed in his stead by the remaining commissioners or a majority of them.

SECTION 2D. And be it enacted, That the capital stock of the Baltimore and Ohio Railroad Company shall be three million of dollars, in shares of one hundred dollars each, of which ten thousand shares shall be reserved for subscription by the State of Maryland and five thousand for the city of Baltimore, for the space of twelve months after the passage of this act by the legislature of Maryland, and the remaining fifteen thousand shares may be subscribed for by any other corporation, or by individuals; and that as soon as ten thousand shares of the said capital stock shall be subscribed, the subscribers of the said stock, their successors and assigns, shall be, and they are hereby declared to be, incorporated into a company by the name of the Baltimore and Ohio Railroad Company, and by that name shall be capable in law of purchasing, holding, selling, leasing, and conveying estates, real, personal, and mixed, so far as shall be necessary for the purpose hereinafter men-

tioned, and no farther, and shall have perpetual succession, and by said corporate name may sue*d* and be sued, and may have and use a common seal, which they shall have power to alter and renew at their pleasure, and shall have, enjoy, and m'y exercise all the powers, rights, and
40 privileges which other corporate bodies may lawfully do for the purposes mentioned in this act.

SECTION 3. And be it enacted, That if more than fifteen thousand shares shall be subscribed to the capital stock of said company, not reserved to the State of Maryland or to the city of Baltimore, the said commissioners, or a majority of them, shall reduce the subscription of fifteen thousand shares by striking off from the largest number of shares in succession until the subscriptions are reduced to fifteen thousand shares, or all the subscriptions to one share; and if there be still an excess, then lots shall be drawn by the commissioners to determine who shall be excluded.

SECTION 4. And be it enacted, That upon every such subscription there shall be paid at the time of subscribing, to the said commissioners or to their agents appointed to receive such subscriptions, the sum of one dollar on every share subscribed, and the residue thereof shall be paid in such installments, and at such times as it be required by the president and directors of said company: Provided, That no more than one-third of the subscription be demanded in any one year from the commencement of the work; nor any payment demanded until at least sixty days' public notice of such demand shall have been given by
41 the said president and directors, and if any subscriber shall fail or neglect to pay any instalment, or part of said subscription thus demanded, for the space of sixty days next after the time the same shall be due and payable, the stock on which it is demanded shall be forfeited to the company, and may be sold by the said president and directors for the benefit of the company; but the president and directors may remit any such forfeiture on such terms as they shall deem proper.

SEC. 5. And be it enacted, That if the subscription herein made necessary to the incorporation of the said company, shall not be obtained within twelve months after the first opening of the subscription books by the said commissioners, this act and all the subscriptions under it shall be null and void; and the said commissioners, after discharging the expenses of opening the books shall return the residue of the money paid in upon such subscriptions to the several subscribers in proper proportions to the sums respectively paid in by them.

SECTION 6. And be it enacted, That at the expiration of the ten days for which the books are first opened if ten thousand shares of said capital stock shall have been subscribed, or if not, as soon thereafter as the same shall be subscribed, if within one year after the first open-
42 ing of the books, the said commissioners, or a majority of *of* them shall call a general meeting of the subscribers at such time and place as they may appoint, and shall give at least twenty days' public notice thereof, and at such meeting the said commissioners shall lay the subscription books before the subscribers, then & there present, and thereupon the said subscribers or a majority of them shall elect twelve directors, by ballot, to manage the affairs of said company and these twelve directors or a majority of them, shall have the power of electing a president of said company either from amongst the directors or others and of allowing him such compensation for his services as they may deem proper; and that in said election and on all other occasions wherein vote of the stockholders of said company is to be taken, each stockholder shall be allowed one vote for every share owned by it, him, or her, and

every stockholder may depute any other person to vote and act for it, him, or her as its, his, or her proxy, and the commissioners aforesaid, or any three or more of them, shall be judges of the said first election of directors.

SECTION 7. And be it enacted, That to continue the succession of the president and directors of said company, twelve directors shall be chosen annually, on the second Monday of October in every year, in the
43 city of Baltimore, by the stockholders of said company, and that the State of Maryland and the city of Baltimore, may each appoint one additional director of said company for every twenty five hundred shares of stock of said company by them respectively owned at the time of such election, but shall not be permitted to vote upon their stock in the election of the directors by the stockholders in general meeting; and that the directors of said company or a majority of them shall have power to appoint judges of all elections, and to elect a president of said company, either from amongst the directors or others, and to allow him such compensation for his services as they may deem proper; and if any vacancy shall occur by death, resignation, or refusal to act, of any president or director, before the year for which he was elected, has expired, a person to fill such vacant place for the residue of the year may be appointed by the president and directors of said company or a majority of them, and that the president and directors of the company shall hold and exercise their offices until a new election of president and directors; and that all elections which are by this act or by the laws of said company, to be made on a particular day or at a particular time, if not made on such day or at such time, may be made at any time within thirty days thereafter.

44 SECTION 8. And be it enacted, That a general meeting of the stockholders of said company shall be held annually at the time and place appointed for the election of the president and directors of said company; that they may be called at any time, during the interval between said annual meetings, by the president and directors or a majority of them or by the stockholders owning at least one-fourth of the whole stock subscribed, upon giving thirty days' public notice of the time and place of holding the same; and when any such meetings are called by the stockholders such notice shall specify the particular object of the call; and if at any such call meetings a majority (in value) of the stockholders of said company are not present in person or by proxy, such meeting shall be adjourned from day to day, without transacting any business, for any time not exceeding three days, and if within said three days stockholders having a majority (in value) of the stock subscribed, do not thus attend, such meeting shall be dissolved.

SECTION 9. And be it enacted, That at the regular annual meetings of the stockholders of said company, it shall be the duty of the president and directors in office for the preceeding year to exhibit a clear and distinct statement of the affairs of the company; that at any called meeting of the stockholders, a majority of those present may re-
45 quire similar statements from the president and directors, whose duty it shall be to furnish them when thus required; and that at all general meetings of the stockholders a majority (in value) of all the stockholders in said company may remove from office any president or any of the directors of said company and may appoint others in their stead.

SECTION 10. And be it enacted, That every president and director of said company, before he acts as such shall swear or affirm, as the case

may be, that he will well and truly discharge the duties of his office to the best of his skill and judgment.

SECTION 11. And be it enacted, That if any of the said fifteen thousand shares of the capital stock of the said company, not reserved to the city of Baltimore or to the State of Maryland, shall remain unsubscribed until the organization of the said company; or if the shares of said capital stock hereinbefore reserved to said State or city, or any part of them, shall not be subscribed by said State or city, respectively, during the time for which said stock is reserved for them; in either case, the president and directors of the said company, or a majority of them, shall have power to open books and to receive subscriptions to any of the capital stock of said company which may thus remain unsubscribed for, or to sell or dispose of such unsubscribed stock for the benefit of the company, for any sum not under its par value; and the pur-
46 chaser or subscribers of such stock, shall have all the rights, powers, and privileges of original subscribers, and shall be subject to the same regulations.

SECTION 12. And be it enacted, That the said president and directors, or a majority of them, may appoint all such officers, engineers, agents, or servants whatever, as they may deem necessary for the transaction of the business of the company, and may remove any of them at their of pleasure; that they or a majority of them, shall have power to determine by contract the compensation of all the engineers, officers, agents, or servants in the employ of said company, and to determine by their by-laws the manner of adjusting and settling all accounts against the company, and also the manner and evidence of transfer of stock in said company; and that they, or a majority of them shall have power to pass all by-laws which they may deem necessary or proper for exercising all the powers vested in the company hereby incorporated, and for carrying the objects of this into effect; provided only, that such by-laws shall not be contrary to the laws of the United States, or the laws of any of the States assenting to this act, or any of the provisions of this act.

SECTION 13. And be it enacted, That if the capital stock of said company shall be deemed insufficient for the purposes of this act, it shall and may be lawful for the president and directors of said com-
47 pany, or a majority of them, from time to time to increase the said capital stock by the addition of as many shares as they may deem necessary, for which they may, at their option, cause subscriptions to be received in the manner prescribed by them, or may sell the same for the benefit of the company for any sum not under their par value; and that a majority of them shall have power to borrow money for the objects of this act, to issue certificates or other evidence of such loan, and to pledge the property of the company for the payment of the same and its interest.

SECTION 14. And be it enacted, That the president and directors of said company shall be, and they are hereby, invested with all the rights and powers necessary to the construction and repair of a railroad from the city of Baltimore to some suitable point on the Ohio River to be by them determined, not exceeding sixty feet wide, with as many sets of tracts as the said president and directors, or a majority of them may deem necessary; and they, or a majority of them, may cause to be made, or contract with others for making, said railroad or any part of it; and they, their agents, or those with whom they may contract for making any part of the same, or their agents, may enter upon and use and excavate any land which may be wanted for the site of said road or the erection of warehouses or other works nec

48 essary to said road, or for any other purpose necessary or useful in the construction or repair of said road or its works; and that they may build bridges, may fix scales and weights, may lay rails, may take and use any earth, timber, gravel, stone, or other materials which may be wanted for the construction or repair of any part of said road or any part of its works; and may make and construct all work whatsoever which may be necessary and expedient in order to the proper completion of said road; and that they, or a majority of them, may make or cause to be made lateral railroads in any direction whatever, in connection with said railroad, from the city of Baltimore to the Ohio River; and in the construction of the same, or their works, shall have, possess, and may exercise all the rights and powers hereby given to them in order to the construction or repair of the said railroad from the city of Baltimore to the Ohio River.

SECTION 15. And be it enacted, That the president and directors of said company, or a majority of them or any person or persons authorized by a m'jority of them, may agree with the owner or owners of any lands earth, timber, gravel, stone or other material or any improvements which may be wanted for the construction or repair of any of said roads, or of any of their works, for the purchase or use and occupation of

49 the same; and if they cannot agree or if the owner or owners or any of them be a feme covert, under age, non compos mentis, or out of the county in which the property wanted may lie, when such land or materials shall be wanted, application may be made to any justice of the peace of such county, who shall thereupon issue his warrant under hand and seal, directed to the sheriff of said county, directing him to summon a jury of twenty inhabitants of said county, not related, nor in anywise interested, to meet on the land or near to the other property or materials to be valued, on a day named in said warrant, not less than ten nor more than twenty days after the issuing of the same; and if at said time and place any of said jurors summoned do not attend, the said sheriff shall immediately summon as many jurors as may be necessary, with the jurors in attendance, to furnish a panel of twenty jurors in attendance, and from them each party, or its, his, her, or their agent, if either be not present in person or by agent, the sheriff for him, her, it, or them, may strike off four jurors, and the remaining twelve shall act as the jury of inquest of damages; and before they act as such, the said sheriff shall administer to each of them an oath or affirmation, as the case may be, that he "will justly and impartially value the damages which the owner or owners will sustain

50 by the use or occupation of the same, required by the company;" and the jury in estimating such damages shall take into the estimate the benefits resulting to the said owner or owners from conducting such railroad through, along, or near to the property of said owner or owners, but only in extinguishment of the claim for damages; and the said jury shall reduce their inquisition to writing and shall sign and seal the same; and it shall then be returned by said sheriff to the clerk or prothonotary of his county, as the case may be, and by such clerk or prothonotary filed in his court, and shall be confirmed by said court at its next session, if sufficient cause to the contrary be shown; and when confirmed shall be recorded by said clerk or prothonotary, at the expense of said company; but if set aside, the said court may direct another inquisition to be taken in the manner above prescribed; and such inquisition shall describe the property taken, or the bounds of the land condemned, and the quantity or duration of the interest in the same valued for the company; and such valuation, when paid or ten-

dered to the owner or owners of said property or his, her or their legal representative, shall entitle the said company to the estate and interest in the same thus valued, as fully as if it had been conveyed by the owner or owners of the same; and the valuation, if not received
51 when tendered, may at any time thereafter be received from the company without costs by the said owner or owners, his, her, or their legal repesentative or representatives.

And the plaintiff also admitted that the said defendant was duly incorporated by and under the laws of the State of Maryland, but proved that the defendant was at the time of the institution of this suit and is now the lessee of the Washington City, Virginia, Midland, and Great Southern Railroad Company, from the town of Strasburg, in the county of Shenandoah, to the town of Harrisonburg, in the county of Rockingham, both in the State of Virginia, and was using, managing, operating and control'ing the same, as set forth in the plaintiff's declaration, and this was all the evidence offered in said motion. And the court, upon consideration thereof, overruled said motion and refused to remove the said cause, to which ruling of the court in refusing to remove this cause, as asked for in said petition, the defendant excepted and tendered its bill of exceptions, and prayed that the same may be signed, sealed, and enrolled, which is accordingly done.

MARK BIRD. [SEAL.]

52 (And at a circuit court continued and held for the county of Shenandoah, on the 19th day of December, 1877—

GEO. W. KOONTZ, ADM'R OF WM. A. WIGHTman, dec'd, pl'ff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def't. } In case.

On the motion of the defendant, by its attorneys, the office judgment and writ of enquiry entered against said defendant at rules are set aside; whereupon said defendant says that it is not guilty of the trespass as in the plaintiff's declaration is alleged, and of this it puts itself upon the country, and the plaintiff likewise, and issue is joined.

And the defendant, by counsel, demurred to the plaintiff's declaration, in which demurrer the plaintiff joined.

And on the further motion of defendant by its attorneys it has leave to plead specially within thirty days, and this cause is continued generally until the next term.

And at a circuit continued and held for said county of Shenandoah, on the 6th day of April, 1877.

Ordered that the following named persons be summoned to the
53 *the* 8th day of this term of the court, that being the 10th day of April, 1877, as a panel for a special jury for the trial of the cause in which William A. Wightman's adm'r is plaintiff, and the Baltimore and Ohio Railroad Company defendant, to wit, Casper Bramer, Jonas Pence, James B. McNeal, John Dingledine, Peter Myers, George Fitzmoyer, Eza Koontz, David Kerlin, John Pennywit, Harrison Miller, Jacob McInturff, Andrew Coverstone, Geo. A. Ridnour, Joshua E. Stump, Henry Kern, Philip Wisman, Wm. H. Riffey, David H. Stickley, Obed. H. Crabill, and John Whittington.

And at a circuit court continued and held for the county of Shenandoah on the 12th day of April, 1877.

GEO. W. KOONTZ, ADM'R OF WM. A. WIGHTman, dec'd, pl'ff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, det'r. } In case.

This day came the parties, by their attorneys, and the following persons of the list furnished by the court to be summoned by the sheriff as a panel for a special jury for the trial of this cause, pursuant to their summons, to wit, Jonas Pence, James B. McNeal, John Dingledine, Peter Myers, David Kerlin, John Pennywit, Harrison Miller, Jacob McInturff, Andrew Coverstone, George A. Ridnour, Joshua E.
54 Stump, Henry Kern, Philip Wisman, Wm. H. Riffey, and Obed H. Crabill, and the residue of said list having failed to appear pursuant to their summons, it is ordered that Samuel P. Shirley, Henry Windle, Joseph Ryman, David Wilkin, and Samuel Wilkin be summoned by the sheriff to appear before this court to-morrow morning, at 9½ o'clock, in order to the completion of a panel for a special jury for the trial of this cause.

At which day, to wit, at a circuit court continued and held for said county of Shenandoah on the 13th day of April, 1877.

WILLIAM A. WIGHTMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def't. } In case.

This day came again the parties, by their attorneys, and Samuel P. Shirley, Henry Windle, Joseph Ryman, David Wilkin, and Samuel Wilkin, summoned by the sheriff, appeared pursuant to their summons completing the panel for a special jury for the trial of this cause, to wit, Jonas Pence, James B. McNeal, John Dingledine, Peter Myers, David Kerlin, John Pennywit, Harrison Miller, Jacob McInturf, Andrew Coverstone, Geo. A. Ridenour, Joshua E. Stump, Henry Kern, Philip Wisman, Wm. H. Riffey, Obed H. Crabill, Samuel P. Shirley, Henry Windle, Joseph Ryman, David Wilkin, and Samuel Wilkin, who were
55 examined by the court, found free from all legal exceptions, and qualified to serve as jurors according to law, except said Samuel P. Shirley and David Kerlin.

The sheriff, upon the order of the court, summoned Luther Neet and Benjamin F. Didawick from a further list furnished by the court to serve on said panel in place of said Samuel P. Shirley and David Kerlin, who were not qualified, and said Luther Neet and Benjamin F. Didawick being examined by the court were found free from all legal exceptions and qualified to serve as jurors according to law.

Whereupon the following sixteen were selected from said panel by lot, to wit, Jonas Pence, James B. McNeal, Peter Myers, John Pennywit, Harrison Miller, Jacob McInturff, Geo. A. Ridenour, Henry Kern, Philip Wisman, Wm. H. Riffey, Obed H. Crabill, Henry Windle, Joseph Ryman, David Wilkin, Samuel Kilkin, and Luther Neet, when the parties begin'ing with the plaintiff alternately struck off one, when the following twelve remained, to wit, Jonas Pence, James B. McNeal, Wm. H.

Riffey, John Pennywit, Henry Windle, Jacob McInturff, George A. Ridenour, Joseph Ryman, Philip Wisman, David Wilkin, Samuel Wilkin, and Luther Neet, and the demurrer to the declaration having been overruled by the court said jurors were sworn well and truly to try the issue joined, and having heard the evidence of witnesses in part
56 were charged by the court and adjourned until to-morrow morning at 9½ o'clock.

At which day, to wit, at a circuit court continued and held for said county on the 14th day of April, 1877, and also on the following days, to wit, on the 16th, 17th, 18th, 19th, 20th, 21st, 23rd, 24th, 25th, 26th, 27th, 28th, and 30th days of April, 1877, and on the 1st and 2d days of May, 1877, the jury heard the evidence of witnesses and arguments of counsel and on the said last-named days, to wit:

At a circuit court continued and held for said county on Wednesday, the 2d day of May, 1877.

WM. A. WIGHTMAN'S ADMINISTRATOR, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def'd'ts. } In case.

The jury adjourned on yesterday, appeared in court pursuant to their adjournment, and having heard the concluding arguments of counsel were instructed by the court, at the instance of plaintiff and defendant, retired to their room to consider of a verdict, and after some time returned and in solemn form do say:

"We, the jury, find for the plaintiff upon the issue joined, and assess his damages at the sum of five thousand dollars with interest from the 6th day of March, 1876, until paid.

"JAMES B. McNEAL,
"*Foreman.*"

Plaintiff's instructions.

57 The court gives the following instruction to the jury:

I. When injury or damage happens to a passenger by the breaking down or overturning of a railroad, or breaking down of a bridge or wheel or axle, or by any other accident occurring on the road, the presumption prima facie is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever; and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

II. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence; when carriers undertake to convey passengers by the powerful, but dangerous, agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case make such carriers liable in damage under the statute.

III. The Baltimore and Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost decree of diligence and care in safely transporting William A. Wightman upon his journey.

58 IV. The slightest neglect against which human prudence and

foresight might have guarded, and by reason of which his death may have been occasioned, renders said company liable in damages for such death.

V. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

VI. Therefore, if the jury believe from the evidence that such prudence, foresight, and skill was not used by said company in respect to Narrow Passage bridge, by the breaking of which William A. Wightman was killed, they should find for the plaintiff and assess the damages for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damage not to exceed ($10,000) ten thousand dollars.

VII. In ascertaining such damages the jury should fix the same with reference to the pecuniary loss sustained by the wife and children of said William A. Wightman:

1st. By fixing the same at such sum as would be equal to the probable earnings of said Wightman, taken into consideration the age, business capacity, experience, and habits, health, energy, and perse-
59 verence of the deceased, during what would probably have been his lifetime if he had not been killed.

2nd. Adding thereto the value of his services in the superintendance, attention to and care of his family and the education of his children of which they have been deprived by his death.

Defendant's instructions.

I. The jury are instructed that in this case the burden of proof of the alleged wrongful act, neglect, or default of the defendant is upon the plaintiff, and unless the jury are satisfied by the evidence that William A. Wightman was killed by the wrongful act, neglect, or default of the defendant, they must find for the defendant, but the breaking of the bridge and the precipitation of the cars, and the death of William A. Wightman by reason thereof, if proved to the satisfaction of the jury, make out a prima facie case of neglect, and impose upon the defendant the burden of proving that the utmost care and diligence had been exercised by said defendant to prevent said occurrence.

II. A railroad company is not responsible for an injury caused purely by accident while engaged in the lawful prosecution of their business, even when the injury was the direct consequence of the act of the said company, and even where the party injured was free from fault.

III. The jury are instructed that the contract for the convey-
60 ing of passengers is one neither of general or limited warranty or insurances, but is an obligation undertaking by the carrier to take due care, including in that term the use of skill and foresight to carry the passenger safely.

IV. The law requires from railroad companies, as carriers of passengers, only such diligence and care as are required of individuals in conducting the same business.

V. In the absence of evidence to the contrary, the defendant and its agents and employés are presumed to have acted as prudent, competent, and honest persons under similar circumstances.

VI. The law does not require of railroad companies superhuman foresight, but only diligence and care as is required of individuals engaged in the same business.

VII. Negligence is not actionable unless it be the proximate cause of the injury complained of, and hence if the jury, from the evidence, shall believe that the defendant's bridge at Narrow Passage Creek, by the breaking down of which William A. Wightman was killed, had in it timbers rotten or defective, if such fact be proved, yet if they shall further believe from the evidence that the breaking of the bridge was not caused by defectiveness or unsoundness of such timbers, but by something else as the proximate cause of such breaking, they cannot find for the plaintiff by reason *reason* of such default or neglect
61 of the defendant in respect to such timbers.

VIII. That if the jury shall believe from the evidence that the defendant, on the 6th day of March, 1876, was lawfully engaged in running its trains through the county of Shenandoah, the Narrow Passage bridge, 465 feet long, constituting part of its railroad track in said county; that on the night of the 6th day of March, 1876, a stock & freight train belonging to said defendant, consisting of the engine, tender, sixteen loaded freight cars, with a passenger car and caboose in the rear, under the control, direction, and management of careful and competent employees, was slowly and prudently run on and upon said bridge, and that William A. Wightman was a passenger on said passenger car; that after the engine and a portion of the train had been run north of the south abutment, the train moving northwardly passing at about 125 feet over the first or south pier and onward as far as the center or new pier, about one hundred feet from said south pier, that the bridge structure between said piers was precipitated to the ground below, the lowest point being about one hundred and ten feet below the track, and that the engine, tender, and cars on said span, as well as the freight, passenger, and caboose cars, in the rear were in a like manner precipitated into the chasm below, whereby said William A. Wightman was killed; then altho' the law presumes prima facie that the
62 disaster resulting from the wrongful act, neglect, or default of the defendant, yet if the jury shall further believe from the evidence that the train was prudently and carefully run on and upon said bridge by competent and reliable employees of the defendant; that the bridge itself was sufficiently strong to carry said train safely over it, the freight cars not being unduly or improperly loaded, and the engine being the engine theretofore daily run over said bridge twice in each twenty-four hours; that the bridge was not crushed or borne down or broken by the weight of said engine and of the cars then upon it, or by reason of any mismanagement, carelessness, or neglect of any employee on said train; and if the jury shall further believe from the evidence that said engine, tender, and cars, and the wheels, axles, and other machinery in and constituting part of said train were of the best materials and of the most approved manufacture, and as well fitted for such service as the best known to skill, foresight, and care could provide for the purpose; and that said engine, tender, cars, wheels, axles, and other machinery were at the time in good condition and order, and were prudently and properly managed and directed with the utmost care, foresight, and diligence of cautious persons engaged in the same business; and that said accident occurred
63 from and was caused by the sudden, unexpected, and unforeseen breaking of an axle, wheel, or other part of said machinery, whereby the tract was displaced, torn up, and thereby the bridge was pulled down in the line and direction of the track, and that said accident could not have been prevented by the utmost care and diligence of

cautious persons engaged in railroad trainsportation, then the jury must find for the defendant.

IX. In ascertaining whether the death of William A. Wightman, resulting from the wrongful act, neglect, or default of the defendant, the jury is bound, in the light of the evidence, to consider the conduct of the defendant, its agents and employees, according to the rules of conduct adopted by and acted on in like cases by prudent, discreet, and cautious railroad companys, agents, and employees; and if the jury, in view of the evidence in respect to the mode of running the defendant's train on the 6th of March, 1877, when William A. Wightman was killed, as stated in the evidence, on and upon the Narrow Passage bridge, and in respect to the condition and order of the defendant's engine and cars at the time, the conduct of the defendant's agents and employees, the sufficiency of the tract superstructure and its condition, and the capacity of the bridge structure and Bollman truss to car'y over them in safety the engine and train of cars, and the condition of said
64 engine, cars, and machinery, are satisfied that everything had been done, and was at the time done, for the safety of the train and passengers which the experience of descreet, judicious, and cautious railway men and engineers have found to be sufficient for safety, the jury cannot hold the defendant responsible for any unforeseen accident, which could not, under the circumstances, have reasonably been prevented.

X. That if the jury shall find from the evidence viewed in the light of the preceding instructions, that the plaintiff is entitled to a verdict, they are instructed that in assessing any damage to the plaintiff, they are not to take into consideration the mental pain and suffering of the wife and children of the decedent, William A. Wightman, arising from his death, or to add anything to said damage as a solace to said wife and children; and the jury are not to give against the defendant punitive, vindictive, or exemplary damages; but in estimating the damages they are confined by pecuniary damages sustained by said wife and children by reason of the death of said William A. Wightman, and are to give as damages only such sum as, in view of all the circumstances of the case, with the restriction aforesaid they may deem just and proper.

65 And at a circuit court continued and held for said county of Shenandoah, on Thursday the 3d day of May, 1877—

GEORGE W. KOONTZ, ADM'R OF WM. A. Wightman, dec'd, pl'ff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def't. } In case.

MEMORANDUM.—Upon the trial of this cause and upon the motion for removal to the circuit court of the United States for the western district of Virginia, the defendant, by its counsel, excepted to eight several opinions of the court given upon said motion and trial, and tendered its eight several bills of exceptions, numbered 1, 2, 3, 4, 5, 6, 7, and and 8, which were signed, sealed, and enrolled by the court, and ordered to be made part of the record in this cause, and which are in the words and figures following, to wit:

Bill of exception No 1.

(See page 31 of MSS.)

Bill of exceptions No 2.

WM. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Be it remembered that the jury having been sworn to try the issue joined in this action, the plaintiff introduced testimony tending
66 to show that the plaintiff's intestate was a passenger on one of defendant's trains on the night of the 6th of March, 1876; that as such train was passing over the bridge across the Narrow Passage Run, in Shenandoah County, the bridge gave way and the train was precipitated into the chasm below, whereby said plaintiff's intestate, William A. Wightman, was killed; and further testimoney tending to show that said bridge was defective in its timbers and insufficient in strength and security; and thereupon plaintiff propounded to George W. Winkle, a witness, the following questions, viz: "Who constituted the family of W. A. Wightman, who was killed in the disaster at Narrow Passage Creek, in this county, on the railroad, on the night of the 6th of March, 1876?" To which question and to the introduction of any evidence in response thereto the defendant objected, on the ground that such evidence as inadmissible under the declaration in this action.

But the court overruled the objection and permitted the evidence to go to the jury, the witness stating that the family of said W. A. Wightman consisted of a wife and five children. To which ruling and action of the court the defendant excepted, and prays that this its bill of exception be signed, sealed, and enrolled; which is here done accordingly.

MARK BIRD. [SEAL.]

No. 3.

W. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

MEMORANDUM.—That after the witness Windle, as stated in the defendant's second bill of exceptions, had stated that the family of the plaintiff's intestate consisted of a wife and five children, said witness further stated that the wife, Julia A. Wightman, was about forty years old; that the oldest son was twenty-one or two years old; the next son was from eighteen to nineteen years old; that the next child, a daughter, was from sixteen to seventeen years old; that the next, a son, was from fourteen to fifteen years old; and that the next, a son, was about ten years old; the eldest son living in Suffolk, in Eastern Virginia; and thereupon the plaintiff offered to introduce from the record of marriages of the county court of Shenandoah County evidence to show that on the 20th day of July, 1852, said William A. Wightman was duly married to Julia A. Grandstaff, being the same Julia A. aforesaid; to the introduction of which evidence, as inadmissible under the declaration in this cause, the defendant objected, but the court overruled the objection and permitted the record of said marriage, as of the above-named date, to be read to the jury; to which opinion and action of the

court the defendant excepted, and prays that this its bill of exception
68 be signed, sealed, and enrolled; which is here done accordingly.

MARK BIRD. [SEAL.]

No. 4.

WM. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

MEMORANDUM.—That after the introduction of evidence tending to show the facts stated in the defendant's second and third bills of exceptions, and further evidence having been introduced to show that for six or eight years before his death the said W. A. Wightman had been engaged in the lumber business, which witness thought had not been profitable for two or three years prior to his death; and the witness Winkle being still on the stand, the plaintiff propounded to the witness the following questions, to each of which, was propounded, the defendant objected.

I. State whether you were acquainted with the relations of William A. Wightman to his family? If so, state what they were.

II. How did he provide for them?

III. State whether you were acquainted with the capacity of William A. Wightman to instruct or educate his children.

IV. From your knowledge of the capacity of W. A. Wightman,
69 his education, business qualifications, and relation to his family, state what, in your opinion, was his value to his said family per year at the time of his death?

But the court overruled the defendant's objection to said interrogatories, as propounded, and allowed the witness to testify, and to state that the said Wightman was very kind to his family, and provided for them very well; that his capacity to instruct and prepare his children for education was very good, but that his own education being limited, he could not educate them himself, and that his services as a clerk or anything of that sort would command from $700.00 to $1,000.00 a year; to which rulings of the court in overruling the defendant's objections to each and all of said interrogatories and its action in allowing said testimony to be given to the jury, the defendant excepted and prays that this its bill of exceptions be signed, sealed, and enrolled; which is here done accordingly.

MARK BIRD. [SEAL.]

No. 5.

W. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

Memorandum.—That after the action of the court, as stated in the defendant's fourth bill of exceptions, a witness, Peter Belew, having testified, among other things, to his knowledge of W. A. Wightman's
69 relations to his family, his business capacity, his constitution, and the condition of his health, his industry, energy, and qualifications as a clerk, salesman, and merchant, being asked by the plaintiff to give an estimate of the pecuniary value of said A. W. Wightman to his family,

and having stated that, in his opinion, from $800 to $900.00 or more would be a fair estimate of such value, adding that he, the witness, thought he was making that amount, the court asked the witness what he would add for the services of said Wightman to his family, stating that in estimating damages the jury may, in addition to the annual pecuniary value of said Wightman as a business man, and in addition to the income he would thus make, take into consideration the value of the services of said Wightman in superintending and controlling and managing the affairs and business of his family, and that the jury may estimate the value of those services in money from the evidence, and thereupon the witness stated that in addition to the amount of $800 or $900 per annum, which he estimated, said Wightman would be able to earn in business he estimated the value of his services in attending to the business of his family at $200.00, anyhow. To which action and ruling of the court, and the said direction to the jury by the
71 court, the defendant excepted, and prays that this its bill of exceptions be signed, sealed, and enrolled; which is here done accordingly.

MARK BIRD. [SEAL.]

No. 6.

W. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Be it remembered that after introducing evidence tending to prove the matters stated in the previous bills of exceptions of defendant, numbered 2, 3, 4, and 5, the plaintiff introduced a witness, John J. Stoneburner, who testified as to the business habits, and the wife and children of W. A. Wightman, dec'd, as authorized by the rulings of the court, and as to other matters; and on the cross-examination of said witness the defendant offered, on its behalf, to prove by said witness that at the time of his death the decedent, W. A. Wightman, held policies of insurance on his life for at least five thousand dollars for the benefit of his wife and children, and that since his death the amount called for by said policies have been collected and paid over to the wife and children of W. A. Wightman, deceased, in pursuance of the provisions of said policies; to the introduction of which evidence, as inadmissible under the
72 issue joined, the plaintiff objected, and the court sustained the objection, and refused to allow the said evidence to be introduced, to which ruling and action of the court in rejecting said offer and in refusing to allow said evidence to go to the jury, the defendant excepted and prayed that this bill of exception be signed, sealed, and enrolled as part of the record; which is here done accordingly.

MARK BIRD. [SEAL.]

7th bill of exception.

W. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered that after the evidence in this cause was closed on both sides, the plaintiff, by his counsel, moved the court to instruct the jury as follows:

I. When injury or damage happens to a passenger by breaking down

or overturning of a railroad train, or the breaking down of a bridge, or wheele, or axle, or by any other accident occur'ing on the road, the presumption prima facie is that it occur'ed by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and tha the damage has
73 been occasioned by inevitable causalty, or by some cause which human care and foresight could not prevent.

II. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest *di*ligence, and compels them to repel, by satisfactory proofs, every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and *neg*ligence. Any negligence or default in such case make such carriers liable in damages under the statute.

III. The Baltimore and Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting W. A. Wightman upon his journey.

IV. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, rendered said company liable in damages for such death.

V. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

74 VI. Therefore, if the jury believe from the evidence that such prudence, foresight, and skill was not used by said company in respect to Narrow Passage bridge, by the breaking of which Wm. A. Wightman was killed, they should find for the plaintiff, and assess the damage for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damages not to exceed ($10,000) ten thousand dollars.

VII. In ascertaining such damages, the jury should fix the same with refere'ce to the pecuniary loss sustained by the wife and children of said Wm. A. Wightman.

1st. By fixing the same at such sum as would be equal to the probable earnings of said Wightman, taking into consideration the age, business, capacity, experience and habits, health, energy and perseverance of the deceased, during what would probably have been his lifetime, if he had not been killed.

2d. Adding thereto the value of his services in the superintendence, attention to and care of his family, and the education of his children, of which they have been deprived by his death.

To the giving of which instructions the defendant objected, but the court overruled said objection, and gave said instructions as prayed for by the plaintiff as aforesaid; to which ruling and action of the
75 court in overruling said objection and giving said instructions the defendant excepted, and prayed that this bill of exceptions be signed, sealed, and enrolled, as part of the record; which is here done accordingly.

MARK BIRD. [SEAL.]

No. 8.

W. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE AND OHIO RAILROAD.

Be it remembered when this case was called for trial, the defendant

and having stated that, in his opinion, from $800 to $900.00 or more would be a fair estimate of such value, adding that he, the witness, thought he was making that amount, the court asked the witness what he would add for the services of said Wightman to his family, stating that in estimating damages the jury may, in addition to the annual pecuniary value of said Wightman as a business man, and in addition to the income he would thus make, take into consideration the value of the services of said Wightman in superintending and controlling and managing the affairs and business of his family, and that the jury may estimate the value of those services in money from the evidence, and thereupon the witness stated that in addition to the amount of $800 or $900 per annum, which he estimated, said Wightman would be able to earn in business he estimated the value of his services in attending to the business of his family at $200.00, anyhow. To which action and ruling of the court, and the said direction to the jury by the
71 court, the defendant excepted, and prays that this its bill of exceptions be signed, sealed, and enrolled; which is here done accordingly.

MARK BIRD. [SEAL.]

No. 6.

W. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Be it remembered that after introducing evidence tending to prove the matters stated in the previous bills of exceptions of defendant, numbered 2, 3, 4, and 5, the plaintiff introduced a witness, John J. Stoneburner, who testified as to the business habits, and the wife and children of W. A. Wightman, dec'd, as authorized by the rulings of the court, and as to other matters; and on the cross-examination of said witness the defendant offered, on its behalf, to prove by said witness that at the time of his death the decedent, W. A. Wightman, held policies of insurance on his life for at least five thousand dollars for the benefit of his wife and children, and that since his death the amount called for by said policies have been collected and paid over to the wife and children of W. A. Wightman, deceased, in pursuance of the provisions of said policies; to the introduction of which evidence, as inadmissible under the
72 issue joined, the plaintiff objected, and the court sustained the objection, and refused to allow the said evidence to be introduced, to which ruling and action of the court in rejecting said offer and in refusing to allow said evidence to go to the jury, the defendant excepted and prayed that this bill of exception be signed, sealed, and enrolled as part of the record; which is here done accordingly.

MARK BIRD. [SEAL.]

7th bill of exception.

W. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered that after the evidence in this cause was closed on both sides, the plaintiff, by his counsel, moved the court to instruct the jury as follows:

I. When injury or damage happens to a passenger by breaking down

or overturning of a railroad train, or the breaking down of a bridge, or wheele, or axle, or by any other accident occur'ing on the road, the presumption prima facie is that it occur'ed by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and tha the damage has
73 been occasioned by inevitable causalty, or by some cause which human care and foresight could not prevent.

II. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest *di*ligence, and compels them to repel, by satisfactory proofs, every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and *neg*ligence. Any negligence or default in such case make such carriers liable in damages under the statute.

III. The Baltimore and Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting W. A. Wightman upon his journey.

IV. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, rendered said company liable in damages for such death.

V. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

74 VI. Therefore, if the jury believe from the evidence that such prudence, foresight, and skill was not used by said company in respect to Narrow Passage bridge, by the breaking of which Wm. A. Wightman was killed, they should find for the plaintiff, and assess the damage for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damages not to exceed ($10,000) ten thousand dollars.

VII. In ascertaining such damages, the jury should fix the same with refere'ce to the pecuniary loss sustained by the wife and children of said Wm. A. Wightman.

1st. By fixing the same at such sum as would be equal to the probable earnings of said Wightman, taking into consideration the age, business, capacity, experience and habits, health, energy and perseverance of the deceased, during what would probably have been his lifetime, if he had not been killed.

2d. Adding thereto the value of his services in the superintendence, attention to and care of his family, and the education of his children, of which they have been deprived by his death.

To the giving of which instructions, the defendant objected, but the court overruled said objection, and gave said instructions as prayed for by the plaintiff as aforesaid; to which ruling and action of the
75 court in overruling said objection and giving said instructions the defendant excepted, and prayed that this bill of exceptions be signed, sealed, and enrolled, as part of the record; which is here done accordingly.

MARK BIRD. [SEAL.]

No. 8.

W. A. WIGHTMAN'S ADM'R
vs.
BALTIMORE AND OHIO RAILROAD.

Be it remembered when this case was called for trial, the defendant

moved the court for a continuance of the same, and in support of said motion, filed and read an affidavit, in the words and figures following, to wit:

John H. Averill, being duly sworn by me, P. W. Magruder, a notary public of Shenandoah County, on oath saith:

That he is supervisor of trains of the valley division of the Baltimore and Ohio Railroad Company, and that as agent of the defendant he has been charged with the duty, under the legal direction of Gen'l James H. Williams, counsel of said company, of preparing for trial the cases in the circuit court of Shenandoah County, and among others the above entitled action of Wightman's administrator (vs.) said company; that a certain Thomas N. Heskett is known to affiant to be a material
76 witness for the defendant, and that without his evidence the said defendant cannot, as affiant is advised, safely go to trial; that until recently the said Heskett was in the services and employment of said defendant, and was, as in the case with the employees of said defendant who are to be examined as witnesses for said defendant, subject to the directions of the officers of said company, and would, with other employees of said company, have been present to testify at the present term of this court but for the fact that most unexpectedly to affiant the said Heskett, on the day the present term commenced, quit the services of said company, and ceased to be subject to the directions and control of its officers; that affiant a day or two before the first day of this term, in a conversation with said Heskett, learned from him that it was his purpose to retire from the services of said company; that affiant urged said Heskett to be sure to attend the trial, and affiant's impression, as the result of his conversation with said Heskett, was that he would certainly be present at said trial; that said Heskett is a non-resident of this commonwealth, and that it was too late, owing to the engagements of the company's counsel after the discovery by affiant of the fact that the said Heskett would quit the service of said company, to take his deposition in the State of Maryland, to be
77 read as evidence on said trial; that said Heskett had uniformly promised and agreed that he would be present to give testimony, and it was the purpose of affiant, as aforesaid, to have had him produced as a witness, and he would have been so produced but for the reasons before stated. That, as affiant is informed, said Heskett in response to an urgent request that he would be present to give his testimony, made to him within two or three days past, stated that his private affairs required that he should go to the West, and that, therefore, he could not come.

Affiant further saith that he and other officers have diligently endeavored to procure the attendance of said witness upon the trial, but without success, and that his deposition could not be taken for the reasons before given.

JOHN H. AVERILL.

Subscribed and sworn to before me this 12th day of April, 1877.

P. W. MAGRUDER, *N. P.*

And, in further support of said motion, James H. Williams, one of counsel for the defendant, stated: That he was of the firm of Williams and Brother (being senior partner); that they were the local counsel of the said defendant in the county of Shenandoah, and that he had, as such, special charge of what was known as the Narrow Passage cases, of which this case was one; that from his knowledge of the condi-

78 tion of the docket of this court he had good reason to believe, and did believe, that this cause would not and could not be reached for trial at this the April term of the court; that a few days before the first day of the term of this court, he was surprised to learn that this cause had been set for the 10th day of April, 1877, for trial, and that upon examination he found, in confirmation of his opinion and conviction, that without his knowledge a number of causes had been removed to places on said docket lower than this cause, and places lower than they had occupied at the last term of this court, or had ever occupied theretofore, and that other causes, in which he was counsel, and that he had the right to suppose would be tried in advance of this cause, he had at said time also learned, had by arrangement with his clients and without his knowledge been agreed to be continued; that up to the time he was placed in possession of said information as to the change of place of this cause on said docket, and the agreed continuance aforesaid, he most confidently believed that this cause, both by reason of its position on the docket and the probable time that would be required for its trial, could not be tried before the August term of this court.

79 That as soon as he learned that this cause had been set for trial as aforesaid, on said day, he at once began to make diligent preparation for the trial of the same, and made a special trip to Baltimore with a view to prepare for the trial of said cause; that there was not time, after he learned said cause had been fixed for trial, to give proper or legal notice for taking of any depositions, and especially that of Thomas W. Haskett, whom he knew by personal interviews to be a most material and important witness, and that he only learned the fact as late as March 30th, 1877; that said Heskett had resolved to leave the employment of the defendant as of the 1st April, 1877, a fact learned in the attempt to prepare for said trial.

The court further certifies the following facts in connexion with the defendant's motion for a continuance: That the docket for the April term, 1877, of this court was arranged and made out by the clerk, by direction of the judge thereof, as early as the 26th of February; that the judge of this court had been connected as counsel with a number of cases on said docket, which rendered it improper for him to sit upon the trial thereof, and that for the purpose of procuring the services of a judge of an adjoining circuit to try said cases, they were taken from the places previously occupied by them and placed lower down on the docket.

80 The court further certifies that the witness, Thomas N. Huskett, on the ground of whose absence the motion for a continuance was in part made, was in the town of Woodstock, the place of trial, during the trial of the cause, and before the examination in chief of plaintiff's witnesses was closed, to wit, on Monday, the 16th day of April, a fact known to the counsel and agent conducting the trial on the part of the defendant, and that Huskett was neither summoned at any time nor any effort made to take his deposition, but that said Haskett left again on Monday night without the knowledge or consent of defendant's counsel or agents conducting and managing the trial of this case on the part of said defendant.

And the court, upon the hearing of said affidavit and statement aforesaid, overruled said motion and refused to continue said cause, to which opinion and ruling of said court, in refusing to continue said case, the defendant excepted, and prays that this its bill of exceptions may be signed, sealed, and enrolled, which is according done.

MARK BIRD. [SEAL.

And thereupon it is considered by the court that the plaintiff
81 recover against the defendant the sum of five thousand dollars, with interest thereon at the rate of six per centum per annum, from the 6th day of March, 1876, until paid, and the costs of plaintiff by him in this behalf expended.

On the motion of defendant it is ordered that the execution of said judgment be suspended for sixty days from this day, upon the execution by said defendant, before the clerk of this court, of a bond in the penalty of two hundred and fifty dollars, with condition reciting said judgment and the intention of said company to present a petition for a supersedeas to said judgment, and providing for the payment of all such damages as any person may sustain by reason of said suspension, in case supersedeas to such judgment should not be allowed and be effectual in the time above specified.

STATE OF VIRGINIA,
County of Shenandoah, to wit:

I, George W. Miley, clerk of the circuit court of Shenandoah County, in the State of Virginia, do hereby certify that the foregoing is a true and complete transcript of the cause therein named as the same appear on file and record in my office.

Given under my hand this 26th day of June, A. D. 1877.

GEO. W. MILEY,
C. C. C. S. C.

82 A true copy—Teste:

JOS. A. WADDELL,
Clerk Court of Appeals, Staunton, Va.

Upon which petition the following order is endorsed, to wit:

Writ of error and supersedeas awarded. Bond required in the penalty of $10,000.00, conditioned as the law directs.

July 19th, 1877.

JOS. CHRISTIAN.

To the clerk of the supreme court of appeals at Staunton.

Upon the filing of the petition aforesaid, to wit, on the 21st day of July, in the year 1877, a writ of error and supersedeas was awarded, returnable to the 1st Monday in the month of September, 1877, which was returned with an endorsement thereon of the acknowledgment of service by the counsel for defendant in error, and the cause was set down for argument at the then next term.

And at another day, to wit, at a supreme court of appeals of the State of Virginia, continued and held at the court-house of Augusta
83 County, on Saturday, the 6th day of October, in the year 1877.

This cause was this day heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel; but because the court here is not yet advised of the judgment to be rendered in the premises, time is taken to consider thereof.

And now at this day, to wit, the 11th day of December, 1877, being the day and year first herein mentioned—

In vacation.

In the clerk's office of the supreme court of appeals, at Staunton, on the 11th day of December, 1877.

The clerk of the supreme court of appeals at Richmond certifies the following order entered by said court, in the words and figures following, to wit:

VIRGINIA:

In the supreme court of appeals, held at the State court-house, in the city of Richmond, on Thursday, the 29th day of November, 1877.

THE BALTIMORE AND OHIO RAILROAD COMPANY, plaintiff,
84 *against*
GEORGE W. KOONTZ, ADM'R OF WILLIAM A. Wightman, dec'd, defendant.

Upon a writ of supersedeas to a judgment rendered by the circuit court of the county of Shenandoah, on the 3d day of May, 1877.

This cause, which is pending in this court at its place of session, at Staunton, having been fully heard, but not determined, at the said place of session, this day came here the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said judgment:

Therefore, it is considered that the same be affirmed, and that the defendant in error recover against the plaintiff in error damages, according to law, and his costs by him about his defence in this behalf expended. And it is ordered that this judgment be entered on the order book here and be forthwith certified to the clerk of the court where the cause is pending as aforesaid, who shall enter the same on his order-book and certify it to the said circuit court of Shenandoah County.

85 A copy—Teste:

GEO. L. CHRISTIAN, *C. C.*

Defendant in error's costs in the court of appeals at Richmond, $2.02
Teste: JOS. A. WADDELL, *Clerk.*

86 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of appeals of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Baltimore and Ohio Railroad Company, appellant, and George W. Koontz, administrator of Wm. A. Wightman, appellee, wherein was drawn in question the validity of a statute or of an authority exercised under the United States, and the decision was against their validity, or wherein

was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or statute of the United States, and the decision was against the right or privilege specially set up or
87 claimed under said clause of the said Constitution or statute, a manifest error hath happened to the great damage of the said Baltimore and Ohio Railroad Company, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morison R. Waite, Chief Justice of the said Supreme Court, this twenty-sixth day of January, in the year of
88 our Lord one thousand eight hundred and seventy-eight.

[SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. States.

Allowed by—

M. R. WAITE,
Chief Justice Sup. C't U. S.

(Indorsed:) Filed January 28th, 1878, by Jas. Bumgardner, jr., esqr. Jos. A. Waddell, clerk of supreme court of appeals of Virginia, at Staunton.

89 The United States of America to George W. Koontz, administrator of William A. Wightman, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of Virginia, wherein the Baltimore and Ohio Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of January, 1878.

M. R. WAITE,
Chief Justice Sup. C't U. S.

On this 28 day of January, in the year 1878, personally ap-
90 peared John C. Smith before me, the subscriber, a notary public in and for the county of Shenandoah, State of Virginia, and made oath in due form of law that he delivered a true copy of the above citation to George W. Koontz, administrator of William A. Wightman, dec'd, on the 28 day of January, in the year 1878, at 9.42 o'clock a. m.

JNO. C. SMITH.

Sworn to and subscribed before me this 28th day of January, 1878. Witness my hand and official seal.

[SEAL.] P. W. MAGRUDER, *N. P.*

91 Know all men by these presents, that the Baltimore and Ohio Railroad Company and John W. Garrett, John M. Miller, and Gilbert S. Meem, are held and firmly bound unto Geo. W. Koontz, administrator of William A. Wightman, dec'd, in the full and just sum of twelve thousand dollars, to be paid to the said George W. Koontz, administrator of said Wightman, dec'd, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this day of January, 1878.

Whereas lately in the supreme court of appeals of Virginia, in a suit depending in said court between George W. Koontz, administrator as aforesaid, plaintiff in the said suit, and the Baltimore and Ohio Railroad Company, defendant, and carried on an appeal to the said supreme court of appeals, judgment was rendered against the said company, and the said Baltimore and Ohio Railroad Company having obtained a writ of error, and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George W. Koontz, administrator aforesaid, citing and admonishing said plaintiff

92 to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next:

Now, the condition of the above obligation is such, that if the said Baltimore and Ohio Railroad Company shall prosecute said writ to effect and shall answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
{ BALTIMORE & OHIO RAILROAD COMPANY'S SEAL. } By JOHN W. GARRETT, *President.*

JOHN W. GARRETT. [SEAL.]
JNO. M. MILLER. [SEAL.]
GILBERT S. MEEM. [SEAL.]

Teste:
JOHN J. GRINDALL.
Teste:
W. H. IJAMS, Jr.
JAS. A. BOYD.
JNO. C. SMITH.

STATE OF MARYLAND,
City of Baltimore, ss:

On January 21st, 1878, before me, the undersigned, a justice of the peace of the State of Maryland, within and for the city of Balti-

93 more, personally appeared John W. Garrett, one of the obligors in the above bond, and made oath in due form of law that he is worth more than twelve thousand dollars, the amount of the penalty of said bond after the payment of all his just debts, and of all debts for which he is liable as surety or otherwise.

Witness my hand and seal the day and year first above written.

JOHN J. GRINDALL, *J. P.* [SEAL.]

STATE OF MARYLAND,
Baltimore City, sct:

I hereby certify that John J. Grindall, esquire, before whom the annexed affidavit was made and who has hereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore City, this 21st day of January, A. D. 1878.

[SEAL.] GEO. ROBINSON,
Clerk of the Superior Court of Baltimore City.

Approved Jan'y 26th, 1878.

M. R. WAITE,
Chief Justice, &c.

94 *Opinion of the court of appeals.*

A preliminary question in this case to be settled, is, whether the circuit court erred in refusing to remove the case to the circuit court of the United States for the western district of Virginia.

The defendant, the Baltimore and Ohio Railroad Company, is a corporation chartered by the State of Maryland. It is also, and was when this suit was brought, the lessee of a railroad from Strasburg to Harrisonburg, in this State, belonging to the Virginia Midland Railroad Company, a Virginia corporation, and was controlling and operating said railroad under said lease, as owner and proprietor, at the time of the injuries committed as set forth in the declaration.

The defendant has not produced the lease nor given evidence of its contents. We are, therefore, not informed as to the precise terms and conditions upon which the lease was granted. All that we know is, that the defendant is operating the road as owner and exercising the powers and privileges granted its lessee by the charter of incorporation. What, then, is the status in Virginia, of the defendant, a Maryland corporation, with reference to this road?

95 The cases generally agree that a corporation created by the law of one State can have no legal existence outside of the limits of that State. It may, however, make contracts, transact business, and even exercise corporate functions in another State with the consent of the latter, express or implied. In the Baltimore and Ohio R. R. Co. vs. Gallahue's adm'r (12 Gratt.) this court decided that under the statutes authorizing that company to construct its road across the territory of Virginia, the Baltimore and Ohio Railroad Company, as to such road, was to be regarded as a Virginia corporation.

In Railroad vs. Harris (12 Wall., 82) the supreme court of the United States decided that the Baltimore & Ohio Railroad Company, having under an act of Congress constructed a lateral branch of its road in the District of Columbia, was by reason thereof liable to suit in that District as if it had been an independent corporation of that locality.

The court did not rest its decision upon the ground, however, that the act of Congress had made the Baltimore and Ohio Railroad Company a corporation of the District, but upon the ground that the act operated as a license to the company to construct its road there; and having accepted the license, the company had placed itself in the position of a domestic corporation for all the purposes at least of being sued in that locality.

The court say they could see no reason why one State may not make

a corporation of another State, as there organized and conducted,
96 a corporation of its own quo ad hoc any property within its territoral limits. (See also Maryland vs. Northern Central R. R. Co., 18 Mary. R., 193; Sprague vs. Hartford, Prov. & Fishk. R. R. Co., 5 R. I., 233; Goshen vs. Supervisors, 1 West Va., 308; The Penn. R. R. Co. vs. Sly, 65 Penn. St. R., 205; Pomeroy vs. New York & New Haven R. R. Co., 4 Blatchf. R., 122.)

The Baltimore and Ohio Railroad Company as a corporation of Maryland can, of course, have no legal existance outside of that State, but as the lessee of a Virginia railroad company, exercising all the functions and powers of the latter it may be subject to all its duties and obligations. This must necessarily be so upon the authority of the cases cited, if that company is acting under any license granted by the State of Virginia. Under such circumstances, so acting, it must be treated as a Virginia corporation quo ad hoc the line of railroad under its control, so far at least as its liability to our own citizens is concerned. It can only escape these consequences by showing that it is exercising corporate powers here without permission of the State, and consequently that it is a tortfeasor or trespasser. Whether the company obtained the lease under any statute or provision in the charter of Virginia the roads does not appear; none was shown to the court and none were claimed in the argument. It may be a very grave question whether
a corporation of this State can be permitted to convey its fran-
97 chise to a foreign corporation so as to enable the latter to exercise corporate rights and powers here without some such authority. The purposes of this case do not require a decision of this question.

If the Baltimore and Ohio Railroad Company is controlling and operating the Valley road without permission of the State, it certainly cannot therefore claim exceptions and immunities to which it could not be entitled if it had obtained such permission.

The company derives all its powers and privileges from the charter of the company which owns the road; it must be subject to all the duties imposed on that company, and among these is the obligation to answer in our own courts to our own citizens for any damage resulting from its conduct.

If under authority of law or on principles of comity a foreign corporation is allowed to hold property and exercise corporate functions in this State, it must also submit to the jurisdiction of our courts in controversies with our citizens. If it claims the privileges and immunities of a domestic corporation, it must also perform the duties, and answer to all the liabilities of a Virginia corporation.

It is estopped by its conduct—by its exercise of corporate functions here under a Virginia charter—to deny that it is a Virginia corporation for all the purposes of Virginia jurisdiction.

The learned counsel for the defendant referred to the case of
98 Baltimore & Ohio R. R. Co. vs. Casey, decided by the supreme court of Ohio (28 Ohio State R., 218), in which a somewhat different view is taken from that which is here presented. It will be seen that the decision in that case is in a great measure based upon the statutes of Ohio, not in force here.

The court was not unanimous, and we think the dissenting opinion contains the more satisfactory doctrine upon this question. We are, therefore, of opinion that the circuit court did not err in refusing to remove the case to the circuit court of the United States.

The next error assigned is in the action of the court overruling the demurrer to the declaration.

It is contended that in an action under our statute, by the personal representatives of the person killed, it is necessary to aver in the declaration for whose benefit the suit is prosecuted—whether the family of the deceased or for his creditors; that otherwise it will be impossible for the defendant to come prepared to meet all the issues arising on the trial. The first, second, and third sections of the act of 1872, incorporated in the revised code of 1873, ch. 145, p 996, comprise all the enactments in our laws upon this subject. We think it is very clear that the framers of these enactments had before them at the time the English and New York statutes on the same subject, from which the statutes of the different States, of a similar character, are generally taken. It will be perceived that our legislature has omitted some of the provis-
99 ions of those statutes and materially changed the phraseology of others. Thus the English statute requires the plaintiff to file with his declaration a full particular of the person or persons in whose behalf the action is brought. Our statutes contain no such provision, and the very fact that it is omitted, while other provisions of the English statutes are adopted, would seem to indicate a deliberate purpose on the part of the legislature to dispense with any such statement.

The first section of our statute and the first section of the English and New York statutes respectively, are almost identically the same. All of them declare that when the death is caused by the wrongful act or neglect of any person or corporation, and the wrongful act or neglect be such, if death had not ensued, as would entitle the party injured to recover damages, then the person or corporation shall be liable in an action for damages, notwithstanding the death of the person injured, to be brought by and in the name of the personal representative. The New York statu'es provide that the action shall be for the exclusive benefit of the widow and next of kin of the deceased.

The Virginia statute does not declare for whose benefit the action is brought, or that it is for the benefit of any one. It authorizes the jury to award such damages as to it may seem fair and just, and to direct in what proportions they shall be distributed to the wife, husband,
100 or parent, or child, the amount recovered to be paid to the parties just named, as the case may be, in such proportions as the jury shall have directed, or if they have not directed, according to the statut' of distributions; but if there be no husband, or wife, parent, or child, the amount recovered shall be assets in the hands of the personal representatives to be disposed of according to law.

In the cases under the New York statutes, and in the cases under the statutes of Indiana, Missouri, and Illinois, which are taken from those of New York, it has been held that the declaration must aver there is a widow and next of kin. But these decisions are uniformly placed upon the ground that the damages are not assets of the estate, but belong exclusively to the widow and next of kin. As the action cannot be entertained unless there be a widow and next of kin, their existence must be averred in the declaration and proved on the trial. (Safford vs. Drew, 3 Duer R., 627; Chicago and Rock Isl. R. R. v. Morris, 26 Illi. R., 400; Woodard v. The Chic. and Mich. West. R. R. Co., 23 Wisc. R., 400; The Ind. and Pittsb'g and Chic. R. R. Co. v. Keely, adm'r, 23 Ind. R., 133.

These cases proceed upon the obvious ground that whenever damages are limited to a class, the declaration must show there is such
101 a class, otherwise the foundation of the action fails.

Under the Virginia statute the damages, it is true, are given first to the husband or wife, parent or child, but if neither of these is alive, the

action then may be maintained and the damages will be assets to be disposed of according to law. In this respect the Virginia statute differs from that of all the other States. As with us the damages are not for the exclusive benefit of the family of the deceased, it would seem not to be essential that the declaration shall allege that there is a family, or that the action is prosecuted for their benefit. It is very true the fact that the deceased left a widow and children dependent upon him for support will, as a general rule, very materially affect the amount of the recovery. There is, however, no rule of law which compels a party to state in his declaration every matter which enhance the damages. In an action of trespass for breaking and entering the plaintiff's house, he may give in evidence without specially stating it, under the general allegation of alia enormia, the debauching of his daughter, or the battery of his servants, and with us it is not even necessary to make the allegation of alia enormia. (Code of 1860, § 12, ch. 171.)

If the declaration ought to state that the deceased left a family for whose benefit the suit is prosecuted, it should go further and
102 state the condition and circumstances of the individual members of the family. And if there is no family, it should state whether there are other relatives of the deceased, their circumstances and condition; also the number and claims of creditors, the age, the mental and physical powers and capacity of the deceased, his avocation and value to his family. All these bear directly upon the question of damages, and all may be the subject of investigation by the jury. Can any good reason be given for not stating them in the declaration, if it be necessary to apprise the defendant of every matter which may materially effect the amount of recovery?

The statute was designed to give to the personal representative a right of action wherever the deceased would have had it had he lived. The declaration must, therefore, always state such facts as will show a good cause of action on the part of the deceased himself. And this would seem to be the only test prescribed by the statute. The defendant knows that the damages are primarily for the benefit of the family, for so the law declares, and he can very rarely be surprised by the evidence upon this point. The manner in which the damages are to be distributed is no concern of the defendant, and not under the control of the plaintiff. It is a question for the jury exclusively, not in-
103 volved in the issue. It is very probable that no serious inconvenience would result from requiring the plaintiff to state for whose benefit the action is brought, but such an averment is not essential to the action. If we require it to be made merely because it has a natural bearing upon the question of damages, it will be difficult to assign a limit to allegation of that character. In simplifying all the proceedings and pleadings we best promote the object of the statute. We are, therefore, of opinion the demurrer to the declaration was properly overruled.

The defendant's second and third bills of exception were taken to the ruling of the court in admitting certain testimony introduced by the plaintiff. The defendant's objection to this testimony is based upon the ground that, as the declaration did not aver that the suit is for the benefit of the family of the deceased, the plaintiff ought not to be permitted to prove any fact relating to their condition or circumstances by way of affecting the amount of damages to be recovered. This objection was considered and disposed of in discussing the demurrer to the declaration. As it is unnecessary to aver that the action is for the benefit of the family, the testimony is admissible without such averment. If the

declaration did not give the defendant sufficient information upon
104 this point, it might have been obtained by calling on the plaintiff to file with his declaration the bill of particulars provided for in our statute.

The defendant's fourth and fifth bills of exception set out the evidence offered by plaintiff to show the business qualifications of the deceased, the value of his services to his family, the condition of his health, and the amount he was realizing annually from the employment in which he was engaged, as also the value of his services in attending to the business of his family.

As all the questions arising upon the admission of this evidence are also fully presented by the instructions given by the court to the jury, it will save time and induce to a clear understanding of the subject to consider the instructions in connection with the evidence. Before doing so it may be proper to advert very briefly to some well-established principles of law governing in this class of cases.

Under the English and American statutes the courts have generally held that the damages must be assessed with reference to the pecuniary loss resulting from the death of the person injured, and that neither the physical pain of the deceased, nor the mental sufferings of the surviving family can be taken into the estimate. (Shearman & Red. on Neg.,
105 sec. 610; Field on the Law of Damages, and cases cited, sec. 630.) Whether the same construction must be given to our statute may not be so clear. The question does not arise in this case, and no opinion is given or even formed on the subject. The plaintiff's instructions concede that the damages are to be fixed with respect to the pecuniary loss sustained by the family of the deceased. The defendant certainly cannot complain of this form of stating the proposition. All the cases agree that where the deceased has left a widow and children it is proper for the jury, in assessing the damages, to estimate the value of the support and maintenance properly derived from the deceased, the amount realized by him from his usual occupation, as also the loss of his care, nurture, and instruction.

Some of the cases have gone much farther in holding that the jury may take into the estimate the loss of the family, in reference to the parent's moral and intellectual training, upon the ground that such training, if judiciously administered, would operate favorably upon the pecuniary interests of the children. Tilley v. Hudson River R. R. Co., 29 N. York R., 252. The instructions given by the court in this case carefully avoid all controverted points of this character. The propositions they affirm are such as have received the sanction of nearly all the courts.

They inform the jury that in ascertaining the damages they shall
106 assess the same with reference to the pecuniary loss sustained by the wife and children of the deceased.

First. By fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy, and perseverance of the deceased, during what would probably would have been his lifetime if he had not been killed.

Second. By adding these to the value of his services in the superintendence, attention to and care of his family, and the education of his children, of which they have been deprived by his death. As was very properly said in Tilley v. Hudson River R. R. Co., 29 New York, 289, "All these are elements of pecuniary success, component parts of that pecuniary capital, of the continued exercise and employment of which

the children were entitled to the benefit, and of which the wrongful act of the defendants deprived them."

The statute is regarded by the courts as remedial in its character—as affording compensation for injuries unknown to the common law—and is to be liberally construed to promote the objects the legislature manifestly had in view. And therefore it is the courts look to the relationship and dependent condition of the parties, the capacity and ability of the deceased, mental and physical, and, indeed, all the surrounding circumstances and situation of the family to enable the jury properly to
107 estimate the loss sustained, and to fix the measure of the damages. The evidence offered by the plaintiff in this connection, and upon which the instructions were based, was properly received; and the instructions correctly stated the law for the guidance of the jury. The cases bearing upon this subject may be found in Shearman & Red. on Negligence, sec 606 to 613; Redf. or Carriers and Bailees, page 295 to 304; and in Field on the Law of Damages, page 490, chap. 21, where the statutes of the different States on this subject are given.

The court, at the request of the plaintiff, also gave the jury five other instructions to which the defendant excepted. They are as follows:

1st. When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption, prima facie, is, that it occurred by the negligence of the railroad company, and the burden of proof is on the company to established that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

2d. The law in tenderness to human life and limbs holds railroad companies liable for the slightest negligence, and compels them to re-
108 pel, by satisfactory proofs, every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case will make such carriers liable in damages under the statute.

3d. The Baltimore and Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost decree of diligence and care in safely transporting William A. Wightman upon his journey.

4th. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death.

5th. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also the structure, repair and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient to say that
they are fully sustained by the elementary writers and by the
109 opinions of the most respectable courts in this country. The decisions on this subject are given in Wharton on Negligence, § 627 to 661, inclusive; also § 422, and the notes to these sections; Redfield on Carriers and Bailees, § 346; Farish & Reigle, 11 Gratt., 697.

The defendant's sixth bill of exceptions is to the refusal of the court to receive the evidence offered by the defendant to show that the deceased, at the time of his death, held policies of insurance on his life to the amount of $5,000.00 for the benefit of his wife and children, and that

since his death the amount called for by said policies had been collected and paid over to the widow and children.

We think the court did not err in refusing to admit this evidence. It was clearly calculated to mislead the jury as to the issue they were to try. The mere fact that the family of the deceased received money from some other source would not justly influence the measure of compensation to be made by the defendant for injuries attributable to the misconduct of its employees and agents.

The party effecting the insurance paid the full value for it, and there is no equity in the claim of the defendant to the benefit of a contract for which it gave no consideration.

It is said that Lord Campbell, the author of the English act, was of opinion that the money received on a policy of insurance by the
110 family of the deceased might be taken into account in assessing the damages. In this country the courts have uniformly held the contrary; and this view is the more just and reasonable. (Althorpe v. Wolfe, 22 New York R., 355; Harding v. Town of Townshend, 43 Verm., 536; Pittsburg and Cin. R. R. Co. v. Thompson, 56 Illi., 138; see also the English case of Bradburn v. Great W. R. Co., 44 L. I. R. U. S. C., p. 9; S. C. L. R., 10 Exch., 1; Yates v. Whyte, 4 Bing. N. C., 272; 5 Scott, 644.)

The only remaining point to be considered was the refusal of the court to continue the case for the defendant. This point ought more properly to have been considered in the beginning; but it is taken in the order in which it is presented by the record, as set forth in the eighth bill of exception. The application for a continuance was upon the ground of the absence of a material witness. This witness, although in the service of the defendant, was a resident of the State of Maryland. No effort was ever made to take his deposition, although the case was pending on the docket for a considerable time. The witness was never summoned, the defendant relying upon his promise to attend the trial. He left the service of the company, and ceased to be subject to its orders, nearly ten days before the commencement of the trial. This fact alone ought to have satisfied the defendant not to rely upon the promise of
111 the witness, but to take the necessary steps to procure his attendance or his deposition. There was an additional reason for the exercise of diligence.

This case, with others against the same defendant, had been arranged as early as February, 1877, for trial in April following, and the judge of an adjoining circuit requested to preside. Under all these circumstances, we think the court very properly overruled the motion for a continuance.

A motion of this kind is addressed to the sound discretion of the court under all the circumstances of the case, and this court will not reverse the action of the court below in such case unless such action was plainly erroneous. Hewitt's case, 17 Gratt., 627.

Upon the whole, we are of opinion the judgment of the circuit court should be affirmed.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of appeals of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of plea which is in the said supreme court of appeal

112 before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Baltimore and Ohio Railroad Company, appellant, and George W. Koontz, administrator of Wm. A. Wightman, appellee, wherein was drawn in question the validity of a statute or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or statute of the United States, and the decision was against the right or privilege specially set up or claimed under said clause of the said Constitution or statute, a manifest error hath happened, to the great damage of the said Baltimore and Ohio Railroad Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
113 Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] (Signed) D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by— M. R. WAITE,
Chief Justice Supr. Ct. U. S.

STATE OF VIRGINIA:

Clerk's office supreme court of appeals of Virginia, at Staunton.

I, Jos. A. Waddell, clerk of the supreme court of appeals of the State of Virginia, at Staunton, in obedience to the mandate of a writ
114 of error awarded by the Hon. M. R. Waite, Chief Justice of the United States, bearing date the 26th day of January, 1878, do hereby certify that the foregoing manuscript, commencing on page 1 and ending on page 82, contains a true transcript of the records in the case of the Baltimore & Ohio Railroad Company against George W. Koontz, administrator of William A. Wightman, dec'd, as the same remains on file in the clerk's office of the said supreme court of appeals; and I do further certify that said supreme court of appeals is the highest court of law or equity in the State of Virginia in which a decision can be had; and I do further certify that the foregoing (on page 89) is a true copy of the appeal bond in the said cause which was filed in my office on the 28th day of January, 1878; & I do further certify that the foregoing writ of error (on page 109) is a true copy of said writ awarded by the Hon. M. R. Waite, Chief Justice of the Supreme Court of United States, to the judgment of the supreme court of appeals of

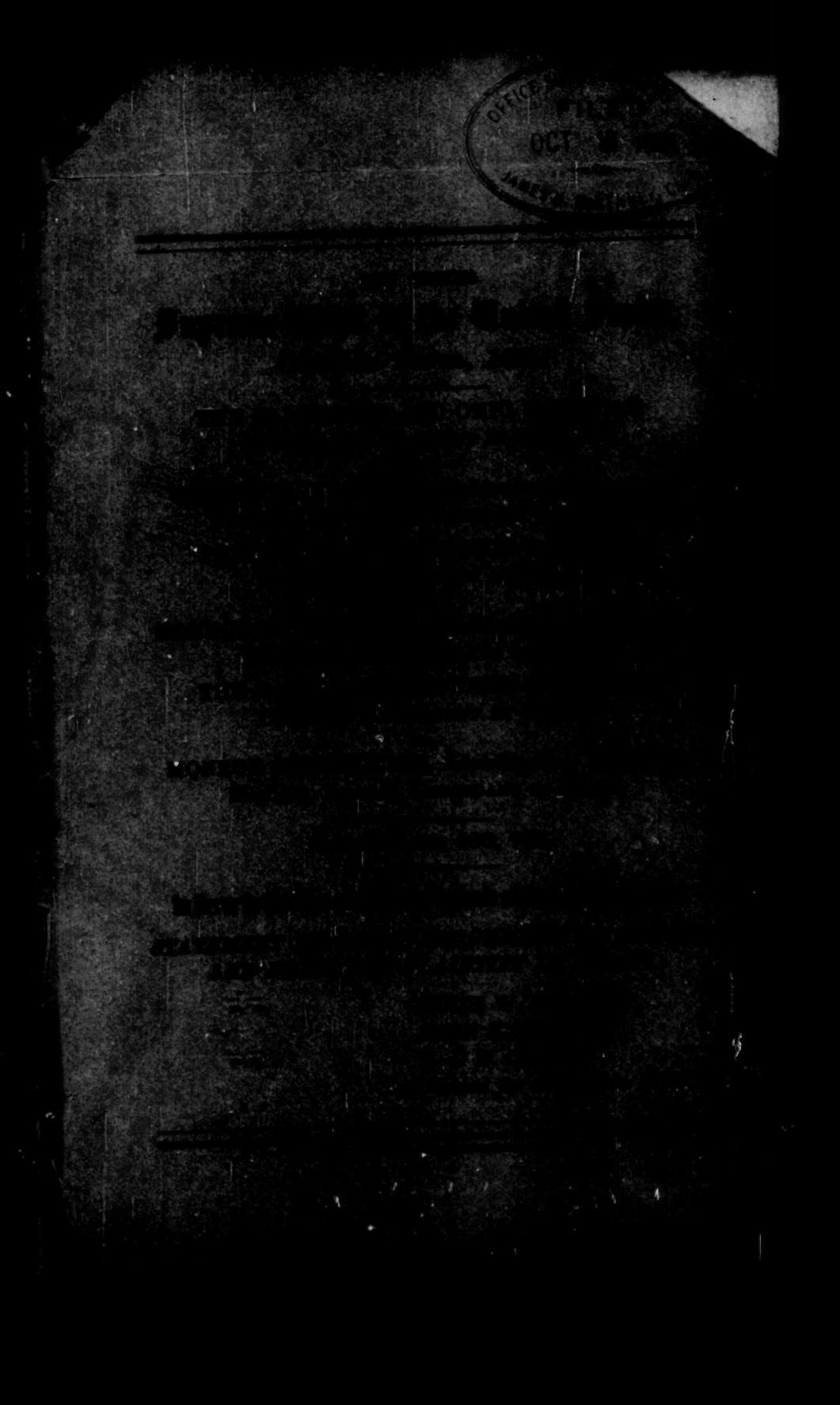
Va., rendered on the 29th day of November, 1877, in the cause of the Baltimore & Ohio Railroad Company, pl'ff in error, vs. George W. Koontz, administrator of William A. Wightman, dec'd, def'a't in error, and that the same was duly filed in my office aforesaid the 28th day of January, 1878.

115 In testimony whereof I have hereunto subscribed my name as clerk of the said supreme court of appeals of Virginia at Staunton (there being no official seal of said court) this 21st day of Septemtember, 1878.

JOS. A. WADDELL,
Clerk Supreme Court of Appeals at Staunton, Va.

Fee for copy R., $31.55.

(Indorsement on cover:) No. 502. The Baltimore and Ohio Railroad Company, plaintiff in error, vs. George W. Koontz, adm'r of William A. Weightman, dec'd. Virginia sup. court of appeals. Filed 4th October, 1878.



IN THE

Supreme Court of the United States.

October Term, 1881.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE W. KOONTZ, *Administrator of* WILLIAM A. WEIGHTMAN, Deceased, DEFENDANT IN ERROR.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MONROE FUNKHOUSER, *Administrator of* CHARLES L. NOEL, Deceased, DEFENDANT IN ERROR.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

MONROE FUNKHOUSER, *Administrator of* REUBEN E. HAMMON, Deceased, DEFENDANT IN ERROR.

Numbers 30, 460, 788.

In Error to the Supreme Court of Appeals of the State of Virginia.

STATEMENT OF CASES, ASSIGNMENT OF ERRORS, AND BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASES.

These cases, by order of this Court, January 27, 1881, were to be heard together, when No. 30 was reached. While the facts in each case are different, the questions involved in the writ of error are similar.

In the case of Koontz, administrator, &c., the action was brought in the Circuit Court of Shenandoah County, Virginia, on the twenty-sixth day of April, 1876, against the Baltimore and Ohio Railroad Company to recover damages for the death of plaintiff's intestate, caused on the sixth of March, 1876, by the alleged neglect and default of the defendant.

The declaration alleges that the defendant was the owner and proprietor of a certain railway known as the "Railway of the Valley Division of the Baltimore and Ohio Railroad Company," running through the counties of Frederick, Shenandoah, Rockingham and Augusta, in the State of Virginia, and in the State of West Virginia; that the plaintiff's intestate on the sixth day of March, 1876, purchased a ticket from the station of Edinburg, in Shenandoah county, Virginia, to Charlestown, West Virginia, and while a passenger on said railroad, lost his life through an accident at the Narrow Passage Bridge, in said county of Shenandoah, in the State of Virginia. The damages claimed in the declaration were ten thousand dollars. (Record, Koontz case, pages 4 to 12.)

In the case of Funkhouser, administrator of Noel, the declaration was similar to the one last mentioned, alleging that Charles L. Noel, deceased, was a passenger on the road, having purchased a ticket from Mount Jackson to the city of Washington, and lost his life through an accident at the Narrow Passage Bridge, and claimed

damages to the amount of ten thousand dollars. (Record in No. 460, pages 9 to 12.)

In the case of Funkhouser, administrator of Hammon, the allegations were similar; said Reuben E. Hammon having purchased a ticket from Mount Jackson to Washington, and lost his life by reason of the accident above mentioned, and the damages claimed were ten thousand dollars. (Record in No. 788, pages 8 to 11.)

Petitions were filed by the then defendant, the Baltimore and Ohio Railroad Company, asking that the causes be removed to the Circuit Court of the United States for the Western District of Virginia, held at Harrisonburg.

These petitions were filed upon the second day of September, 1876. The ground of removal in each case was, that the Baltimore and Ohio Railroad Company was, at the time of the bringing of the suits, and at the time of the filing of the petitions, a corporation incorporated under and by virtue of the laws of the State of Maryland, and was a citizen of said State of Maryland, and that the plaintiff in each case was, at said times, a citizen of the State of Virginia; that said petitions were filed at the first term of the Court at which said causes could be tried. Proper bonds were filed with each petition.

On the 9th of September, 1876, the Circuit Court for the county of Shenandoah, Virginia, overruled the motion, to which rulings the defendant excepted.

The cases were subsequently tried, and, in the first case, a verdict was rendered in favor of the plaintiff, May 2, 1877, for five thousand dollars.

In the second case, a verdict was rendered in favor of the plaintiff for four thousand nine hundred and twenty-five dollars, on April 29, 1878; and, in the third case, a verdict was rendered in favor of the plaintiff for six thousand dollars, on January 6, 1879.

Upon writ of error, each case was taken to the Supreme Court of Appeals for the State of Virginia, and the judgments affirmed. Said causes were then brought to this Court by writs of error to said Court of Appeals.

ASSIGNMENT OF ERRORS.

The sole question for the consideration of this Court is, *was there error in denying the petitions of the Baltimore and Ohio Railroad Company for removal of the causes from the Virginia State Court to the Circuit Court of the United States for the Western District of Virginia.*

The plaintiff in error respectfully submits that its petition for such removal should have been granted.

It was conceded that the plaintiff in each suit in the State Court was a citizen of the State of Virginia, and that the Baltimore and Ohio Railroad Company was a corporation, incorporated under, and by virtue of the laws of the State of Maryland. It was alleged that said corporation was the lessee of that part of the Washington City, Virginia Midland and Great Southern Railroad from the town of Strasburg in Shenandoah county to Harrisonburg in Rockingham county, Virginia, and was, at the time of the alleged accident, using and operating the same as lessee. The Virginia Midland Railway Company was incorporated by the State of Virginia.

The act of incorporation of the Baltimore and Ohio Railroad Company by the State of Maryland is printed in each record. In the first case upon pages from 15 to 20. The lease of the Strasburg Branch of the Virginia Midland Road, is printed in the Record in No. 460, pages 21 to 24.

The opinion of the Court of Appeals of the State of Virginia is found on pages 36, 37 first record and 43 to 50, second record, and 29 third record.

We cite the opinion of the Court in the first case, as in the succeeding cases the Court of Appeals followed its decision in the first case.

"A preliminary question in this case to be settled is, whether the Circuit Court erred in refusing to remove the case to the Circuit Court of the United States for the Western District of Virginia.

"The defendant, the Baltimore and Ohio Railroad Company, is a corporation chartered by the State of Maryland. It is also, and was when this suit was brought, the lessee of a railroad from Strasburg to Harrisonburg, in this State, belonging to the Virginia Midland Railroad Company, a Virginia corporation, and was controlling and operating said railroad under said lease as owner and proprietor at the time of the injuries committed, as set forth in the declaration.

"The defendant has not produced the lease nor given evidence of its contents. We are, therefore, not informed as to the precise terms and the conditions upon which the lease was granted. All that we know is that the defendant is operating the road as owner, and exercising the powers and privileges granted its lessee by the charter of incorporation. What then is the status in Virginia of the defendant, a Maryland corporation, with reference to this road?

"The cases generally agree that a corporation created by the law of one State, can have no legal existence, outside the limits of that State. It may, however, make contracts, transact business, and even exercise corporate functions in another State with the consent of the latter, express or implied. In the Baltimore and Ohio Railroad Company vs. Gallahue's administrator, 12 Gratt., this Court decided that under the statutes authorizing that company to construct its road across the territory of Virginia, the Baltimore and Ohio Railroad Company, as to such road, was to be regarded as a Virginia corporation.

"In Railroad vs. Harris, 12 Wall., 82, the Supreme Court of the United States decided that the Baltimore and Ohio Railroad Company, having, under an Act of Congress, constructed a lateral branch of its road in the District of Columbia, was by reason thereof, liable to suit in that District, as if it had been an independent corporation in that locality.

"The Court did not rest its decision upon the ground, however, that the Act of Congress had made the Baltimore and Ohio Railroad Company a corporation of the District, but upon the ground

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"The Court did not rest its decision upon the ground, however, that the Act of Congress had made the Baltimore and Ohio Railroad Company a corporation of the District, but upon the ground

that the Act operated as a license to the company to construct its road there; and having accepted the license, the company had placed itself in the position of a domestic corporation for all the purposes at least of being sued in that locality.

"The Court say that they could see no reason why one State may not make a corporation of another State, as there organized and conducted the corporation of its own *quo ad hoc* any property within its territorial limits. See also Maryland vs. Northern Central R. R. Co., 18 Md. Rep., 193; Sprague vs. Hartford and Prov. and Fishk. R. R. Co., 5 Rd. Island, 233; Goshen vs. Supervisors, 1 W. Va., 308; Pennsylvania R. R. Co. vs. Sly, 65 Penn St. Reps., 205; Pomeroy vs. New York & New Haven R. R. Co., 4 Blatchf. 122.

"The Baltimore and Ohio Railroad Company, as a corporation of Maryland, can, of course, have no legal existence outside of that State, but as a lessee of a Virginia railroad company, exercising all the functions and powers of the latter, it may be subject to all its duties and obligations. This must necessarily be upon the authority of the cases cited, if that company is acting under any license granted by the State of Virginia. Under such circumstances, so acting, it must be treated as a Virginia corporation *quo ad hoc* the line of railroad under its control, so far, at least, as its liability to our own citizens is concerned. It can only escape these consequences by showing that it is exercising corporate powers here without the permission of the State, and consequently that it is a tort feasor or trespasser. Whether the company obtained the lease under any statute or provision in the charter of Virginia, the roads do not appear: none was shown to the Court, and none was claimed in the argument. It may be a very grave question whether a corporation of this State can be permitted to convey its franchise to a foreign corporation, so as to enable the latter to exercise corporate rights and powers here without some such authority. The purposes of this case do not require a decision of this question.

"If the Baltimore and Ohio Railroad Company is controlling and operating the Valley Road without permission of the State, it certainly cannot, therefore, claim exceptions and immunities to which it could not be entitled if it had obtained such permission.

"The company derived all its powers and privileges from the charter of the company which owns the road. It must be subject to all the duties imposed on that company; and among these is the obligation to answer in our own Courts to our own citizens for any damages resulting from its conduct.

"If under authority of law or on principles of comity a foreign corporation is allowed to hold property and exercise corporate functions in this State, it must also submit to the jurisdiction of our Courts in controversies with our citizens. If it claims the privileges and immunities of a domestic corporation, it must also perform the duties and answer to all the liabilities of a Virginia corporation.

"It is estopped by its conduct—by its exercise of corporate functions here under a Virginia charter—to deny that it is a Virginia corporation for all the purposes of Virginia jurisdiction."

The Virginia Court of Appeals specifically decided that where a railroad company incorporated in another State was lessee of a railroad in Virginia, the company lessee could be sued in the State Court, and had no right of removal to the Federal Court.

BRIEF.

It being admitted that the Baltimore and Ohio Railroad Company was a corporation incorporated by the State of Maryland, when sued in the Circuit Court of Shenandoah County, by a citizen of Virginia, has it lost its right of removal to the United States Court because it was the lessee and operator of a railroad incorporated by and located in the State of Virginia?

I.

A corporation for the purpose of suing and being sued, is a citizen of the State which created it. It owes its existence to that State. It has no legal existence beyond its bounds. By a conclusive presumption of law as settled by this Court, a suit by it is regarded as the joint suit of the individual persons which compose the corporation. Further, the legal presumption is that its members and all of them are citizens of the State in which alone the corporate body has existence. When it sues or is sued by its corporate name, it must be presumed to be a suit by or against the citizens of that State which created such corporation, and no averment or evidence to the contrary is admissible for the purpose of withdrawing jurisdiction from a Court of the United States. A suit, therefore, by or against the Baltimore and Ohio Railroad Company for jurisdictional purposes, must be considered a suit by or against citizens of the State of Maryland. This doctrine has been fully established by this Court in the following cases:

The Louisville C. & C. R. R. Co. vs. Letson, 2 How., 497.
Marshall vs. B. & O. R. R. Co., 16 How., 314.
R. R. Co. vs. Wheeler, 1 Black, 286.
R. R. Co. vs. Harris, 12 Wall., 65.
R. R. Co. vs. Whitton, 13 Wall., 270.

In the case of R. R. Co. vs. Harris, 12 Wall., 65, this Court decided, having before it the Act of Incorporation of the plaintiff in error and the Virginia Statutes relied upon by the Virginia Court of Appeals in its decision in these cases, that the B. & O. R. R. Co. was for jurisdictional purposes, a citizen of the State of Maryland. The Court held (page 81) that the act of Virginia permitting the Railroad to be constructed in that State did not create a new corporation of that State.

"The Company was chartered to construct a road in Virginia as well as in Maryland. The latter could not be done without the

consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to this question before us, they were the same as to powers, privileges, obligations, restrictions and liabilities as those contained in the original charter.

"The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. In its name, locality, capital-stock, the election and power of its officers, in the mode of declaring dividends and doing all its business, its unity was unchanged, only the sphere of its operations was enlarged. * * * * For the purposes of Federal jurisdiction it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members will be permitted."

The Act of Virginia which gave the Baltimore and Ohio Railroad Company the license to construct its road within the territory of Virginia, was not in evidence in the first case. It was offered in evidence in the second and third cases and is to be found on the Record in the second case, on page 24. By that act the Railroad Company was granted the same privileges within the territory of Virginia as it had within the territory of Maryland, except that it could not make any lateral roads within Virginia without the consent of the Legislature. After the passage of this Act, the State of Virginia was divided, and the entire line of the Baltimore and Ohio Railroad is within the limits of the State of West Virginia; and no part of its road is within the State of Virginia. So that this Act has no bearing upon the questions involved in these cases. The Baltimore and Ohio Railroad Company does not operate any part of its line in that State. The Court of Appeals of Virginia did not base its decision upon the terms of this Act, but solely upon the ground that as lessee of a Virginia railroad company it occupied the position of the company it leased, and should be

treated as a Virginia corporation as to the railroad under its control, so far as its liability to citizens of Virginia is concerned.

The Baltimore and Ohio Railroad Company being a Maryland corporation, and a citizen of that State, when sued by a citizen of Virginia in a Court of that State was entitled to have the case transferred to the Federal Court.

Its corporate existence was not dependent upon any Act of the State of Virginia. By leasing or operating a railroad incorporated by and situated within that State, it no more became a citizen of that State than would a natural person, a citizen of another State, who should purchase a farm in Virginia. The jurisdiction of the Federal Courts is such as they have under the Constitution of the United States and the Acts of Congress passed in conformity therewith. This jurisdiction can neither be taken away or impaired by the State legislation or by the act of any party. If under the wording of the statutes, that party can have his suit transferred to a Federal Court, this is a right which he cannot waive nor can any legislature divest him of it. The implied assent spoken of by the Court of Appeals of Virginia in connection with the license to the plaintiff in error to act as a lessee of a Virginia railroad company, cannot be construed on the one hand as a requirement by the State of Virginia that the plaintiff in error should not exercise the right of removal, or on the other hand as a surrender of that right by the plaintiff in error.

This Court in the case of Insurance Company vs. Morse, 20 Wall., 445, 450, &c., has held that a statute of a State requiring an insurance company, before transacting any business in that State, to sign an agreement that it would not remove any suit into the Federal Courts is unconstitutional and void.

"Every citizen is entitled to resort to all the Courts of the country, and to invoke the protection which all the laws of all these Courts may afford him. A man may not barter away his life or his freedom, or his substantial rights."

A citizen by going to another State and there engaging in business, does not lose thereby his citizenship. This is a right of which he can be divested only in one manner. When sued in a State Court he may not assert his right of removal, but he none the less has it. While he remains a citizen of another State he may always assert it.

Railroad Co. vs. Harris, 12 Wall., 65, 81, 82, 83, 84.
Doyle vs. Continental Ins. Co., 94 U. S., 535.
Ex parte Schollenberger, 96 U. S., 369.
Cowles vs. Mercer County, 7 Wall., 118.

The Court of Appeals of Virginia in these cases held, that the Maryland corporation, operating under an implied license, the Manassas Gap Railroad in the State of Virginia as lessee thereof, is to be deemed for all jurisdictional purposes to be identical with said Manassas Gap Railroad, and as the latter company could not move to transfer a suit to the Federal Court, neither can the Baltimore and Ohio Company, its lessee, do so.

The error arises from confounding the idea that as lessee it may be sued in Virginia, with the very different idea that when sued, although conceded to be a citizen of Maryland, it cannot make a motion to remove.

The sounder view of this question is taken by the Supreme Court of Ohio in the case of B. & O. R. R. Co. vs. Cary, 28 Ohio St. 208.

That Court held that a foreign railroad corporation by merely leasing, possessing and operating the property of a railroad company of that State, did not thereby become a citizen of that State, nor lose its right of removal to the Federal Court. Also, that a statute providing that such leasing and operating should be regarded as a waiver of the right of removal, was unconstitutional.

If therefore the right of removal is such a right as cannot be specifically waived, or contracted away, or cannot be divested by a State statute, how can there be an implied waiver of this right by

the transaction of its business by the plaintiff in error in Virginia as lessee of a Virginia corporation.

The reasons which have led the Courts to raise the implication of assent to the institution of suits against a foreign corporation within the State in which it undertakes to do business, are already given by this Court in the case of the Railroad Company vs. Harris, 12 Wallace, 81. The Court says, that "a corporation cannot migrate; but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to *be sued* there. If it do business there it will be presumed to have assented and will be bound accordingly." The Court however adds: "For the purposes of Federal jurisdiction, it is regarded as if it were a citizen of the State where it was created, etc.,"—and the Court approves the case of the B. & O. R. R. Co. vs. Gullahue's, Adm., 12 Grat., upon the same grounds: and not upon the grounds that the B. & O. Company was a citizen or corporation of Virginia for jurisdictional purposes, but that acting under a license to do business in Virginia, it was, on the principles referred to, suable in that State. And that citizens of Virginia, dealing with it, should not be compelled to go to Maryland to institute their actions. That is all that either case decides. Neither of them suggests the idea that when sued, the Company could not move to transfer the case to the Federal Court.

It is submitted that the case of Knapp vs. Railroad Company, 20 Wall., 117, is in point, in respect to the effect of a lease of a railroad to a non-resident corporation. It decides that such lease does not affect the citizenship of the corporation lessee.

The facts in the case were these: The Western Vermont Railroad Company, a corporation of Vermont, mortgaged the road to Knapp & Briggs, citizens of New York, to secure the payment of its bonds. The mortgage was regularly foreclosed, and Knapp & Briggs purchased it as trustees for the bondholders. They leased the railroad to the Troy and Boston Railroad Company, a corpor-

ation of New York. Suit was brought in the State Court of Vermont by Knapp, surviving trustee, against the Troy and Boston Railroad Company upon the covenants of the lease. The defendants applied to have the case removed, under the Act of March 2, 1867, on the ground of local prejudice, alleging that a certain corporation by the name of the Bennington and Rutland Railroad Company had been organized under Vermont law by a majority of the bondholders represented by Knapp & Briggs as trustees, and that this new corporation, Knapp, the surviving trustee being a nominal party, had become the real party in the suit. That therefore the subject matter of the controversy was between the Bennington and Rutland Railroad Company, (the Vermont corporation,) and the Troy and Boston Railroad Company, as lessee of the Vermont road. The case was removed to the Federal Court, a motion to remand was denied, and the Circuit Court proceeded to hear and adjudge the case, deciding it against Knapp, surviving trustee, who took the writ of error.

This Court held: that although the Troy and Boston Railroad Company was the lessee of the Vermont road, and held and operated it for a term of years, it did not thereby become a citizen of Vermont within the meaning of the Act of Congress, but was and continued to be a citizen of the State of New York, and that Knapp and Briggs being substantial and not merely formal parties, and likewise citizens of New York, the suit could therefore not be maintained in the Federal Court.

This case was followed in Brownell vs. Troy & Boston R. R., 3 Fed. Rep., 761.

II.

The record in each case shows that the petitions for removal were filed in due time, and the bonds tendered with them were unquestioned. When this was done, on the 2d September, 1876, the jurisdiction of the State Court was divested. By the 3d sec-

tion of the Act of March 3, 1875, it is provided that "it shall then be the duty of the State Court to accept said petition and bond, and proceed no further in said suit."

But the Virginia Court asserted its jurisdiction and decided that the plaintiff in error was for the purposes of these suits a citizen of that State. The plaintiff in error at no time acquiesced in this decision. On the contrary, by its motion to remove, by the exceptions reserved by it, by its assignment of error on this ground in the Court of Appeals of Virginia, it has persisted in its claim of right to have these cases tried in the only Court having jurisdiction. At all times and in all places, it has insisted upon its rights.

In the brief of counsel for defendant in error, they allege that the plaintiff in error, by reason of not filing copies of the record in the United States Court, has lost its right of removal, if at any time it had such right.

It is a sufficient answer to this, merely to say, that what may or may not have been done by the plaintiff in error in this respect, does not appear in the records. This Court will not consider any such matters.

Whether the plaintiff in error filed copies of the records in each case in time or not, is a question of fact. Whether by so doing, the defendants were prejudiced by such action, is also a question of fact. Questions of fact which may be different in each case. Hence this Court cannot pass upon all these matters which do not appear in the records. They might be cognizable in the Circuit Court of the United States on motions to remand.

We may be permitted, however, to observe that the defendant in error in each case now complains of *laches* resulting from a judgment of a State Court, procured by himself upon an issue tendered in his own answer to the statements contained in the petitions for removal. He obstinatety, persistently, and so far as the judgment of the State Court was concerned, successfully resisted and defeated the acceptance by the State Court

of the petitions filed, and a removal of the cases to the proper forum. He incited and encouraged the State Court to usurp authority over the cases, against the Act of Congress, and to continue that usurpation, and held the plaintiff in error under the dominion of that power, down to the date of the final judgment in the Court of Appeals of Virginia. His complaint now seems to be, that the plaintiff in error did not arrest his illegal purposes in the Court below, and did not at the risk of a conflict of jurisdiction prevent him from dragging the plaintiff in error through all this litigation. To say the least of it, the complaint of *laches* coming from the defendant in error, is inconsistent with his own contention, and should perhaps be supplemented by expressions of regret at the violation of law procured by himself, and by reason of which he now seeks to defeat the just rights of the plaintiff in error. There is no reason for such claim and it is wholly unsustained by the authorities.

Where a party entitled to removal is, notwithstanding his protests and exceptions, held for the trial of his case in the State Court, he loses none of his rights by defending against that action. He is not bound to desert the case and take the risk of such judgment as the State Court may pronounce against him by default, when by its solemn judgment it has determined that the case shall not be removed from its jurisdiction, but shall be proceeded in to final judgment.

Gordon vs. Longest, 16 Peters, 97.
Kanouse vs. Martin, 15 How., 198.
Ins. Co. vs. Dunn, 19 Wall., 214.
Removal Cases, 100 U. S., 457, 475.
Railroad Co. vs. Mississippi, 102 U. S., 135.
Kern vs. Huidekoper, 103 U. S., 485.

In the case of Railroad Co. vs. Mississippi, The party whose motion for removal was denied, remained in the State Court and contested the case. He did not file the record in the Federal

Court, as was done in Kern vs. Huidekoper, and in The Removal Cases. But as in the cases of Gordon vs. Longest and Kanouse vs. Martin he defended his rights in the State Court. The waiver of the right of removal must affirmatively appear, it cannot be inferred from the fact of contesting the case in the State Court.

The contention of the defendant in error has a double aspect.

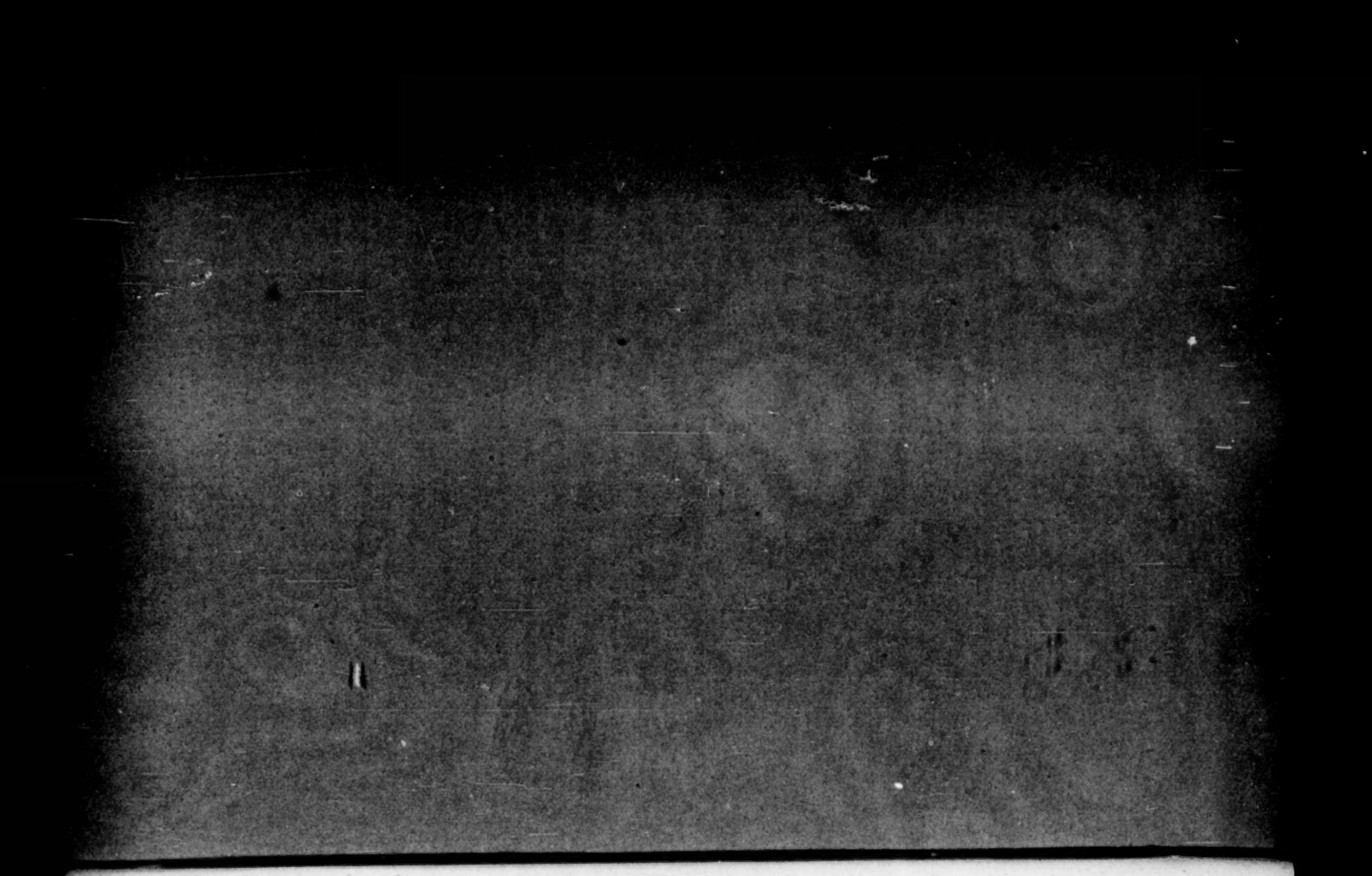
(a.) He insists that the judgment of the State Court is right, and therefore should not be reversed.

(b.) That even if that judgment be erroneous, the plaintiff in error has no right to have that error corrected in this Court.

In addition to the authorities referred to, to show such an error must be corrected by this Court in conformity with the twenty-fifth section of the Judiciary Act, we remark that in the decision of neither of these cases did the Supreme Court of Appeals of Virginia take the ground that the plaintiff in error had been guilty of any *laches*, and in the recent cases decided by that Court, such as Beery vs. Irick, Newton vs. Bushong, and Continental Ins. Co. vs. Casey, 27 Grattan, 316, and other cases, has any such idea been suggested.

When such distinguished tribunals as the Appellate Courts of Virginia and Ohio, both recognizing the same mode of proceeding, differ so widely on the identical question here involved, that is to say, whether the Baltimore and Ohio Railroad Company, by reason of leasing the railroad of a domestic corporation does or does not lose its citizenship in Maryland, and thereby its right of removal under the Act of Congress, it is eminently right and proper that this very grave and important question should be settled by the only Court which can decide it.

HUGH W. SHEFFEY,
JOHN K. COWEN,
E. J. D. CROSS,
of Counsel for Plaintiff in Error.



OFFICE SUPREME COURT U.S.
FILED
JAN 26 1881
JAMES H. McKENNEY, CLERK

In the Supreme Court of the U. S.

The B. & O. R. R. Co. Appellant,

vs.

W. A. WIGHTMAN'S Admr., Appellee.

BRIEF OF COUNSEL FOR APPELLEE.

In the Supreme Court of the U. S.

The E. & G. R. R. Co., Appellant,

vs.

W. A. WIGHTMAN'S Admr., Appellee.

BRIEF OF COUNSEL FOR APPELLEE.

In the Supreme Court of the U. S.

The B. & O. R. R. Co. Appellant,

vs.

W. A. WIGHTMAN'S Admr., Appellee.

BRIEF OF COUNSEL FOR APPELLEE.

This cause is one of appeal from the decision of the Supreme Court of Virginia, affirming a decision of the Circuit Court of Shenandoah County Virginia, by which the latter court refused to remove the suit of W. A. Wightman's admr. plff. vs. The Baltimore and Ohio Railroad Company, defendant, into the Circuit Court of the United States for the Western District of Virginia, upon petition filed.

The allegations of error set out in the petition filed in this court are very general and brief.

In substance they amount to simply this. That the Supreme Court of Appeals of Virginia erred in refusing to reverse the decision of the said Circuit Court, because of

alleged error in refusing to grant a motion to remove said cause into the Circuit Court of the United States, for the Western District of Va., based upon the ground that the plaintiff in the court below was a citizen of Virginia and the defendant corporation, a citizen of Maryland.

No brief has been filed by the counsel for the appellant, and we are therefore constrained to present our own views, from our own stand point, and at the same time conjecture and anticipate as far as we can, those of our opponent.

The question presented seems to resolve itself into two general propositions, viz:

I. Did the right of removal ever exist under the law and facts of the case?

II. If it ever did exist, has it not been lost by laches?

We affirm the negative of the first, and the affirmative of the second of these propositions and will endeavor to maintain our views by reason and authority.

I. The first question necessarily involves the relation of the defendant corporation in the court below, the appellant here, to the State of Virginia and her citizens.

The record shows, 1st. that the appellant was chartered by act of the Virginia Legislature of date March 8th 1827, p. 84, and thereby granted in general terms all the rights, privileges, franchises, &c, in *that State*, which were previously granted in the State of Maryland by its Legislature, with certain restrictions and limitations imposed upon the Company, among which was that of suing and being sued in said State.

Further legislation in respect to said Company by the Virginia legislature will be found in the following acts passed by the same, enlarging and restricting its rights, privileges, and franchises, viz:

1. Acts of Feb'y. 13th, 1838, Ch 158. p. 112,
2. " " March 19th, 1839, Ch. 98, p. 66.
3. " " " 19th, 1841. Ch. 87, p. 97.
4. " " Feb'y. 25th, 1841, Ch. 97, p. 107.

5. " " Feb'y. 19th, 1845, Ch. 88, p. 69,
[Acts of 1844-5.

6. " " March 20th, 1848, Ch. 148. p. 179,
[Acts of 1847-8.

"By the Act of March 1847, Sess. Acts p. 86, the Company was authorized to complete the road through the State of Virginia over a route thereby prescribed, and by the 6th section of this law it was subjected to the general provisions of the general railroad law of the 11th of March, 1837, with respect to that portion of the road constructed within said commonwealth, so far as the same were properly applicable and the company was required to accept the provisions of the same within 6 months as a condition upon which the power and privileges of the said act were granted," and it appears by the preamble to the Act of 21st March 1850, Sess. Act p. 49. the Company proceeded to complete its road, thus submitting itself to the provisions of the general law regulating railroad Companies incorporated in said Commonwealth, and became in so far as its road was constructed in Virginia. a corporation of that State.

For a full and elaborate examination of this whole subject, and a reference to said Acts, so far as necessary, the Court is referred to the case of the Balto. and Ohio R. R. Co. vs, Gallahue's, Admr. p p. 665. and especially 658-9,-660-1 and 2, in which the doctrine is maintained that said corporation is a Virginia corporation. None of these enactments have ever been repealed or modified.

2. The case of "The Ohio and Mississippi R. R. Co. vs, Henry D. Wheeler, 1st. Black, p. 286 and Miller's decisions of the S. C. of U. S. p. 470, decides as to the jurisdiction of Circuit Courts, citizenship of corporation."—That

1st. "It is the settled doctrine of this court that a suit by or against a corporation in its corporate capacity, is a suit by or against citizens of the State which created it and no averment to the contrary will be heard to defeat the jurisdiction of the Circuit Court."

2d. "It follows that a *statement* in the *declaration* that plaintiff is a corporation created by the laws of Ohio and Indiana implies a suit in which plaintiffs are citizens of *both* these States."

3d. It also follows that no such suit can be maintained in the Circuit Court for the district of Indiana against a citizen of that State."

That was a case where charters were granted by two States and the action defeated because the plff. and deft. were held to be citizens of the same State under the averment of the declaration, and the facts relating to the charter.

See 4th Miller 472-3.

In this case the averment of the declaration is that the defendant is a Virginia corporation and while the statement of facts relating to the question of removal admits that said defendant was chartered by the State of Maryland, the same fact is proved or admitted in respect to a charter by Virginia in the record. See p. 14 of record.

3d. The case of the B. & O. R. R. Co. vs. Harris, in 12 Wallace p. 82, seems to be relied upon as maintaining a different doctrine by the counsel for the appellant.

The decision in that case was simply that the B, & O. R. R. Co, having under an act of Congress constructed a lateral branch of its road in the District of Columbia was by reason thereof liable to suit in that district; "*as if it had been an independent corporation of that locality,*" See 12th Wall. p. 83-4.

"The court did not rest its decision upon the ground however, that the act of Congress had made the B. & O. R. R. Co. a corporation of the district, but upon the ground that the act operated as a *license* to the Company to construct its road there, and having *accepted* the license, the Company had placed itself in the position of a *domestic corporation, for all the purposes at least of being sued in that locality.*

Ibid, and opinion of Staples, Judge in this case p. 36 of record; and 29th Gratt. p.

There can therefore be no doubt about the right to sue in one or the other of said grounds in the State of Va. certainly none in the latter, under the facts disclosed in the record, and said decisions construed together.

II. The doctrine of license and comity operates in this class of cases and under the decision in 12th Wall. as we construe it, places the citizen and the R. R. Co. which enjoys a license in any particular State substantially upon the same ground as if the latter was a corporation of such State by actual, original creation.

It is insisted that such license &c. determines the question of citizenship of corporations in respect to suability just as effectually as a charter and *consequently and inferentially* the question of *Removal.*

If a corporation can be sued in the State court of another State where it is operating by license of legislative act. it would be contrary to reason to suppose that such right can be nullified or rendered unavailing by the removal of the cause to another jurisdiction on the ground of the non-residence of the corporation. It would be to recognize a right and at the same time refuse to enforce it or declare it nugatory. The only difference between the evils so strongly depicted in the case in 12th Gratt. and quoted approvingly in 12th Wall, resulting from an inability to sue except in the State, which originally created the corporation, would be in *degree*, and in that respect only to a very *limited* extent.

This doctrine of the right to sue a corporation doing business in a State other than that which chartered it is further and more fully illustrated in another and earlier case in 18th Howard p. 404, and 1st Miller p. 340. The Lafayette Insurance Company vs. French and others—Justice Curtis delivering the opinion of the court. This case decides "inter alia"—That where such a corporation is permitted by the statute of another State to do business there-

in—the latter State has a right to *impose*, as a condition of this privilege that it *shall be suable* by service of process on its agent within the State," and that "a judgment obtained by such service is under the constitution and acts of Congress—entitled to the same faith and credit in any other State as it has by law and usage in the State where it was rendered."

"A corporation created by Indiana can transact business in Ohio *only with the consent*, express or implied, of the latter State," 13th Peters 519, Bank of Augusta vs. Earle. "This consent may be accompanied with such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by *other States* and this court provided they are not repugnant to the constitution and laws of the United States, or inconsistant with the rules of public law, which secure the jurisdiction and authority of each State from encroachment by all others, on that principal of natural justice which forbids condemnation without opportunity for defence." 1st Miller S C. R. p. 343, 18th Howard 407. The LaFayette Insurance Co. vs. French.

See also Maryland vs. Northern Central R. R. Co. 233 18th Maryland R. 193. Sprague vs. Hartford, Prov. & Fishk. R. R. Co. 5th R. I. Sly - 65th Penna. St. Repts, 205. Pomeroy vs. New York and Haven R. R. Co. 4th Blatcht. R. 122.

These views are in accord with those of Judge Johnson in the very able and as we think unanswerable dissenting opinion in the case of the Baltimore & Ohio R. R. Co. vs Casey—reported in the Sept No. of the Am. Law Times Reports of 1877 and 28th Ohio St. Rep. and which has been quoted with approbation by the court in this case. It is in accord with Continental Insurance Co. vs. Casey 27th Gratt. 316. and especially 220 to 228 inclusive.

B & O. R. R. Co. vs. Noel's Admr. and same Company vs. Hamman's Admr. which will be reported in 33d Gratt, reaffirming the doctrines of the decision in this case, upon

the subject of the right of Removal. That the right to sue a corporation doing business in the State of Virginia exists by statute. See Code of 1873 ch. 56. Sec. 32 to 35 inclusive pp. 543-4 also ch, 165 p, 1082 and the 2nd and 7th Secs. of ch. 166 pp. 1083 and 5 and 16th Gratt. 318.

IV. The Baltimore & Ohio Rd. Company was at the time of the accident out of which this suit arose the lessees of the road of the Washington City, Virginia Midland and Great Southern Railroad Company (upon the line of which the plffs. intestate was killed) from the town of Strasburg to that of Harrisonburg, both in the State of Virginia, a Virginia corporation exclusively and was using, controlling, managing and operating the same as set forth in the plff's. declaratton. See Record p. 20.

It is insisted that if the positions assumed already were untenable, these facts would not only subject the appellant to the jurisdiction of the State court, but constitute it a domestic corporation in such sense and to such extent as to deprive it of the right to claim quo ad hoc that it is a citizen of another State, and therefore entitled to exercise the right of removal of the cause to the Federal Court.

"The B. & O. R. R. Co, as a corporation of Maryland can, of course, have no legal existence, (*as such*) outside of that State, but as the lessee of a Virginia railroad Company, exercising all the functions and powers of the latter, it may be subject to all its duties and responsibilities. This it is insisted must necessarily be so, under the authorities cited, if that Company is acting under any license granted by the State of Virginia.

If the Company leased without authority of law, it was a tortfeaser or trespasser in running said road.

If it leased with authority and is operating said road under said charter, it must be regarded as a domestic corporation and as such liable to perform the duties and answer all the liabilities of a Virginia corporation. As the *lessor* was amenable to the jurisdiction of the State courts as a

citizen and not entitled to exercise the privilege of removing the cause, the same rule should be applied to the lessee, standing in its shoes and assuming all its responsibilities. "It is estopped by its conduct, by its exercise of corporate functions under a Virginia charter," granted to its lessor. "to deny that it is a Virginia corporation for all the purposes of Virginia jurisdiction.

If the position is assumed that the B. & O. R. R. Co. is without right in Virginia, either chartered or by lease, then it is submitted that it must be regarded as a trespasser "ab initio," and as such without protection, except by such defence as a *trespasser* may make in the *locality* where he violates rights and incurs consequent responsibility. Sherman and Redfield on Negligence Sec. 332, p. 399. By analogy the doctrine applies to any other species of trespass or injury than that specified.

II. If the right of removal ever existed, it has been lost by waiver and *laches*, for the reason that the provisions and requirements of the statute have not been observed and pursued.

1st. The motion in this case was made under the act of the 3d of March 1875.

2d. It was made on the 2d of Sept. 1876, see record, p. 12, and overruled on that day.

3d. The next term of the Circuit Court of the United States for the Western District of Virginia, in regular order commenced on the Tuesday after the 2d Monday of October, 1876, which was the 13th day of October 1876. This gave 41 days for the copy of a brief record and the presentation of it for filing in that court. So far as appears no copy of the record was ever ordered, copied or offered in said court either at *that* or any *subsequent term*. After the motion was made, overruled and exceptions taken, the defendant *rested* in efforts to remove, and never afterwards aroused to the assertion of its alleged rights until after the chances had been fully taken in the Circuit Court below and

the appellate court above and he had suffered defeat in fair and full trials upon the merits of the cause.

4th. So far from prosecuting his motion for removal, the record discloses the fact p. 20, that after said Federal court (at which under the statute the record might have been filed had met and adjourned,) on the 19th day of Dec. 1876, (erroneously printed in the record 1877), "on the motion of the *defendants* by its attorneys the office judgment and writ of enquiry entered against the said defendant at rules" were "set aside, it *pleaded* not guilty of the trespass alleged "and of this put itself upon the country," and issue was joined thereon.

The Deft. also at that time demurred to the plaintiff's declaration, in which the plaintiff joined.

And on farther motion of the deft. leave was granted it to plead within 30 days and the cause was continued generally until the next term.

5th. At the April term (Apl. 6) 1877, an application was made (upon the call of said cause) by the Deft, for a continuance of the same based upon the absence of a witness under the circumstances detailed in the affidavit of J. H. Averill and the statement of J. H. Williams, counsel for defendant, on p.p. 29, 30 and 31 of the record, and upon the overruling of said motion, a special jury was summoned for the 8th day of the term being the 10th day of April (1877), on the 12th day of April, p. 21, the parties again appeared by their attorneys and the persons summoned as special jurors, and the panel being incomplete other jurors were summoned, and on the 13th of April, said pannel was completed by the active participation of the counsel of the appellants in error, the jury being selected by lot to the number of 16, and that number reduced to 12 subsequently by the *parties*, beginning with the plaintiff, *alternately* striking off one.

The demurrer was then overruled, the jury sworn and the

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trial proceeded without objection from the 14th of April until the 2d day of May when after the concluding arguments of counsel, the grant of instructions at the instance of plaintiff and defendant, they rendered a verdict for $5,000 with interest from the 6th day of March 1876, until paid.

Record p. 22.

Subsequently the petition was filed for an appeal found on p p. 2, 3 and 4 of record and the decision rendered by the Supreme Court of Appeals of Virginia, p p. 36 to 42 inclusive.

It only remains to examine and interpret so much of the Act of the 3d of March 1875, and the authorities touching the same as may be applicable to the foregoing statement of facts and determine the legitimate legal results of such investigation.

The 3d section provides "That whenever either party . . . . entitled to remove any suit mentioned in the next preceeding section shall desire to remove such suit from a State Court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State Court before or at the term at which said cause could be first tried and before the trial thereof for the removal of such suit into the Circuit Court, to be held in the District where such suit is pending, and shall make and file therewith a bond with good and sufficient surety, for his or their entering into such Circuit Court, *on the 1st day of its then next session, a copy of such record* &c. &c. . . . . it shall then be the duty of the State Court to accept said petition and bond and proceed no further in such suit," . . . . . "and the copy *being entered as aforesaid* in said Circuit Court of the United States, the cause shall *then* proceed" &c. . . . . as if it had been originally commenced in said Circuit Court." Section 7 provides "that if the next term shall commence within 20 days after the application for removal, the party *shall have twenty days after* the application to file in the Federal court the copy of the record and

enter his appearance therein." We raise no question about the right of removal under this statute in a proper case, provided the remedy be sought and *prosecuted* in proper mode and within the time prescribed. We do contest however most earnestly the proposition that having simply filed a petition, given bond &c. and excepted to an adverse ruling in the court below, the defendant can then, *rest* an *indefinite time*, take all the chances in the State courts and when defeated ultimately in the court of last resort, revert back to such adverse decision as furnishing a ground for an appeal to this court, with a view to proceeding again "de novo" to a trial upon the merits. Our view is that the act of Congress on this subject was intended to be *remedial* not *obstructive*, simply to change the *tribunal*, and not to operate as a *Stay law*. It seems to us that it never could have entered into the mind of that body to impose a *penalty* upon an *innocent* party as the result of a decision in his *favor* and especially in a case where the original right to sue in the State court was and is unquestioned.

When the State court decided against the defendant, the law conferred upon him a right to take further action. The plff. had no right to test the right of removal any further. He could only remain still and await the further action of the deft. and if he took none within the time prescribed, proceed as in this case to enforce his remedy in the State court. If the right of a deft. is thus lost, it is simply the result of his own inaction. To these points the following authorities go.

"It this condition of the undertaking and bond is not complied with, the obligor would doubtless be liable on the bond *and there may be such unexcused laches in the filing of the copy of the record of the State court, as where without necessity or good reason a term lapses* or the *other party is prejudiced by delay*, that the Federal court will for this reason remand the case even though one of Federal cognizance. Such is the practice of the Federal courts so far as we are acquainted with it."

granted, should be heard with it.

favor such views, were rendered under this statute, and that the *restrictive* features of this statute were designed to prevent such results and to relieve the courts from any necessity either apparent or real, to inflict such wrong.

All of which is respectfully submitted.

Moses WALTON,
for Appellee.

J R Tucker,
of Counsel,

OFFICE SUPREME COURT U. S.
FILED
OCT 13 1881
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United S.

B. & O R. R. Co.

vs.

WIGHTMAN'S Admr.

SUPPLEMENT TO THE NOTE FILED BY THE COUNSEL FOR THE APPELLEES, AT THE LAST TERM OF THIS COURT.

At that term the case of B. & O. R. R. Company vs. W. A. Wightman's, admr. was continued until the present term with the understanding and agreement that when it was reached upon the call of the docket, the cases of the

B. & O. R. R. Co. vs. Hamman's admr. and

same vs. Noel's admr. in which appeals were subsequently granted, should be heard with it.

These cases are kindred in character and grew out of the same great disaster at Narrow Passage Bridge in Va. on the night of the 6th of April 1876, by which the lives of each of the decedents were extinguished.

They only differ 1st in the amount of damages ascertained by the respective verdicts, viz: $5.000 with int. from the 6th day of April 1876.

$4.925 with interest from date of Verdict - 29th Feb 1878-
$6.000 with int. from 6th Jany. 1879 -

and 2d in the *length* of time they *severally remained* upon the docket *before* they were *tried*, and especially the length of time they so remained, *after motion for removal* to the Federal Court.

On this last point, the *two last* cases *illustrate* and *enforce* the doctrine laid down in the argument upon the first in respect to *laches*. It will be seen upon a careful examination of the records in these two cases that the one remained upon the record *after* motion of removal without any further action to give the Federal Court jurisdiction by filing a copy of the record in that Court from the 9th day of Sept. 1876 - until the 6th day of Jany 79 a period of 28 months and the 2d from the 9th day of Sept. 1878 until the 29th day of Feb 78 a period of 5 months.

The decision in the Circuit Court being *in favor* of the Appellees, they could do nothing except *try* the case in said Court. The Appellant neither *did* or *tried* to do anything to *perfect* the removal, if the right existed. The result of this non-action must necessarily be a perpetual stay of proceedings, unless broken by *trial* or some other act in the way of removal.

Having thus called attention to the additional cases, brought before the Court for hearing,

We submit the following views in addition to those in former brief:

1. Is Appellant *quoad* this suit a citizen of Maryland?

It is a lessee and operator of a Road of a Virginia corporation. It is not its own road built by it under license granted by law of Congress, as in case of B. & O. R. R. Co. vs. Harris 12 Wallace, or of Virginia, as to the Railway from Harper's Ferry to Wheeling. It really is the Va. corpora-

tion *sub nomine*, B. & O. R. R. Co. It is *domestic* in Va. as to privilege, and sinks its foreign being in the corporate power and function of a Va. corporation. It is as if it had become the sole corporator in the Va. corporation, and merges its foreign being in the Va. Company.

In all the cases in this Court, in which a corporation has been held a citizen for purposes of jurisdiction, this Court has leaned in favor of that conclusion, because the corporation of another State really represented through its corporate entity the private corporators, who are the real parties to the controversy; and the reason for the constitutional jurisdiction confered on the federal courts, is to protect the foreign corporations from possible injustice before the State Courts. The court presumes all corporations to be resident citizens of the State granting the charter of incorporation, in aid of this constitutional policy conferring federal jurisdiction.

Now here is a suit really between the W. C. V. M. & G. S. R.R.Co. which did the injury conplained of. Its corporate functions were in operation and killed the Appellee's decedent. It was operated as a Va. corporation, by appellant, who took its charter, and all its powers, and the place of its corporators, for a money consideration, and *doffed* its alienage, and and put on the character of Va. citizenship, as to corporate power, and stockholder's interests. On what ground can it ask this court now to presume its alienage, in order to vest federal jurisdiction of this suit, when all the reasons inducing the presumption of a foreign corporate being, fail in this case? Those reasons were based on a substantial interest being in citizens of another State. Here the the case is otherwise. All the interests corporate and stockholding are Virginian—and when the B. & O. R. R. Co. an alien corporation comes into the place of Va. stockholders to operate a Va. corporation, it must be presumed to be Virginian, as completely, as if such presumption would be made, if the B. & O. R. R. Co. had bought the stock of the Va. corporation. It has really taken the place of the Stockholders, and of the corporation, and underneath the form of this action, which makes the B. & O. R. R. Co. *nominal* defendant, the suit is against the Va. corporation whose hand inflicted the injury complained of. Its corporate power dealt the blow, for which we claim damages, and while its lessee is liable in this action, it is only because the lessor's power has

been delegated to its lessee under its Va. charter, and the lessee has exercised power only, under this Va. charter, and not at all under the Maryland charter.

Under these circumstances, do not the reasons, which induce a presumption of alienage in favor of a corporation, fail? The interests, which induce that presumption are substantially foreign to the State where suit is pending. It is not so here—all power and interest here are Virginian, and the foreign corporation domesticates itself in Va. by exercising Va. power, and enjoying Va. interests. All reasons require a presumption that the Deft. Company is a citizen of Va. whose charter it uses, whose functions it exercises, and whose favors it enjoys.

2. But conceding, for argument, that the B. & O. R. R. Co. is an alien defendant, has not the deft. lost its right to removal by its *laches?*

The State court had unquestioned jurisdiction of this case—divestible, by proper procedure under the U. S. Statute.

Upon this point we insist—

First, Until the Federal Court gets hold of the case under this procedure, the State court does not lose its hold.

Second, The Federal court never did get hold of this case, through Deft's laches—and the judgment of the State court is therefore valid—as by a court of competent jurisdiction not divested by any procedure.

Third, By the demurer and plea of Deft. and trial on issues joined, *all* after motion to remove the cause, the Deft. conceded the jurisdiction of the State court, submitted to it, waived the right to removal, surrendered its right under its motion—and estops it now to aver error in the proceedings resulting in the judgment complained of.

In support of these views we cite the following authorities, viz: Dillon on Removal of causes p. 102 to 105 inclusive and notes, 3d and last edition. Kern vs. Huidekoper 13th Otto. p. 485, in which all previous decisions reviewed by justice Woods and the doctrine *held* "that on entering in the Circuit Court, *within the period prescribed by that act*, (March 3d 1875), the transcript of the record, that court acquired jurisdiction of the suit." &c.

All of which is respectfuly submitted.

J. R. TUCKER,
MOSES WALTON,
Counsel for Appellees.

Oct. 1881.

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J. R. TUCKER.
MOSES WALTON.
Counsel for Appellees.

Oct. 1881.

12 - 2

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1128.~~ 788

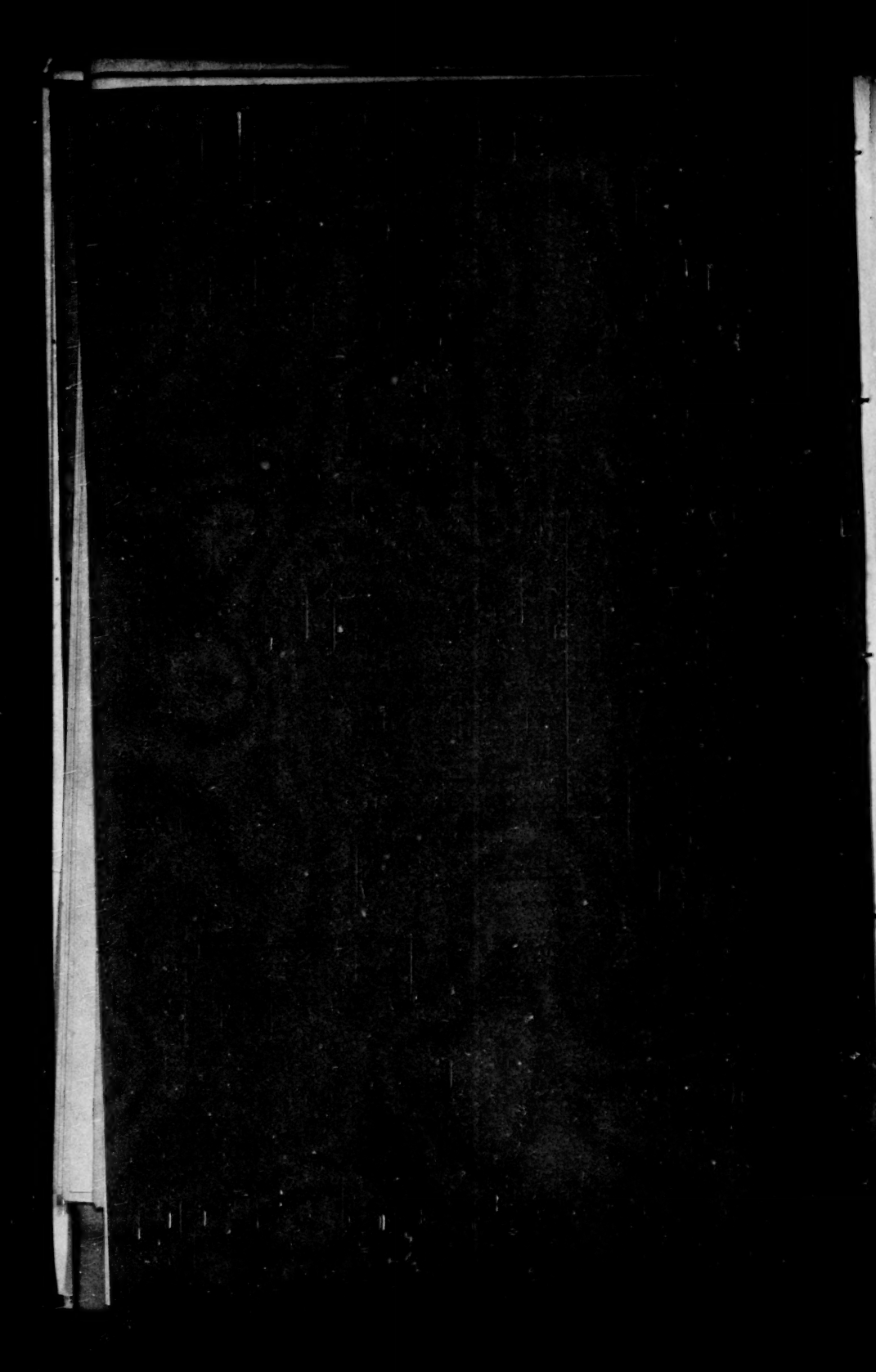
THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MONROE FUNKHOUSER, ADMINISTRATOR OF REUBEN E. HAMMON, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED DECEMBER 13, 1880.



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1 Supreme court of appeals of Virginia, at Staunton, Virginia.

To the honorable judges of the court of appeals of Virginia:

The petition of the Baltimore and Ohio Railroad Company respectfully represents: That your petitioner is aggrieved by the rulings and final judgment of the circuit court of Shenandoah County, in an action of law instituted against your petitioner in said court by Monroe Funkhouser, administrator of Reuben E. Hamman, deceased, on the 6th day of June, 1876. A transcript of the record of said action and of the final judgment therein is herewith exhibited and prayed to be read as a part of this petition. Said judgment was recovered on the 8th day of January, 1879, and was for the sum of $6,000, with interest from its date.

This case, in its circumstances, and in the points presented for the consideration of the court, is almost the exact counterpart of the case of the Baltimore & Ohio Railroad Compony vs. Noel's administrator, now pending and awaiting the decision of this honorable court. The decedents in both cases were killed in the accident at the Narrow Passage bridge, on the 6th day of March, 1876. The evidence as to the circumstances of the accident, the instructions asked on both sides, and the rulings of the court were in both cases substantially the same. The record shows that Monroe Funkhouser as adm'r of Reuben E. Hamman, dec'd, on the 6th day of June, 1876, intituted his action of

2 trespass against your petitioner, to recover ten thousand dollars damages. The gravamen of the plaintiff's action was that through and by reason of the negligence of your petitioner and its employees, in running its trains of railroad cars over and across the Narrow Passage bridge in Shenandoah County, in the State of Virginia, on the 6th day of March, 1876, said bridge was broken down, and said petitioner's engine and cars were precipitated into the chasm below, and that said Reuben E. Hamman, being a passenger on one of the cars, was killed. The tendencies of the evidence as shown by the record, and in connection with which certain instructions prayed for by the plaintiff were given to the jury, were strong to show that the casualty was not the result of negligence on the part of your petitioner, or its employees, but was caused by an unforeseen and unavoidable accident, and that the prima facie presumption of negligence arising from the fact of the breaking of the bridge, and the precipitation of the trains into the chasm below, and the consequent killing of the plaintiff's intestate was repelled; and at all events there could be no controversy on one point; that is, if technically negligence were attributable to your petitioner at all, it was not wilful, gross or wanton negligence, and that there was nothing in the case to justify anything in the nature of punitive or vindictive dam-

ages, and yet, as will appear from the record, the court so instructed

3 the jury as to authorize them to give damages against your petitioner of a punitive or vindictive character.

Your petitioner need not inform your honors that the action was founded on sections 7, 8, and 9 of chapter 145 of the code of Virginia (1873), wherein it is provided that "the jury in any such action may award such damages as to it may seem fair and just." The plaintiff's instructions, as given by the court to the jury, will be found on pp. 50–52 of the record, and are set forth in your petitioner's bill of exceptions to the action of the court in giving such instructions. The instruction asked by your petitioner, and expressing, as your petitioner is advised, the law correctly in regard to punitive or vindictive damages as applied

to such a case as the present, and which the court refused to give to the jury, will be found on pp. 54, 55, of the record, and as set forth in your petitioner's bill of exceptions to the action of the court in refusing to give such instructions.

Your petitioner is advised that whilst exception might be taken to the extreme and almost superhuman foresight and vigilance exacted of the common carrier of passengers in the first five instructions, verging as they do upon the ground of absolute warranty on the one hand, and disregarding on the other the recognized rule that the carrier is not bound by his undertaking to furnish other structures and machinery than such as the most prudent and judicious persons engaged in the same
4 business employ for the safety of passengers; these instructions, except the 4th, nevertheless turn upon the idea that the actual cause of the disaster or casualty must be the negligence of the carrier. But in the 4th instruction the jury have thrown open to them the wide field of conjecture. The language of that instruction is this: "The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death." Had the words been "by reason of which his death was occasioned," &c., the instruction would have been logical, and would have laid down the law of cause and effect as the true ground of liability.

It will be observed from the tendencies of the evidence on behalf of plaintiff that he did not rest on the prima facie presumption of negligence arising out of the bare fact of the breaking down of the bridge, but that he introduced evidence at large, in order to establish as the cause of the casualty the unsoundness of some of the timbers in the bridge, and to show negligence in not furnishing perfect timbers in the bridge structure, the imperfection of which caused, as he claimed, the disaster; and it will be further observed from the tendencies of the evidence on behalf of the defendant, and of some of the evidence introduced by the plaintiff himself, that undsoundness of part of the timbers in the bridge could not reasonably have caused the acciden—nay, that in the judgment of all who spoke on
5 that point, it was impossible that the accident could have resulted from defects in the timbers. And in view of these divergent tendencies of the evidence it was surely error to say to the jury that however strong and overwhelming the preponderance of the testimony might be in favor of the theory of your petitioner, sufficiently so in ordinary cases to require the jury to find, upon such preponderance of probabilities, that the bridge was dragged down by an unforeseen and unavoidable accident to the machinery, and did not fall by reason of any defect or unsoundness in the structure, they should nevertheless give a verdict for damages against your petitioner, in case they should entertain an idea, perhaps a suspicion, that the accident may have been occasioned by the unsoundness of the timbers. That is to say, that whilst if called upon to say whether under all of the circumstances, and in view of all of the testimony in the case, the alleged neglect of petitioners in connection with the bridge timbers did occasion Reuben E. Hamman's death, the jury would be constrained to say that the evidence heavily preponderated against that theory; and upon the ordinary rules of judgment that such was not the fact, the jury, nevertheless, were instructed that if, notwithstanding such preponderance of evidence, and such customary mode of reaching conclusions as to matters of fact, the accident may have been occasioned by such neglect (how or why the jury need
6 not inquire), if it was within range of hidden or undeveloped

possibility, remotissima potentia, that decayed timbers may have caused the accident, then they must find against your petitioner.

Now your petitioner need not say to your honors that it is always hazardous to allow a jury to guess or imagine their way to a conclusion, but it is particularly so where a railway company is a defendant. To throw the ruins upon the necks of juries in such wise is an almost certain precursor upon a railway company's treasury.

Your petitioner is further advised that the court erred in giving the third cause of the 7th instruction, which is in these words: "By adding thereunto such further sum as they may deem fair and just, by way of solace and comfort to his said wife and children for the sorrow, suffering, and mental anguish occasioned to them by his death." And in refusing to give the instruction prayed for by your petitioner in these words: "That if the jury shall find from the evidence, viewed in the light of the preceding instructions, that the plaintiff is entitled to verdict, they are instructed that in assessing any damages to the plaintiff they are not to take into consideration the mental pain and suffering of the wife and children of Reuben E. Hamman, arising from his death, or to add to anything to said damage as solace to said wife and children,

7 and the jury are not to give against the defendant punitive, vindictive, or exemplary damages, but in estimating the damages they are confined to the pecuniary damage sustained by said wife and children by reason of the death of said Reuben E. Hamman, and are to give as damages only such sums as in view of all the circumstances of the case, with the instructions aforesaid, they may deem right and proper."

The instructions given and the instructions refused were tantamount to a declaration by the court to the jury that the right of the plaintiff to a verdict necessarily involved the right to vindictive damages. This instruction was given, as your petitioner believes, reluctantly by the able and learned judge who presided at the trial in mistaken deference to the supposed ruling of the supreme court of appeals in the case of Mathews vs. Warner's adm'r, 29 Grattan. In that case Judge Christian says: "The certificate of facts shows that Warner was shot and killed by Mathews under circumstances which, if not such as the law declares to be murder in the second degree, or at the very least voluntary manslaughter, certainly must be held to be a wrongful act." The point in that case arose of the refusal of the court below to give an instruction asked for by the defendant to the effect that the jury would not be justified in taking into consideration the mental suffering occasioned by Warner's death to his mother, and as this court held the

8 question raised by the instruction was whether in such cases as that presented by the record the jury are justified in giving punitive and exemplary damages.

The court very properly holding that damages for the mental suffering of his mother, occasioned by the death of the deceased son, were on the footing of punitive or exemplary damages. It will be noted further in the case referred to, the instruction did not assume the affirmative form as in the case now under consideration, of directions and order to the jury to find damages by way of solace and comfort to his mother for her sorrow, suffering, and mental anguish occasioned to her by the decedent's death. It will be further noted that the instructions in this case, taking the 7th instruction in connection with the 6 preceding instructions was to the effect that the jury should add to their finding damages by way of solace and comfort to Hamman's wife and children for their sorrow, suffering, and mental anguish

occasioned by his death, even though the jury should believe from the evidence that Hamman's death resulted from the slightest neglect on the part of your petitioner, against which human prudence and foresight might have guarded, and by reason of which said Hamman's death may have been occasioned; and even though the jury should be satisfied that there had been no gross or reckless negligence, even though they be satisfied that the accident occurred from some cause wholly unknown to your petitioner and its employees, and in connection with which they were free from any gross negligence or intentional wrong-
9 doing, and that the disaster was a casualty amounting, if not to an inevitable accident, at the most to a common calamity, in respect to which your petitioner could be blamed only upon the technical ground that said disaster had in fact happened, and that the excusing cause could clearly be made out. It will be further noted that in the case of Mathews vs. Warner's adm'r the court makes the distinction between a death caused by negligence and a death caused by a wrongful act. Your petitioner, with the profoundest respect for the judgment and opinion of this hon. court, and with no disposition to open for reconsideration the precise question adjudicated in the case referred to (one at least of the honorable judges whilst concurring in the judgment of the court, not concurring in so much of the opinion rendered as conveyed the idea that the jury should give exemplary or punitive damages), begs leave to submit, in connection with the case now brought to the attention of the court, the following considerations:

1st. That it has been only recently in the history of the law that punitive or vindictive damages in cases of negligence have been held under any circumstances to be authorized. In the case of Emblem vs. Myers, 6 Huelton & W. 54, Pollock, C. B., says: "There is a difference between an injury which is the mere result of such negligence as amounts to little more than an accident, and an injury, wilful or negligent, which is accompanied by expressions of insolence. I do not say that in
10 actions for negligence there should be vindictive damages, such as are sometimes given in actions of trespass, but the measure of damages should be different, according to the nature of the injury and the circumstances with which it is accompanied." It may, however, now be deemed to be (as your petitioner is advised) settled, that, under certain well-defined restrictions, punitive or vindictive damages may be imposed. By reference to sec. 32, Field on Damages (note), and sec. 347–356, inclusive, Field on Corporations, it will be seen that the struggle in the courts against the theory of punitive and vindictive damages is still maintained.

Your petitioner is further advised that at the time the act contained in section 7, 8, 9 of chapter 145, of code of Virginia, were enacted, and in view of which it is presumed the legislature acted in adopting the words of said act, "such damages as to it may seem fair and just," the following principles were recognized as law: (*a.*) Punitive or vindictive damages can be recovered only in cases where person or property has been injured by the wilful act of another, or where the act causing the injury was the result of wanton'ess or reckless indifference to the rights of others. Hail vs. Glanding, 42 Penn. St., 493, and Sherman and Redfield on Negligence, sec. 600, page 605 (note). (*b.*) To justify these damages (that is, punitive or vindictive damages), the negligence, "according to the more carefully considered authorities, must be so great as to amount to recklessness; that is, to a degree where
11 a generally malicious or negligent purpose careless of consequences might perhaps be presumed, although no hostile purpose

was entertained against an individual." (*c.*) "To justify them, the act must be wilful, or the negligence must amount to a reckless disregard of person or property." (Sedgwick on Damages, 6th ed., p. 570 (m), 467 in note.) (*d.*) And in their text, Sherman and Redfield on Damages, sec. 600, say: "That gross negligence is required to justify punitive or vindictive damages, and gross negligence means, in this connection, such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequence of carelessness, and is indifferent or worse to the danger of injury to the person or property of others." It is only in case of such recklessness that punitive and exemplary damages should be allowed. (*e.*) In a number of cases it has been held that in no case and no hypothesis of facts should the court instruct the jury to give vindictive damages. (See Sedgwick on Damages, p. 572 (m), 467, note, citing Hawk vs. Ridgeway, 33 Ill. 473, Southern R. R. Co. vs. Handrick, 40 Mass., 374.) In addition to the authorities cited, reference is specially made to Field on Corporations, 351-'2. Among other things, it is said that "mere gross negligence is held not to be sufficient to warrant exemplary damages, even where the general doctrine is recognized, but the negligence must be so gross as to raise a presumption that the party in fault is conscious of the probable consequences of his negligence or carelessness, and is indifferent to
12 the injury likely to follow."

Second. Such being the state of the law at the time the statute referred to was enacted, and taking it for granted that damages for solace and comfort to surviving relations in the nature of exemplary and punitive damages may, under the decision of the court in Mathews vs. Warner's adm'r, be allowed, and conceding, for the present, that, under the statute, the court had the right, affirmatively, to instruct the jury as to what should be deemed by them "fair and just" considerations on which to found a verdict of damages, your petitioner respectfully submits that the court should have instructed that they could not find vindictive or punitive damages against the defendant unless they were satisfied not only that your petitioner had been guilty of negligence, but of such negligence as is spoken of in the foregoing authorities, that is, of such negligence as at least amounted to a reckless disregard of or indifference to the safety of person or property and the rights of others. And your petitioner deems that in this view of the error committed by the court below, there is nothing in conflict with the true intent and meaning of the act of the general assembly, or with the constructions thereof given by this hon. court.

The acts of Victoria, and the acts of New York and other States in the Union, following the acts of Victoria, have been construed by the courts in England and the United States as prohibiting the juries
13 from giving vindictive and punitive damages in any state of facts.

As construed by this court, the words "as to the jury may seem fair and just" are held to open the way for the finding of vindictive and punitive damages by the jury; but your petitioner hardly presumes that the legislature, in using the language "the jury may award such damages as to it may seem fair and just," ever intended to give to the personal representative of a dead man the right to recover damages under such circumstances as would not have justified that dead man, had he lived, in asking for such damages. The law, on its face, gives the personal representative, by way of substitution, the right of action for his testator or intestate, thus abrogating the rule of the common law, that personal actions of this kind died with the person, and it is not to be presumed that this court, in deciding the case of Mathews vs.

Warner's adm'r, intended to say that the jury, by virtue of the words "fair and just," should be authorized to give punitive and vindictive damages, except upon such ground as the law then and theretofore required as the foundation of such damages.

Your petitioner is further advised that while the language used by the Virginia legislature differs somewhat from that used by the English and New York acts, it cannot be deemed so broad as to confer upon the jury the unlimited power and right to determine what is "just and fair," independently of the guidance and direction of the court.

14 Nay, the plaintiff below in asking for the instruction, and the court in giving it, assumed that the court has the right to tell the jury what is "just and fair." And the court undertook to inform the jury that, irrespective of the character of the negligence, it was their privilege and their duty to the verdict, which on no other grounds they would have formed further damages by way of punishment for the sorrow and mental anguish of the wife and children, caused by the death of the husband and father; that is, they must look to and punish for the results alone, without regard to the motives or actors or circumstances of the transaction. The sorrow and mental suffering of the wife and children would necessarily be the same whether the calamity which caused the death of the husband and father resulted from inevitable accident or from some cause wholly unknown to the most faithful, diligent, and attentive employees; and as to which, having done in all respects what they deemed to be their duty, they were without conscious fault, but which, nevertheless, might technically be deemed prima facie, that is, merely presumptive negligence, or from gross negligence and recklessness. The results being the same, the sorrow and suffering would be the same, and the punishment, according to the court's instruction, ought to be the same. And yet, it is conceded that in case of inevitable accident no damages could be given at all; and why?

15 Not because there was no sorrow or mental suffering, as the result; not because there was no pecuniary loss sustained; but because there was no motive or purpose to do the injury, and because there was no wrongful omission to what the most prudent and judicious men engaged in the same business might have done to prevent the casualty.

The excuse here is complete, respect being had to the origin of the calamity; but in this it was held that if there is the least possible, the very sightest flaw in the structure of the roadway or bridge or machinery, by reason of which the casualty may have happened (it matters not whether it did so happen or not), it makes no difference whether the company and its employees strive with the utmost zeal and vigilance to do their full duty, and thought they had done it—it makes no difference that they suffered in life, limb, and the destruction of property, the utmost security of an unforeseen and most unexpected common calamity—the same rule of punishment must be laid down for them as for the most reckless and wilful wrong-doers. If the sufferer had been maimed for life, and wrecked in body and mind, and doomed through weary years to bear the burdens of a living death, he could only have asked for pecuniary compensation. He would not have been tolerated in demanding vindictive and punitive damages. And it is not deemed amiss to say that one of the Narrow Passage disaster, upon evidence, the tendencies of which, as to the cause of the calamity, were

16 identical with those disclosed in this record, has submitted his case to a jury of his country, and that there was for him, although he claimed to have suffered much, no serious demand for exemplary or

vindictive damages, the clear and satisfactory instruction on this point given by the court at the instance of the able counsel for the plaintiff (copy of which is appended to this petition) excluding the idea of that sort of damages in such a case.

One of the greatest lawyers in Virginia, whose voice was once heard in this court with the profoundest attention—Thomas J. Michie—in discussing before a jury the outrageous wrongs inflicted on the estates of dead men, once said with his usual forceful earnestness: "If such things be tolerated—if living wrong-doers be allowed thus to plunder dead men's estates—then, gentlemen, all I can say is, die, if you dare!" Were he now living, and should have learned that the words in the act referred to, "such damages as to the jury may seem fair and just," are supposed to mean that in case of death the jury may, nay, must give such vindictive damages as would not have been thought of had the injured person survived, although with a maimed & mangled body, he would have vigorously exclaimed, "If this be law, then live, if you dare."

Fourth. Your petitioner is further advised that the said circuit court erred in refusing to remove said action to the circuit court of the United States, as prayed for in the petition, to be found on pages 10 and 11 of
17 the record, and for the reason stated in your petitioner's exceptions beginning on page 14 of the record.

Fifth. Your petitioner suggests as further error in the action of the court the overruling of petitioner's demurrer to the plaintiff's declaration, pages 37 and 38.

For the reasons aforesaid, and others apparent on the face of the record, and in view of the gravity and importance of some of the questions arising out of this record, deeply interesting as they must be to the profession, and seriously affecting the vital interests of corporations as well as individuals, your petitioner is advised that said rulings and judgments of the circuit court of Shenandoah County should be reviewed and reversed, and your petitioner accordingly prays that a writ of error be awarded, and that said final judgment be superseded until the questions involved be adjudicated in this hon. court; and, as in duty bound, your petitioner will ever pray, &c.

THE BALTIMORE & OHIO R. R. CO.,
By Counsel.

SHEFFEY & BUMGARDNER,
Of Counsel for Petitioner.

I am of opinion that the judgment complained of in the foregoing petition should be reviewed & reversed.

HUGH W. SHEFFEY.

MARCH 11th, 1879.

Writ of error and supersedeas awarded. Bond required in penalty of $8,000, conditioned as the law directs.

JOS. CHRISTIAN.

MARCH 17TH, 1879.

To the clerk of the supreme court of appeals, at Staunton.

18 VIRGINIA:

Pleas before the circuit court of Shenandoah County, on the 8th day of January, 1879.

MONROE FUNKHOUSER, ADMINISTRATOR OF Reuben E. Hamman, dec'd, pl'ff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def't.
} In case.

Be it remembered that on the 6th day of June, 1876, came the plaintiff, by his attorneys, and sued out of the clerk's office of the circuit court of Shenandoah County a summons against the defendant, which was returned duly executed by the sheriff of said county.

And at rules held in said clerk's office on the first Monday in July, 1876, the plaintiff, by his attorney, filed the following declaration against the defendant, to wit:

STATE OF VIRGINIA,
Shenandoah County, to wit:

In the circuit court of the said county.

Monroe Funkhouser, administrator of Reuben E. Hamman, dec'd, plaintiff, complains of the Baltimore & Ohio Railroad Company, a corporation doing business in the State of Virginia, which has been duly summoned to answer the plaintiff in the action of a plea of trespass on the case, for this, that the defendant, before and at the time of the committing of the grievances hereinafter mentioned, was the owner and
19 proprietor of a certain railway, known as and called the Railway of the Valley Division of the Baltimore and Ohio Railroad Company, running through and operated in and doing business in the counties of Frederick, Shenandoah, Rockingham and Augusta, in the State of Virginia, and in the State of West Virginia, and was the owner and proprietor of certain other railways connected therewith as hereinafter stated, and of certain steam engines, cars, and carriages used by the said defendant in, upon, and along said railway in the transaction of the said business of defendant, and the operation of the same for the transportation and conveyance of passengers and their baggage upon and along said railway, from a certain place, to wit, the city of Staunton, in Augusta County, State of Virginia, aforesaid, to the town and station of Harper's Ferry, in West Virginia, and from and to all the intermediate stations between said city of Staunton and town and station of Harper's Ferr .

That thereupon plaintiff's intestate, heretofore in his lifetime, to wit, on the 6th day of March, 1876, at the request of the said defendant, became and was a passenger in one of the said carriages of said defendant, to be by the said defendant safely and securely carried thereon and thereby in a certain journey along said railway, to wit, from the town and station of Mt. Jackson, in said county of Shenandoah, and State of Virginia, a station on the line of the said railway, known as the
20 Valley Division of the Baltimore & Ohio Railroad Company, as aforesaid, to Washington City, District of Columbia; that the said defendant then, to wit, on the 6th day of March, 1876, at the said town and station of Mt. Jackson, received the said plaintiff's intestate as such passenger aforesaid from said town and station to said station of Washington City, District of Columbia, and thereupon it became and was the duty of the said defendant to use all due and proper care that the said plaintiff's intestate should be safely and securely carried and

conveyed by said defendant by, upon, and along said railway as aforesaid from the said town and station of Mt. Jackson, aforesaid, in said county of Shenandoah, and State of Virginia, to said Washington City, District of Columbia; but the said plaintiff says and avers that the said defendant did not use due care in that behalf, and that by reason of the negligence, default, and wrongful act of the said defendant the said Reuben E. Hamman, the plaintiff's intestate, while being so carried upon said railway, was so greatly wounded and injured, to wit, at the county of Shenandoah, State of Virginia, aforesaid, to wit, on the 6th day of March, 1876, that he then and there, to wit, at the time and place last aforesaid died, and that the death of the said Reuben E. Hamman was caused by said wrongful act, neglect, and default of the
21 said railroad company, as aforesaid; whereupon the said plaintiff, administrator as aforesaid of said Reuben E. Hamman, says that he is entitled to recover damages against the said defendant to the amount of ten thousand dollars, under and by virtue of the laws of the State of Virginia for such cases made and provided, and therefore he brings suit; and

SECOND COUNT.—For this, that the defendant before and at the time of the committing of the grievances hereinafter mentioned was the owner and proprietor of a certain railway, known as and called the railway of the Valley Division of the Baltimore and Ohio Railroad Company, running through and operated in and doing business in the counties of Frederick, Shenandoah, Rockingham, and Augusta, in the State of Virginia, and in the State of West Virginia, and was the owner and proprietor of certain other railways connected therewith, as hereinafter stated, and of certain steam engines, cars, and carriages used by the said defendant in, upon, and along said railway in the transaction of the said business of defendant, and the operation of the same for the transportation and conveyance of passengers and their baggage upon and along said railway from a certain place, to wit, the city of Staunton, in Augusta County, State of Virginia aforesaid, to the town
22 and station of Harper's Ferry, in West Virginia, and from and to all the intermediate stations between the city of Staunton and town and station of Harper's Ferry.

That therefore pl'ff's intestate heretofore in his lifetime, to wit, on the 6th day of March, 1876, at the request of the said defendant, became and was a passenger in one of the said carriages of said defendant, to be by the said defendant safely and securely carried thereon and thereby in a certain journey along said railway, to wit, from the town and station of Mt. Jackson, in said county of Shenandoah, and State of Virginia, a station on the line of said railway, known as the Valley Division of the Baltimore & Ohio Railroad Company, as aforesaid, to Washington City, District of Columbia; that the said defendant then, to wit, on the 6th day of March, 1876, at the said town and station of Mt. Jackson, received the said plaintiff's intestate as such passenger aforesaid from said town and station to said station of Washington City, District of Columbia, and thereupon it became and was the duty of the said defendant to have and use good and safe engines, cars, and carriages for the conveyance of passengers, to have the same well and carefully managed, and a good and safe track and bridges upon said road upon which to run and operate said engines, cars, and carriages for the convey-
23 ance of passengers, and to use due and proper care that the plaintiff would be safely and securely carried and conveyed by the said defendant by, upon, and along said railway, as aforesaid, from the said town and station of Mt. Jackson, in Shenandoah County, State of Virginia,

aforesaid, on the line of the said railway, to the said Washington City, District of Columbia; but the defendant did not have good and safe engines, cars, and carriages for the conveyance of passengers, and have the same well and carefully managed, and a good and safe track and bridges upon said road, upon which to run and operate said engines, cars, and carriages for the conveyance of passengers; did not use due and proper care that plaintiff should be safely and securely carried and conveyed by the said defendant upon and along said railway, as aforesaid, from said town and station of Mt. Jackson, in said county of Shenandoah, State of Virginia, to said Washington City, District of Columbia, but on the contrary thereof had and then ran engines, cars, and carriages that were not good and safe, and upon and over a track and bridges of said railway that were not good and safe, and run said engine, cars, and carriages so negligently, carelessly, wilfully, and recklessly upon said track and bridges, upon said railway so defective and unsafe, as aforesaid, from said town and station of Mt. Jackson aforesaid, upon the line of said road, to Washington City, District of Columbia, that a
24 certain bridge thereon and over which the said track and the and the said engines, cars and carriages of said road run, called and known as the Narrow Passage bridge, constructed over a stream called or known as Narrow Passage Creek, in said county of Shenandoah aforesaid, that by reason of the wrongful act, neglect, and default of said defendant, broke and fell down while the said engine, cars and carriages thereto attached, in and upon which the said plaintiff's intestate was riding as a passenger, as aforesaid, were passing upon and over the same, whereby and by reason whereof the said engine, cars, and carriages thereto attached, as aforesaid, were precipitated and fell with great force and violence a great distance, to wit, 114 feet, and were thereby greatly wrecked and damaged, and the plaintiff's intestate greatly hurt, injured, maimed, disfigured, and wounded in his limbs and body, by reason whereof the said plaintiff's intestate suffered greatly, and finally died, and that the death of the said Reuben E. Hamman was caused by said wrongful act, neglect, and default of the said railroad company, as aforesaid; whereupon said plaintiff, administrator as aforesaid of Reuben E. Hamman, dec'd, says that he is entitled to recover damages against the said defendant to the amount of $10,000, under and by virtue of the laws of the State of Virginia for such cases made and provided, and therefore he brings suit, &c.

3RD COUNT.—Same as the first count, except that the words "a corporation doing business in the State of Virginia," omitted, and
25 the following words substituted therefor, to wit, a corporation of the State of Virginia.

4TH COUNT.—Same as second count, except the addition of the words as added in the third count.

And the defendant not appearing, on the motion of plaintiff, by his attorneys, it was ordered that judgment be entered for the plaintiff against the defendant for what damages the plaintiff ought to recover.

And at rules held in said office on the first Monday in August, 1876, the defendant still failing to appear, on the motion of the plaintiff, by his attorneys, it is ordered that the conditional judgment entered in this action at the last rules stand confirmed, and that the plaintiff's damages be ascertained by a jury at the next term.

At a circuit court continued and held for the county of Shenandoah on Saturday, September 2, 1876:

MONROE FUNKHOUSER, ADM'R OF R. E. HAMMAN, dec'd, pl'ff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, DEF'T. } In case.

The def't, by its counsel, moved the court to remove this cause to the circuit court of the United States for the western district of Virginia, upon the ground that the defendant is a corporation under the laws of the State of Maryland.

Petition for removal.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

26 To the honorable the circuit court of Shenandoah County, State of Virginia:

The petition of Baltimore & Ohio Railroad Company, of the State of Maryland, respectfully shows that your petitioner is the defendant in this suit, and that the same was brought by Monroe Funkhouser, adm'r of Reuben E. Hamman, dec'd, plaintiff, on or about the 6th day of June, 1876, in the circuit court of Shenandoah County, Virginia (the said county being in the 18th judicial circuit of said State); that the said plaintiff is now, and was at the time of bringing of this suit, a citizen of the State of Virginia, and that your petitioner is now and was at the time of the bringing of this suit a corporation duly incorporated under and by virtue of the laws of the State of Maryland, and as such corporation is now, and was at the time of the bringing of said suit, a citizen of said State of Maryland.

And your petitioner further represents that this suit is brought to recover damages in the sum of ten thousand dollars by said pl'ff against the defendant for the alleged killing of his intestate whilst being carried as a passenger by the said defendant from said county to the , and that the amount in controversy and dispute exceeds the sum of five hundred dollars, exclusive of costs.

Petitioner further avers that this, the August term, 1876, of this said circuit court of Shenandoah County is the first term of this court at which this said cause could be tried, if, indeed, it can be tried at
27 this term of said court. And your petitioner is ready now to give such good and sufficient surety as this court may require for its doing all acts required to be done by the provisions of the acts of Congress in such cases made and provided, and hereby offers its bond with good and approved security in the penal sum of two hundred and fifty dollars, conditioned according to law, upon application for removal of causes to the next circuit court of the United States, which said bond your petitioner prays may be accepted as good and sufficient.

And your petitioner therefore prays that this cause may be removed to the circuit court of the United States for the western district of Virginia, held at Harrisonburg, pursuant to the statute of the United States in such cases made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, &c.

BALTIMORE & OHIO RAILROAD COMPANY,
By WILLIAMS & BRO.,
Its Att'ys.

Bond executed by the Baltimore & Ohio Railroad Company by Jno. King, jr., its vice president, with W. J. Williams, Jas. H. Williams, and J. P. Nelson as its securities, in the penalty of two hundred and fifty dollars, conditioned according to law.

And at a circuit court continued and held for the county of Shenandoah, on Saturday, September 9, 1876.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def't.

28 The motion of the defendant for a removal to the circuit court of the United States for the western district of Virginia, held at Harrisonburg, Virginia, made at a former day of this term, came on to be heard this 9th day of September, 1876, upon the petition of said defendant, then filed, together with the bond of said defendant, with approved security in the penalty of two hundred and fifty dollars (the amount fixed by the court, acknowledged before and accepted by the court, at the time said petition was filed), to wit: On the 2nd of September, 1876, the answer of the plaintiff to said petition admitting the fact that the said defendant was a corporation duly incorporated under and by virtue of the laws of the State of Maryland, but averring that it was also a corporation of the State of Virginia, duly incorporated under and by virtue of the laws of said State of Virginia, and was at the time of the institution of said suit, and is now, lessee of that part of the Washington City, Virginia Midland and Great Southern Railroad from the town of Strasburg, in Shenandoah County, to Harrisonburg, in Rockingham County, Virginia, and replication thereto, and the evidence offered by said defendant, and by said court admitted, and after argument by counsel, the court overruled said motion, and refused to grant said removal as prayed for, and to said ruling of the court in refusing to grant said removal the defendant, by its counsel, excepted and
29 tendered a bill of exceptions, which, as prayed by the defendant, was signed, sealed, enrolled, and made part of the record, and which is in the words and figures following, to wit:

Defendant's bill of exceptions, No. 1.

MONROE FUNKHOUSER, ADM'R OF R. E. HAMman, dec'd, pl'ff,
vs.
THE BALTIMORE & OHIO RAILROAD COMpany, def't.
} On a motion for removal.

Be it remembered that the defendant, in support of its motion for the removal of this suit to the circuit court of the United States for the western district of Virginia, made in pursuance of a formal petition filed in this suit by the Baltimore & Ohio Railroad Company, claiming to be a citizen of the State of Maryland, against the plaintiff, Monroe Funkhouser, adm'r of R. E. Hamman, dec'd. who is and whose intestate was a citizen of Shenandoah County, in the State of Virginia, said petition being accompanied by a bond, as required by law, duly executed and acknowledged and accepted by the court, offered in evidence the charter of incorporation of the said Baltimore & Ohio Railroad Com-

pany, being an act of the legislature of the State of Maryland, which appeared in the public laws of said State of Maryland, and which was read to the court without objection or exception, and which is in the words and figures following, to wit:

AN ACT to incorporate the Baltimore & Ohio Railroad Company, passed February 28th, 1827.

30 SECTION 1. Be it enacted by the general assembly of Maryland, That Isaac McKim, Thomas Ellicott, Joseph W. Patterson, John McKim, jr., Wm. Stewart, Talbot Jones, Roswell L. Colt, George Brown, and Evan Thomas be, and they are hereby, appointed commissioners, under the direction of a majority of whom subscription may be received to the capital stock of the Baltimore & Ohio Railroad Company, hereby incorporated, and they, or a majority of them, may cause books to be opened at such times and places as they may direct for the purpose of receiving subscriptions to the capital stock of said company, after having given such notice of the times and places of opening the same as they may deem proper; and that upon the first opening of said books they shall be kept open for at least ten successive days, from 10 o'clock a. m. until 2 o'clock p. m., and if at the expiration of that period such a subscription to the capital stock of said company as is necessary to its incorporation shall not have been obtained, the said commissioners, or a majority of them, may cause the said books to be opened from time to time after the expiration of the said ten days for the space of twelve months thereafter, or until the sum necessary to the incorporation of the company shall be subscribed, if sooner subscribed; and if any of the said commissioners shall die, resign, or refuse to act during the continuance of the duties devolved upon them by this act, another may be appointed in his stead by the remaining commissioners,
31 or a majority of them.

SECTION 2. And be it enacted, That the capital stock of the said Baltimore & Ohio Railroad Company shall be three millions of dollars, in shares of one hundred dollars each, of which ten thousand shares shall be reserved for subscription by the State of Maryland, and five thousand for the city of Baltimore, for the space of twelve months after the passage of this act by the legislature of Maryland, and the remaining fifteen thousand shares may be subscribed for by any other corporation or by individuals; and that as soon as ten thousand shares of the said capital stock shall be subscribed, the said subscribers of the said stock, their successors, and assigns, shall be and are hereby declared to be incorporated into a company by the name of the Baltimore & Ohio Railroad Company, and by that name shall be capable in law of purchasing, holding, selling, leasing, and conveying estates, real, personal, and mixed, so far as shall be necessary for the purposes hereinafter mentioned, and no further, and shall have perpetual succession, and by said corporate name may sue and be sued, and may have and use a common seal, which they shall have power to alter or renew at their pleasure, and shall have, enjoy, and may exercise all the powers, rights, and privileges which other corporate bodies may lawfully do for the purposes mentioned in this act.

32 SECTION 3. And be it enacted, That if more than fifteen thousand shares shall be subscribed to the capital stock of said company, not reserved to the State of Maryland or the city of Baltimore, the said commissioners, or a majority of them, shall reduce the subscription to fifteen thousand shares, by striking off from the largest number of

shares in succession, until the subscriptions are reduced to fifteen thousand shares, or all the subsciptions to one share, and if there be still an excess, then lots shall be drawn by the commissioners to determine who are to be excluded.

SECTION 4. And be it enacted, That upon every such subscription there shall be paid, at the time of subscribing, to the said commissioners, or to their agents, appointed to receive such subscriptions, the sum of one dollar on every share subscribed, and the residue thereof shall be paid in such instalments and at such times as it may be required by the president and directors of said company, provided that not more than one-third of the subscription be demanded in any one year from the commencement of the work, nor any payment demanded until at least sixty days' public notice of such demand shall have been given by the said president and directors; and if any subscriber shall fail or neglect to pay any instalment or part of said subscription thus demanded
33 for the space of sixty days next after the time the same shall be due and payable, the stock on which it is demanded shall be forfeited to the company, and may be sold by the said president and directors for the benefit of the company; but the president and directors may remit any such forfeiture on such terms as they shall deem proper.

SECTION 5. And be it enacted, That if the subscription herein made necessary to the incorporation of the said company shall not be obtained within twelve months after the first opening of the subscription books by the said commissioners, this act and all the subscriptions under it shall be null and void; and the said commissioners, after discharging the expenses of opening the books, shall return the residue of the money paid in upon such subscriptions to the several subscribers in proper proportions to the sums respectively paid in by them.

SECTION 6. And be it enacted, That at the expiration of the ten days for which the books are first opened, if ten thousand shares of said capital stock shall have been subscribed, or, if not, as soon thereafter as the same shall be subscribed, if within one year after the first opening of the books, the said commissioners, or a majority of them, shall call a general meeting of the subscribers, at such time and place as they may appoint, and shall give at least twenty days' public notice
34 thereof, and at such meeting the said commissioners shall lay the subscription books before the subscribers then and there present, and thereupon the said subscribers, or a majority of them, shall elect twelve directors by ballot to manage the affairs of said company; and these twelve directors, or a majority of them, shall have the power of electing a president of said company, either from amongst the directors or others, and of allowing him such compensation for his services as they may deem proper; and that in said election, and on all other occasions wherein a vote of the stockholders of said company is to be taken, each stockholder shall be allowed one vote for every share owned by it, him, or her; and every stockholder may depute any other person to vote and act for it, him, or her, as its, his, or her proxy; and the commissioners aforesaid, or any three or more of them, shall be judges of the said first election of directors.

SECTION 7. And be it enacted, That, to continue the succession of the president and directors of said company, twelve directors shall be chosen annually, on the second Monday of October in every year, in the city of Baltimore, by the stockholders of said company, and that the State of Maryland and the city of Baltimore may each appoint one additional director of said company for every twenty-five hundred shares of stock of said company by them respectively owned at the time

of such election, but shall not be permitted to vote upon their stock in the election of the directors by the stockholders in general meeting; and that the directors of said company, or a majority of them, shall have power to appoint judges of all elections, and to elect a president of said company, either from amongst the directors or others, and to allow him such compensation for his services as they may deem proper; and if any vacancy shall occur by death, resignation, or refusal to act, of any president or director, before the year for which he was elected has expired, a person to fill such vacant place for the residue of the year may be appointed by the president and directors of said company, or a majority of them; and that the president and directors of the company shall hold and exercise their offices until a new election of president and directors; and that all elections which are by this act or the by-laws of said company to be made on a particular day, or at a particular time, if not made on such day or at such time, may be made at any time within thirty days thereafter.

SECTION 8. And be it enacted, That a general meeting of the stockholders of said company shall be held annually, at the time and place appointed for the election of the president and directors of said company; that they may be called at any time during the interval between said annual meetings by the president and directors, or a majority of them, or by the stockholders owning at least one-fourth of the whole stock subscribed, upon giving thirty days' public notice of the time and place of holding the same; and when any such meetings are called by the stockholders, such notice shall specify the particular object of the call; and if at any such called meetings a majority (in value) of the stockholders of said company are not present, in person or by proxy, such meetings shall be adjourned from day to day without transacting any business for any time not exceeding three days, and if within said three days stockholders having a majority (in value) of the stock subscribed do not thus attend, such meeting shall be dissolved.

SECTION 9. And be it enacted, That at a regular annual meeting of the stockholders of said company it shall be the duty of the president and directors in office for the preceding year to exhibit a clear and distinct statement of the affairs of the company; that at any called meeting of the stockholders a majority of those present may require similar statements from the president and directors, whose duty it shall be to furnish them when thus required; and that at all general meetings of the stockholders a majority (in value) of all the stockholders in said company may remove from office any president or any of the directors of said company and may appoint others in their stead.

SECTION 10. And be it enacted, That every president and director of said company, before he acts as such, shall swear or affirm, as the case may be, that he will well and truly discharge the duties of his said office to the best of his skill and judgment.

SECTION 11. And be it enacted, That if any of the said fifteen thousand shares of the capital stock of the said company, not reserved to the city of Baltimore or to the State of Maryland, shall remain unsubscribed until the organization of the said company; or if the shares of said capital stock hereinbefore reserved to the said State or city, or any part of them, shall not be subscribed by said State or city, respectively, during the time for which said stock is reserved for them, in either case, the president and directors of the said company, or a majority of them, shall have the power to open books, and to receive subscriptions to any of the capital stock of said company, which may thus

remain unsubscribed for, or sell or dispose of any such unsubscribed stock, for the benefit of the company, for any sum not under its par value; and the purchasers and subscribers of such stock shall have all the rights, privileges, and powers of original subscribers, and shall be subject to the same regulations.

SECTION 12. And be it enacted, That the said president and directors, or a majority of them, may appoint all such officers, engineers, agents or servants whatsoever, as they may deem necessary for the transaction of the business of the company, and may remove any of them at their pleasure; that they, or a majority of them, shall have power to determine, by contract, the compensation of of all the engineers, officers, agents or servants in the employ of said company, and to determine by their by-laws, the manner of adjusting and settling all accounts against the company, and also the manner and evidence of transfers of stock in said company; and that they, or a majority of them, shall have power to pass all by-laws which they may deem necessary or proper for exercising all the powers vested in the company hereby incorporated, and for carrying the objects of this act into effect: Provided only, that such by-laws shall not be contrary to the laws of the United States, or the laws of any of the States, assenting to this act, or any of the provisions of this act.

SECTION 13. And be it enacted, that if the capital stock of said company shall be deemed insufficient for the purpose of this act, it shall and may be lawful for the president and directors of said company, or a majority of them, from time to time, to increase the said capital stock, by the addition of as many shares as they may deem necessary, for which they may, at their option, cause subscriptions to be received in the manner prescribed by them, or may sell the same for the benefit of the company, for any sum not under their par value; and that they or a majority of them, shall have power to borrow money for the objects of this act, to issue certificates or other evidence of such loans, and to pledge the property of the company for the payment of the same and its interest.

SECTION 14. And be it enacted, That the president and directors of said company shall be, and they are hereby invested with all the rights and powers necessary to the construction and repair of a railroad from the city of Baltimore to some suitable point on the Ohio River, to be by them determined, not exceeding sixty-six feet wide, with as many sets of tracks as the said president and directors, or a majority of them, deem necessary; and they, or a majority of them, may cause to be made, or contract with others for making, said railroad, or any part of it; and they, their agents, or those with whom they may contract for making any part of the same, or their agents, may enter upon and use, and excavate any land which may be wanted for the site of said road, or the erection of warehouses or other works necessary to said road, or for any other purpose necessary or useful in the construction or repair of said road or its works; and that they may build bridges, may fix scales and weights, may lay rails, may take and use any earth, timber, gravel, stone or other materials which may be wanted for the construction or repair of any part of said road, or any of its works; and may make and construct all works whatsoever which may be necessary and expedient, in order to the proper completion of said road; and that they, or a majority of them, may make, or cause to be made, lateral railroads, in any direction whatsoever, in connection with said railroad, from the city of Baltimore to the Ohio River; and in the construction of the same or their works, shall have, possess, and may exercise all the

rights and powers hereby given to them in order to the construction or repair of the said road from the city of Baltimore to the Ohio River.

SECTION 15. And be it enacted, That the president and directors of said company, or a majority of them, or any person or persons authorized by a majority of them, may agree with the owner or owners of any land, earth, timber, gravel, stone or other materials, or any improvements which may be wanted for the construction or repair of any of said roads, or any of their works, for the purchase or use and occupation of the same; and if they cannot agree, or if the owner or owners, or any of them be a feme-covert, under age, non compos mentis, or out of the county in which the property wanted may lie, when such land or materials shall be wanted, application may be made to any justice of the peace of such county who shall thereupon issue his warrant under hand and seal, directed to the sheriff of said county, directing him to summon a jury of twenty inhabitants of said county, not related, nor in anywise interested, to meet on the land, or near to the other property or materials to be valued, on a day named in said warrant, not less than ten nor more than twenty days after the issuing of the same; and if at said time and place any of said jurors summoned do not attend, the same sheriff shall immediately summon as many jurors as may
41 be necessary with the jurors in attendance to furnish a panel of twenty jurors in attendance, and from them each party, or its, his, her, or their agent, if either be not present in person or by agent, the sheriff for him, her, it, or them, may strike off four jurors, and the remaining twelve shall act as the jury of inquest of damages; and before they act as such the said sheriff shall administer to each of them an oath or affirmation, as the case may be, that he "will justly and impartially value the damages which the owner or owners will sustain by the use or occupation of the same, required by the company;" and the jury, in estimating such damages, shall take into the estimate the benefit resulting to the said owner or owners from conducting such railroad through, along, or near to the property of said owner or owners, but only in extinguishment of the claim for damages; and the said jury shall reduce their inquisition to writing and shall sign and seal the same, and it shall then be returned by said sheriff to the clerk or prothonotary of his county, as the case may be, and by such clerk or prothonotary filed in his court, and shall be confirmed by said court at its next session, if no sufficient cause to the contrary be shown; and when confirmed shall be recorded by said clerk or prothonotary at the expense of said company; but if set aside the said court may direct another inquisition to be taken in the manner above prescribed; and such inquisition shall describe the property taken, or the bounds of the land
42 condemned, and the quantity or duration of the interest in the same, valued for the company, and such valuation, when paid or tendered to the owner or owners of said property, or his, her, or their legal representatives, shall entitle the said company to the estate and interest in the same thus valued, as fully as if it had been conveyed by the owner or owners of the same; and the valuation, if not received when tendered, may at any time thereafter be received from the company, without costs, by the said owner or owners, his, her, or their legal representative or representatives.

SECTION 16. And be it enacted, That wherever in the construction of the said road or roads it shall be necessary to cross or intersect any established road or way it shall be the duty of the president and directors of said company so to construct the said road across such estab.

lished road or way as not to impede the passage or transportation of persons or property along the same; or where it shall be necessary to pass through the land of any individual it shall also be their duty to provide for such individual proper wagon ways across said road or roads from one part of his land to the other.

SECTION 17. And be it enacted, That whensoever it shall be necessary for said company to have, use, or occupy any lands, materials, or other property, in order to the construction or repair of any part of said road or roads, or their works or necessary buildings, the president and directors of said company, or their agents, or those contracting
43 with them for making or repairing the same, may immediately take and use the same, they having first caused the property wanted to be viewed by a jury (formed in the manner hereinbefore prescribed in those cases where the property is to be changed or altered by admixture with other substances before such alteration is made), and that it shall not be necessary after such view, in order to the use or occupation of the same, to wait the issue of the proceedings upon such view; and the inquest of the jury, after confirmation and after payment or tender of the valuation, shall be a bar to all actions for taking or using such property, whether commenced before or after such confirmation or the payment of said valuation.

SECTION 18. And be it enacted, That the said president and directors, or a majority of them, shall have power to purchase with the funds of said company, and place on any railroad constructed by them under this act, all machines, wagons, vehicles, or carriages of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and they shall have power to charge for tolls upon (and the transportation of persons) goods, produce, merchandise, or property of any kind whatsoever, transported by them along said railway, from the city of Baltimore to the Ohio River, any sum not exceeding the following rates, viz: on all goods, produce, merchandise, or property of any description whatsoever transported by them from west to east, not exceeding one cent a ton per mile for
44 toll, and three cents a ton per mile for transportation; on all goods, produce, merchandise, or property of any description whatsoever transported by them from east to west, not exceeding three cents a ton per mile for tolls, and three cents a ton per mile for transportation; and for the transportation of passengers, not exceeding three cents per mile for each passenger; and it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of said roads of said company, or to transport persons, merchandise, produce, or property of any description whatsoever along said roads, or any of them, without the license or permission of the president and directors of said company, and that the said road or roads, with all their works, improvements, and profits, and all the machinery of transportation used on said road, are hereby vested in the said company incorporated by this act, and their successors, forever; and the shares of the capital stock of said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the States assenting to this law.

SECTION 19. And be it enacted, That the said president and directors shall annually or semi-annually declare and make such dividend as they may deem proper of the net profits arising from the resources of the said company, after deducting the necessary current and probable contingent expenses, and that they shall divide the same amongst the proprietors of the stock of said company, in proper proportion to their respective shares.

45 SECTION 20. And be it enacted, That if any person or persons shall willfully, by any means whatsoever, injure, impair, or destroy any part of any railroad constructed by said company under this act, or any of their necessary works, buildings, carriages, vehicles, or machines of said company, such person or persons so offending shall each of them, for every such offence, forfeit and pay to the said company the sum of five hundred dollars, which may be recovered in the name of said company by an action of debt, in the county court of the county wherein the offence shall be committed, and shall also be subject to indictment in said court, and upon conviction of such offence, shall be punished by fine and imprisonment in the discretion of the court.

SECTION 21. And be it enacted, That as soon as this act shall have been passed by the legislature of Maryland, books may be opened, subscriptions received, and the said company organized, and that when organized the said company and the president and directors of the same shall have all the powers, rights, and privileges granted by this act, and shall be subject to all its regulations in constructing or repairing any of the said railroads or other necessary works or buildings which may or can be constructed within the limits of the State of Maryland, and in transporting persons, goods, merchandise or property of any description, along any of said roads, and that the provisions of this act shall be wholly
46 in force as to all the property of the company which may be situated or may be within the State of Maryland, and which said company is permitted to hold under this act.

SECTION 22. And be it enacted, That if said road shall not be commenced in two years from the passage of this act, and shall not be finished within this State in ten years from the time of the commencement thereof, then this act shall be null and void.

SECTION 23. And be it enacted, That full right and privilege is hereby reserved to the citizens of this State, or any company hereinafter incorporated under the authority of this State, to connect with the road hereby provided for, any other railroad leading from the main route, to any part or parts of this State, provided that in forming such connection no injury shall be done to the works of the company hereby incorporated.

And the plaintiff also admitting that the said defendant was duly incorporated by and under the laws of the said State of Maryland, but proved that the defendant was at the time of the institution of this suit, and is now lessee of the Washington City, Virginia Midland and Great Southern Railroad Company, from the town of Strasburg, in the county of Shenandoah, to the town of Harrisonburg, in the county of
47 Rockingham, both in the State of Virginia, and was using, managing, operating, and controlling the same, as set forth in the plaintiff's declaration, along said line and in said county of Shenandoah, in the State of Virginia, where said cause of action arose.

And the plaintiff further answers that the defendant was a corporation of the State of Virginia, by virtue of an act of the legislature of said State, of date the 8th day of March, 1827, which was offered in evidence and read to the court without objection, in the following words and figures, to wit:

An act passed M'ch 8, 1827, by the legislature of Virginia. "Whereas an act has passed the legislature of Maryland, entitled 'An act to incorporate the Baltimore & Ohio Railroad Company,' in the following words and figures, viz:

(See act.)

Therefore be it enacted by the general assembly, That the same rights and privileges shall be, and are hereby granted to the aforesaid company within the territory of Virginia, as are granted to them within the territory of Maryland. The said company shall be subject to the same pains, penalties, and obligations as are imposed by said act, and the same rights, privileges, and immunities which are reserved to the State of Maryland or to the citizens thereof are hereby reserved to the State of Virginia and her citizens, except that the said company shall not make, or authorize to be made, any lateral road or roads within the territory of Virginia, without the consent of this legislature; that

48 the said road shall not strike the Ohio River at a point lower than the mouth of the Little Kanawha, on said river; that the words "or other property," in the seventeenth section of the above recited act, shall in no case be construed to extend to any property other than materials necessary for the construction or repair of said road, or other works or necessary buildings, and that in obtaining a right to any lands through which the contemplated railroad may be extended, or to any timber, gravel, stone or earth which shall be necessary to the construction or repair of said road, or other works or necessary buildings within this Commonwealth, the Baltimore & Ohio Railroad Company shall proceed in the same manner as is prescribed in the seventh, eighth, ninth, tenth, and twelfth sections of an act entitled "An act prescribing certain general regulations for the incorporation of turnpike companies," passed February the seventh, one thousand eight hundred and seventeen, except also that any injury which may at any time be done within the limits of Virginia, to the said road or other works or necessary buildings, shall at all times be punished according to the laws which may be in force in this Commonwealth for the protection of the public works of the Commonwealth of Virginia."

And also referred to and relied upon the following acts of the legislature of Virginia, relating to the Baltimore & Ohio Railroad Company, to wit:

1st. Act of February 13, '38, acts of 1838, ch. 158, p. 112.
2nd. " " March 19, '39, " " 1839, " 98, p. 66.
3rd. Act of March 19, '41, acts of 1841, ch. 87, p. 97.
4th. Act of Feb'y 25, '41. Acts of 1841, ch. 97, p. 107.

49 5th. " " Feb'y 19, '45. " " 1844–'5, ch. 88, p. 69.
6th. " " March 20, '48. " " 1847–'8, " 145, p. 179.

And this was all the evidence offered on said motion. And the court, upon consideration thereof, overruled said motion, and refused to move said suit; to which ruling of the court in refusing to remove this suit as aforesaid, and as asked for in said petition, the defendant excepted, and tendered its bill of exceptions, and prayed that the same be signed, sealed, and enrolled; which is done accordingly.

MARK BIRD. [SEAL.]

And at a circuit court continued and held for the county of Shenandoah, on Tuesday, December 19, 1876.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY. } In case.

On the motion of the defendant, by its attorneys, the office, judgment, and writ of enquiry entered against said defendant at rules are set aside; whereupon said defendant says that it is not guilty of the trespass as in the plaintiff's declaration is alleged, and of this it puts itself upon the country and the plaintiff likewise, and of this it puts itself upon the by counsel, demurred to the plaintiff's declaration; in which demurrer the plaintiff joined.

And on the further motion of defendant, by its attorneys, it has leave to plead specially within thirty days, and this cause is continued generally until the next term.

50 And at another day, to wit, at a circuit court continued and held for the county of Shenandoah, on Thursday, May 3rd, 1877.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def't. } Action of trespass on the case.

Upon the application of the plaintiff in this cause, leave is given him to file a bill or statement of particulars with his declaration, setting forth the names and ages of the wife and children of said Reuben E. Hamman, dec'd, who will be the beneficiaries of the recovery in the cause, if one should be had, within 30 days from the rising of the court, at this term, subject to objections at the next term, except upon the ground of time.

Statement of particulars.

REUBEN E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def'ts. } Trespass on the case.

Reuben Hamman, who died intestate, left as his heirs at law his wife, Ella V. Hamman, aged 33 years, and the following children, to wit, Effie Alice Hamman, aged 12 years; Clara R. Hamman, aged 9 years; Mary R. Hamman, aged 5 years; John R. T. Hamman, aged 3 years; and Reuben E. Hamman, aged 1 year, who claim as beneficiaries in said suit, and who, as his family, had received and had a right to expect maintenance and support from said decedent, and for whom, as beneficiaries aforesaid, the adm'r, the said Monroe Funkhouser, institutes the said suit.

51 And at a circuit court continued and held for the county of Shenandoah, on Monday, December 9th, 1878.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, DEF'T. } In case.

This day came again the parties by their attorneys, and the following were selected from the panel in the special jury in this case, viz: Sam'l

An act passed M'ch 8, 1827, by the legislature of Virginia. "Whereas an act has passed the legislature of Maryland, entitled 'An act to incorporate the Baltimore & Ohio Railroad Company, in the following words and figures, viz:

(See act.)

Therefore be it enacted by the general assembly, That the same rights and privileges shall be, and are hereby granted to the aforesaid company within the territory of Virginia, as are granted to them within the territory of Maryland. The said company shall be subject to the same pains, penalties, and obligations as are imposed by said act, and the same rights, privileges, and immunities which are reserved to the State of Maryland or to the citizens thereof are hereby reserved to the State of Virginia and her citizens, except that the said company shall not make, or authorize to be made, any lateral road or roads within the territory of Virginia, without the consent of this legislature; that
48 the said road shall not strike the Ohio River at a point lower than the mouth of the Little Kanawha, on said river; that the words "or other property," in the seventeenth section of the above recited act, shall in no case be construed to extend to any property other than materials necessary for the construction or repair of said road, or other works or necessary buildings, and that in obtaining a right to any lands through which the contemplated railroad may be extended, or to any timber, gravel, stone or earth which shall be necessary to the construction or repair of said road, or other works or necessary buildings within this Commonwealth, the Baltimore & Ohio Railroad Company shall proceed in the same manner as is prescribed in the seventh, eighth, ninth, tenth, and twelfth sections of an act entitled "An act prescribing certain general regulations for the incorporation of turnpike companies," passed February the seventh, one thousand eight hundred and seventeen, except also that any injury which may at any time be done within the limits of Virginia, to the said road or other works or necessary buildings, shall at all times be punished according to the laws which may be in force in this Commonwealth for the protection of the public works of the Commonwealth of Virginia."

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And this was all the evidence offered on said motion. And the court, upon consideration thereof, overruled said motion, and refused to move said suit; to which ruling of the court in refusing to remove this suit as aforesaid, and as asked for in said petition, the defendant excepted, and tendered its bill of exceptions, and prayed that the same be signed, sealed, and enrolled; which is done accordingly.

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And on the further motion of defendant, by its attorneys, it has leave to plead specially within thirty days, and this cause is continued generally until the next term.

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51 And at a circuit court continued and held for the county of Shenandoah, on Monday, December 9th, 1878.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, DEF'T. } In case.

This day came again the parties by their attorneys, and the following were selected from the panel in the special jury in this case, viz: Sam'l

C. Keister, Jos. T. Baker, Jno. M. Ryman, Jos. Hutchinson, Israel Wilkin, William Foltz, Benjamin F. Didawick, Wm. A. Spurrier, Jno. W. Lohr, Addison A. Ormdorff, Janna C. Clem, and Morgan F. Schmucker, to whom there was no exception, who were sworn well and truly to try the issue joined; and, being charged by the court, were adjourned until to-morrow morning at 9½ o'clock.

And the jury having been sworn on the 9th day of December, 1878, and having heard the evidence of witnesses on the 10th, 11th, 12th, 13th, 14th, 16th, 17th, 18th, 19th, 20th, 21st, 23rd, 24th, 26th, 27th, 28th, and 30th days of December, 1878, and the arguments of counsel on the 30th and 31st days of December, 1878, and 1st and 2nd days of January, 1879, and having considered of a verdict on the 3rd, 4th, and 6th days of January, 1879, at which last day, to wit:

At a circuit court continued and held for the county of Shenandoah, on Monday, January 6th, 1879.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, DEF'T. } In case.

52 The def't, upon the day the panel for the special jury was completed, and before the jury was sworn to try the issue in this cause, demurred to each count of the declaration, in which the plaintiff joined, whereupon the demurrer to the declaration and said demurrer to each count thereof were overruled, and the entry of the foregoing action of the court having inadvertently been omitted at the time said demurrers were overruled, the court doth order that the same be entered nunc pro tunc

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, DEF'T. } In case.

This day came again the parties by their attorneys, and the jury, adjourned over on yesterday, appeared in court pursuant to their adjournment, retired to their room to consider further of a verdict, and after some time, returned, having found the following verdict, to wit:

We, the jury, find for the plaintiff, upon the issue joined, and assess his damages at the sum of six thousand dollars.

JNO. M. RYMAN,
Foreman.

The court instructed the jury as follows:

For plaintiff:

1. When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption, prima facie, is that it occurred by the negligence of the railroad company, and the burden of proof is on the com-
53 pany to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

II. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case occasioning injury makes such carriers liable in damages under the statutes.

III. The Baltimore & Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Reuben E. Hamman upon his journey.

IV. The slightest neglect, against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, rendered said company liable in damages for said death.

V. Said railroad company is held by law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of its track and bridges, and all other arrangements necessary to the safety of passengers.

VI. Therefore, if the jury do not believe from the evidence that
54 such care, prudence, foresight, and skill was used by said company, in respect to the machinery of its cars, the structure, repair and care of its track and the bridge at Narrow Passage Creek, and all other arrangements necessary to the safety of passengers, and that in consequence of such negligence or default the accident occurred at said bridge, by which Reuben E. Hamman was killed, they should find for the plaintiff, and assess the damages for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damages not to exceed ten thousand ($10,000) dollars.

VII. In ascertaining such damages, the jury should fix the same with reference to the pecuniary loss sustained by the wife and children of said Reuben E. Hamman.

First. By fixing the same at such sum as would be equal to the probable earnings of said Hamman, taking into consideration the age, business habits, the health, industry, energy, and perseverance of the deceased, during what would probably have been his lifetime, if he had not been killed.

Second. Adding thereto the value of his services in the superintendance, attention to and care of his family, and the education of his children, of which they have been deprived by his death; and

Third. By adding such further sum as they may deem fair and just, by way of solace and comfort to his said wife and children, for the sorrow, suffering, and mental anguish occasioned to them by his death.

The court gives the following instructions for def't:

1st. A railroad company is not responsible for an injury caused
55 purely by accident, while engaged in the lawful prosecution of their business, even when the injury has the direct consequence of the act of the said company, and even when the party injured was free from fault.

2nd. The jury are instructed that the contract for the conveying of passengers is one neither of general nor limited warranty or insurance; but is an obligation undertaken by the carrier to take due care, including in that term the use of skill and foresight, to carry the passengers safely.

3rd. The law requires from railroad companies, as carriers of passen-

C. Keister, Jos. T. Baker, Jno. M. Ryman, Jos. Hutchinson, Israel Wilkin, William Foltz, Benjamin F. Didawick, Wm. A. Spurrier, Jno. W. Lohr, Addison A. Ormdorff, Janna C. Clem, and Morgan F. Schmucker, to whom there was no exception, who were sworn well and truly to try the issue joined; and, being charged by the court, were adjourned until to-morrow morning at 9½ o'clock.

And the jury having been sworn on the 9th day of December, 1878, and having heard the evidence of witnesses on the 10th, 11th, 12th, 13th, 14th, 16th, 17th, 18th, 19th, 20th, 21st, 23rd, 24th, 26th, 27th, 28th, and 30th days of December, 1878, and the arguments of counsel on the 30th and 31st days of December, 1878, and 1st and 2nd days of January, 1879, and having considered of a verdict on the 3rd, 4th, and 6th days of January, 1879, at which last day, to wit:

At a circuit court continued and held for the county of Shenandoah, on Monday, January 6th, 1879.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, DEF'T. } In case.

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The court instructed the jury as follows:

For plaintiff:

I. When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption, prima facie, is that it occurred by the negligence of the railroad company, and the burden of proof is on the com-
53 pany to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

II. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case occasioning injury makes such carriers liable in damages under the statutes.

III. The Baltimore & Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Reuben E. Hamman upon his journey.

IV. The slightest neglect, against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, rendered said company liable in damages for said death.

V. Said railroad company is held by law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of its track and bridges, and all other arrangements necessary to the safety of passengers.

VI. Therefore, if the jury do not believe from the evidence that
54 such care, prudence, foresight, and skill was used by said company, in respect to the machinery of its cars, the structure, repair and care of its track and the bridge at Narrow Passage Creek, and all other arrangements necessary to the safety of passengers, and that in consequence of such negligence or default the accident occurred at said bridge, by which Reuben E. Hamman was killed, they should find for the plaintiff, and assess the damages for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damages not to exceed ten thousand ($10,000) dollars.

VII. In ascertaining such damages, the jury should fix the same with reference to the pecuniary loss sustained by the wife and children of said Reuben E. Hamman.

First. By fixing the same at such sum as would be equal to the probable earnings of said Hamman, taking into consideration the age, business habits, the health, industry, energy, and perseverance of the deceased, during what would probably have been his lifetime, if he had not been killed.

Second. Adding thereto the value of his services in the superintendance, attention to and care of his family, and the education of his children, of which they have been deprived by his death; and

Third. By adding such further sum as they may deem fair and just, by way of solace and comfort to his said wife and children, for the sorrow, suffering, and mental anguish occasioned to them by his death.

The court gives the following instructions for def't:

1st. A railroad company is not responsible for an injury caused
55 purely by accident, while engaged in the lawful prosecution of their business, even when the injury has the direct consequence of the act of the said company, and even when the party injured was free from fault.

2nd. The jury are instructed that the contract for the conveying of passengers is one neither of general nor limited warranty or insurance; but is an obligation undertaken by the carrier to take due care, including in that term the use of skill and foresight, to carry the passengers safely.

3rd. The law requires from railroad companies, as carriers of passen-

gers, only such diligence and care as are required of individuals in conducting the same business.

4th. In absence of evidence to the contrary, the defendant and its agents and employees are presumed to have acted as prudent, competent, and honest persons under similar circumstances, and to have faithfully discharged their respective duties.

5th. The law does not require of railroad companies superhuman foresight, but only such diligence and care as is required of individuals engaged in the same business.

6th. Negligence is not actionable unless it be the proximate cause of the injury complained of, and hence, if the jury from the evidence shall believe that the defendant's bridge at the Narrow Passage Creek, by the breaking down of which the plaintiff's intestate was killed, as stated in the evidence, had in its timbers rotten or defective, if such fact be proved, yet if they shall further believe from the evidence that
56 the breaking of the bridge was not caused by the defectiveness or unsoundness of such timbers, but by something else as the proximate cause of such breaking, they cannot find for the plaintiff by reason of such fault or neglect of the defendant in respect to such timbers.

7th. If an accident occur from the breaking down or overturning of a railroad car, or the breaking down of a bridge, or wheel or axle, or by any other casualty occurring on the road, from which injury happens to a passenger, then whilst, without implication, the law presumes prima facie that there was negligence on the part of the railroad company, that presumption of negligence will be repelled by evidence to satisfy the jury that the road-bed or bridge was sufficiently strong and secure to convey the train on it, and that the machinery employed was in good order and was of the best kind manufactured and used by the most prudent and careful railroad men in the country, and that absolute perfection is not required in such structures or machinery, but only such as the skill and foresight of prudent men engaged in such business can attain.

8th. The plaintiff in this case having by evidence introduced by him undertaken not merely to prove that his intestate was killed by the disaster which occurred at the Narrow Passage Bridge on the 6th of March, 1876, but further to prove that such disaster was caused by rotten timbers in the defendant's bridge, by reason whereof said bridge gave way and was borne and crushed down by and under the
57 pressure and weight of defendant's engine, tender, and cars then upon the same; and the defendant, on its part, having by evidence introduced by it undertaken to prove that, altho' there were found in the wreck of said bridge timbers more or less rotten or decayed, the rot or decay in said timbers was not the proximate cause of the disaster, but that, without the fault or neglect of the defendant, said disaster was caused purely by an accident, the breaking of an axle, wheel wheel, or other part of the machinery, or otherwise, on the track, whereby said bridge was broken, torn down, and wrecked, the court instructs the jury that it will be their duty in the first place to determine and decide which of said alleged causes of disaster has been made out by the preponderance of evidence, and if upon such preponderance of evidence they believe that decay or rot in the timbers was not the proximate cause of the disaster, but that the same was caused by an accident as aforesaid without fault or neglect of the defendant in connection therewith, the jury must find for the defendant.

9th. That if the jury shall believe from the evidence that the defend-

ant, on the 6th day of March, 1876, was lawfully engaged in removing its trains through the county of Shenandoah, the Narrow Passage bridge, 465 feet long, constituting a part of its railroad track in said county; that on the night of the 6th day of March, 1876, a stock and freight train belonging to said defendant, consisting of engine, tender,
sixteen loaded freight cars, with a passenger car and caboose in
58 the rear, under the control, direction, and management of careful
and competent employees, was slowly and prudently run on and upon said bridge, and that the plaintiff's intestate was a passenger in said passenger car; that after the engine and a portion of the train had been run north of the south abutment, the train moving northwardly, passing at about 125 feet over the first or south pier and onward as far as the centre of the new pier, about 100 feet from said south pier; that the bridge structure between said pier was precipitated to the ground below, the lowest point being about 110 feet below the track, and that the engine, tender, and cars on said span, as well as the freight, passenger, and caboose cars in the rear, were in like manner precipitated into the chasm below, whereby said plaintiff's intestate was killed, as stated in the evidence; then, although the law presumes without explanation, prima facie, that the disaster resulted from the wrongful act, neglect, or default of the defendant; yet, if the jury shall further believe from the evidence, that the train was prudently run on and upon said bridge, by competent and reliable employees of the defendants, that the bridge itself was sufficiently strong to carry said train safely over it, the freight cars not being unduly or improperly loaded, and the engine being the same engine theretofore daily run over said bridge twice in each twenty-four hours, that the bridge was not crushed or borne
down or broken down by the weight of said engine and the cars
59 then upon it, or by reason of any mismanagement, carelessness,
or neglect of any employee of said train; and if the jury shall further believe from the evidence that said engine, tender, and cars, and the wheels, axles, and other machinery in and constituting part of said train were of the best materials and of the most approved manufacture, and as well fitted for such service as the best known skill, foresight, and care could provide for the purpose; and that said engine, tender, cars, wheels, axles, and other machinery were at the same time in good condition and order, and were prudently and properly managed and directed, and with the utmost care, foresight, and diligence of cautious persons engaged in the same business; and that said accident occurred from, and was caused by, the sudden and unexpected and unforeseen breaking of an axle, wheel, or other part of said machinery, whereby the track was displaced, torn up, and thereby the bridge was pulled down in the line and direction of the track, and that said accident could not have been prevented by the utmost care and diligence of cautious persons engaged in railroad transportation, then the jury must find for the defendant.

10th. In ascertaining whether the injury to the plaintiff's intestate, as stated in the evidence, resulted from the wrongful act, neglect, or default of the defendant, the jury is bound in the light of the evidence to consider the conduct of the defendant, its agents and employees, ac-
cording to the rules of conduct adopted by and acted on in such
60 cases by prudent, discreet, and cautious railroad companies,
agents, and employees; and if the jury, in view of the evidence in respect to the mode of running defendant's train on the 6th of March, 1876, when the plaintiff's intestate was killed, as stated in the evidence, on and upon the Narrow Passage Bridge, and in respect to the condi-

tion and order of the defendant's cars and engines at the time, the conduct of the defendant's agents and employees, the sufficiency of the track, superstructure, and its condition, and the capacity of the bridge structure and Bollman truss to carry over them in safety the engine and train of cars, and the condition of said engine, cars, and machinery, are satisfied that everything had been done and was done for the safety of the train and passengers which, in the experience of discreet, judicious, and cautious railway men and engineers have been found to be sufficient for safety, the jury cannot hold the defendant responsible for any unforeseen accident which could not under the circumstances have reasonably been prevented.

At a circuit court continued and held for the county of Shenandoah, on Tuesday, January 7, 1879.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, DEF'T. } In case.

61 The court certifies that during the trial of this cause, and after all the evidence had been introduced by the plaintiff and defendant before the jury, but before the commencement of the argument, the defendant, by its counsel, excepted to the ruling and action of the court in granting the instructions asked for by the plaintiff, as set forth in defendant's bill of exceptions No. 2.

Def't's bill of exceptions No. 2.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, DEF'T. } In case.

MEMORANDUM.—That upon the trial of this case, and after all the evidence for the plaintiff and for the defendant had been closed, the plaintiff moved the court to give to the jury instructions in the words following, to wit:

Plaintiff's instructions.

I. When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption, prima facie, is that it occurred by the negligence of the railroad company, and the burden of the proof is on the company to establish that there has been no negligence whatever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

II. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel, by satisfactory proofs, every imputation of such negligence.

62 When carriers undertake to carry passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence; any negligence or default in such case occasioning injury makes such carriers liable in damages under the statute.

III. The Baltimore & Ohio Railroad Company, as a common carrier of

passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Reuben E. Hamman upon his journey.

IV. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, render said company liable in damages for said death.

V. Said railroad company is held by law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of its track and bridges, and all other arrangements necessary to the safety of passengers.

VI. Therefore, if the jury do not believe from the evidence that such care, prudence, foresight, and skill was used by said company in respect to the machinery of its cars, the structure, repair, and care of its track and the bridge at Narrow Passage Creek, and all other arrangements necessary to the safety of passengers, and that in consequence of such negligence or default the accident occurred at said bridge, by which Reuben E. Hamman was killed, they should find for the plaintiff, and assess the damages for such killing at such sum as they may deem
fair and just under all the circumstances of the case, such dam-
63 ages not to exceed ten thousand ($10,000) dollars.

VII. In ascertaining such damages, the jury should fix the same with reference to the pecuniary loss sustained by the wife and children of said Reuben E. Hamman.

First. By fixing the same at such sum as would be equal to the probable earnings of said Hamman, taking into consideration the age, business habits, the health, industry, energy, and perseverance of the deceased during what would probably have been his lifetime, if he had not been killed.

Second. Adding thereto the value of his services in the superintend*ance*, attention to, and care of his family, and the education of his children, of which they have been deprived by his death; and

Third. By adding such further sum as they may deem fair and just by way of solace and comfort to his said wife and children, for the sorrow, suffering, and mental anguish occasioned to them by his death.

To the giving of which instructions and of each of them the defendant, by his counsel, objected, but the court overruled said objection, and gave said instructions to the jury as prayed for by the plaintiff. To which ruling and action of the court, the defendant, by counsel, excepted, and prayed that this its bill of exceptions be signed, sealed, and enrolled, and made *by* part of the record; which is here done accordingly, this 30th day of December, 1878.

MARK BIRD. [SEAL.]

And in refusing to grant a certain instruction asked for by the defendant as set forth in its bill of exceptions marked No. 3.

Def't's bill of exceptions No. 3.

64 R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, DE'FT. } In case.

That upon the trial of this case, and after all the evidence for the plaintiff and the defendant had been closed, and evidence having been introduced by the defendant tending to show that the defendant and its employees used the Narrow Passage Bridge with the belief and assurance that it was sufficient and secure, and without knowledge of any

latent defects thereon, and further to prove that said casualty occurred from an unforeseen and inevitable accident, arising from the breaking of an axle or other part of the machinery of the train on the bridge at the time it was wrecked, whereby said bridge was torn down and the plaintiff's intestate was killed, leaving a widow and children surviving him; and after giving of the plaintiff's instructions as set forth in the defendant's second bill of exceptions, the defendant moved the court to give to the jury the following instructions, to wit:

Def't's instruction H.

That if the jury shall find from the evidence reviewed in the light of the preceding instructions that the plaintiff is entitled to a verdict, they are instructed that in assessing any damages to the plaintiff, they are not to take into consideration the mental pain and suffering of the wife and children of the decedent, Reuben E. Hamman, arising from his death, or to add anything to said damage as solace to said wife and children, and the jury are not to give against the defendant,
65 punitive, vindictive, or exemplary damages, but in estimating the damages they are confined to the pecuniary damage sustained by said wife and children by reason of the death of the said Reuben E. Hamman, and are to give as damages only such sum as in view of all the circumstances of the case, with the instructions aforesaid, they may deem just and proper.

To the giving of which instruction the plaintiff by counsel objected, and the court sustaining said objection refused to give said instructions, to which ruling and action of the court the defendant by counsel excepted, and prayed that its bill of exceptions be signed, sealed, and enrolled as part of the record, which is here done accordingly.

DECR. 30th. 1878.

MARK BIRD. [SEAL.]

Which action and ruling of the court is ordered to be made part of the record.

At a circuit court continued and held for the county of Shenandoah, on Wednesday, January 8, 1879.

R. E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def't. } In case.

This day came again the parties by their attorneys, and it is considered by the court that the plaintiff recover against the defendant the sum of six thousand dollars with interest thereon, to be computed after the rate of six per centum per annum, from the 6th day of January, 1879, until paid, and the costs of plaintiff by him in this case expended.

66 At a circuit court continued and held for the county of Shenandoah on Tuesday, January 9th, 1879.

REUBEN E. HAMMAN'S ADM'R, PL'FF,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def't. } In case.

On the motion of the defendant, by its attorneys, it is ordered that the

execution of the judgment in this cause be suspended for sixty days from this day, upon the execution of said defendant, before the clerk of this court, of a bond in a penalty of $500, with conditions reciting said judgment, and the intention of said defendant to present a petition for a supersedeas to said judgment, and providing for the payment of all such damages as any person may sustain by reason of the said suspension in case a supersedeas to such judgment should not be allowed and be effectual in the time above specified.

STATE OF VIRGINIA,
County of Shenandoah, to wit:

I, Geo. W. Miley, clerk of the circuit court of Shenandoah County, in the State of Virginia, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings of the cause therein named as the same appears on file and record in my said office.

Given under my hand this 6th day of Febrnary, 1879.

GEO. W. MILEY, *Clerk.*

Cl'k, for transcript of record and suspending bond, $15.75.

A true copy.

JOS. A. WADDELL,
Clerk of S. C. of A. at Staunton.

67 *Opinion of the court by Christian, J.*

BALTIMORE AND OHIO R. R. CO.
vs.
HAMMAN'S ADM'R.

This is a writ of error to a judgment of the circuit court of Shenandoah County.

The defendant in error recovered judgment against the Baltimore and Ohio R. R. Co. for the sum of $6,000 damages assessed by the jury in favor of the administrator of the deceased, who was killed by the accident known as the "Narrow Passage disaster." The circuit court entered its judgment in accordance with the verdict of the jury. The court is of opinion that there is no error in said judgment.

The evidence in this case and the instructions asked on both sides are precisely the same as the evidence and instructions contained in the record in the case of the Baltimore and Ohio R. R. Co. vs. Noel's adm'r, and indeed the two cases are precisely alike, both upon the facts certified and the instructions given by the court.

68 It is not necessary to repeat here the reasons of the court set forth at large upon a careful consideration upon the points raised in the case above referred to.

It is sufficient to say that upon the principles declared and the authorities cited in the case of the Baltimore and Ohio R. R. Co. vs. Noel's adm'r the judgment in the case before us is fully sustained.

The facts certified being the same and the instructions propounded in the court below by both plaintiff and defendant being substantially the same, all that was said in that case applies with full force to the case at bar and is conclusive of the same.

The court is therefore of opinion that there is no error in the judgment of the said circuit court and that the same be affirmed.

VIRGINIA:

At a supreme court of appeals held at the court-house of Augusta County, at Staunton, on Thursday, the 14th day of October, 1880.

THE BALTIMORE & OHIO RAILROAD COMPANY, pl'ff in error,
against
MONROE FUNKHOUSER, ADMINISTRATOR OF Reuben E. Hamman, dec'd, def't in error.

69 Upon a writ of error and supersedeas to a judgment of the circuit court of Shenandoah County, rendered on the 8th day of January, 1879, in an action at law then therein depending, in which the defendant in error was plaintiff and the plaintiff in error was defendant.

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said judgment. Therefore, it is considered that the same be affirmed, and that the defendant in error recover against the plaintiff in error damages according to law, and his costs by him in this behalf expended. Which is ordered to be certified to the said circuit court of Shenandoah County.

A copy—Teste:

JOS. A. WADDELL, *Clerk.*

The following is the opinion of the supreme court of appeals of Virginia, in the case of the Baltimore & Ohio Railroad Company vs. Noel's administrator, referred to in the opinion in this case:

CHRISTIAN, J.

This is a writ of error to a judgment of the circuit court of Shenandoah County.

70 The action was brought by the personal representative of Charles L. Noell, who was killed on the cars of the Baltimore and Ohio Railroad Company at Narrow Passage bridge, in the county of Shenandoah. There was a verdict and judgment for the plaintiff for the sum of $4,925, with interest from the date of the verdict, April 30th, 1878; and to this judgment a writ of error was awarded by one of the judges of this court.

Several specific grounds of error are alleged in the petition and relied upon in argument at the bar. Each will be duly considered, though not in the precise order presented in the petition.

The first question raised in the bills of exception filed is whether the circuit court erred in refusing to remove the case, on motion of the plaintiff in error, to the circuit court of the United States for the western district of Virginia. This question was determined by this court in the case of the Balt. & Ohio R. R. Co. v. Wightman's adm'r, 29 Gratt., 431. The plaintiff in error in that case was the same corporation against whom suit was brought and damages recovered in the case at bar. It was a suit, too, brought by the personal representative of a party killed at the same time and place at which the intestate of defendant in error was killed—both having lost their lives in the fearful calamity known as the "Narrow Passage bridge disaster."

In that case it was held that where a railroad company which was incorporated in another State leases a railroad lying in this State, and

operates the same as owner thereof, and an injury occurs on said
71 railroad, the person having the right of action for such injury may sue the railroad company in the courts of this State; and such company has no right to remove the suit to the federal court.

It was further held that, while the Baltimore and Ohio Railroad as a corporation of the State of Maryland could have no legal existence outside of that State, yet, as the lessee of a Virginia railroad company, exercising all the functions and powers of the latter, it may be subject to all its duties and obligations, and that, so acting, it must be treated as a Virginia corporation quoad hoc the line of railroad under its control, so far, at least, as its liability to its own citizens is concerned.

The company derives all its powers and privileges from the charter of the company which owns the road; it must be subject to all the duties imposed on that company, and among these is the obligation to answer in our own courts to our own citizens for any damage resulting from its conduct.

Without any further discussion of this question, it is sufficient to refer to the well considered opinion of Judge Staples in this very recent case against the same defendant, and to the cases cited in that opinion.

I am, therefore, of opinion that the circuit court did not err in refusing to remove the case to the circuit court of the United States.
72 I am further of the opinion that the circuit court did not err in overruling the demurrer to the plaintiff's declaration. The questions raised by the demurrer are the same as those decided by this court in the case of Balt. & Ohio R. R. Co. v. Wightman's adm'r, and reaffirmed in Mathews v. Warner's adm'r, 29 Gratt., 570, which cases are conclusive in support of the judgment of the circuit court upon the demurrer.

Having disposed of these preliminary questions, we now proceed to consider the more important and difficult questions affecting the merits of the case.

And first it is to be noted that there was in this case no motion to set aside the verdict as contrary to the evidence; consequently we have no certificate of the facts proved, but only so much of the evidence as may be necessary to give application to the instructions asked for on both sides. These were numerous, and very fully presented the legal propositions contended for by the counsel on each side.

The defendant in the court below (plaintiff in error here) asked for eleven specific instructions; all of which were given by the circuit court, and of course need not be considered by this court.

The questions we have to determine arise upon the instructions given at the instance of the plaintiff in the court below, and which were assailed here as not expounding the law correctly.

The instructions are as follows:

I. When injury or damage happens to a passenger by the
73 breaking down or overturning of a railroad train or breaking down of a bridge or wheel or axle, or by any other accident occurring on the road, the presumption prima facie is that it occurred by the negligence of the railroad company; and the burden of proof is on the company to establish that there has been no negligence whatsoever and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

II. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous

agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case makes such carriers liable in damages under the statute.

3. The Baltimore and Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Charles L. Noell upon his journey.

4. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death.

5. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrange-
74 ments necessary to the safety of passengers.

6. Therefore, if the jury believe from the evidence that such prudence, foresight, and skill were not used by said company in respect to Narrow Passage bridge, by the breaking of which Charles L. Noell was killed, they should find for the plaintiff, and assess the damages for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damages not to exceed ten thousand dollars.

7. In ascertaining such damages the jury should find the sum with reference—

First. To the pecuniary loss sustained by Phœbe Ann Noell, the mother of said Charles L. Noell, by the death of said Charles L. Noell, fixing the sum at such sum as would be equal to the probable earnings of the said Charles L. Noell, taking into consideration the age, business capacity, experience, habits, energy, and perseverance of the deceased during what would probably have been his lifetime, and the lifetime of said Phœbe Ann Noell, if he had not been killed.

Second. In ascertaining the probability of life, the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

Third. By adding thereto compensation for the loss of his care, attention, and society to his mother; and

Fourth. By adding such further sum as they may deem fair and just by way of solace and comfort to his said mother for the sorrow,
75 suffering, and mental anguish occasioned to her by his death.

To the giving of which instructions, and each of them, the defendant by its counsel objected; but the court overruled the objection and gave the said instructions to the jury; to which action and ruling of the court the defendant by its counsel excepted, and prayed that this, its bill of exceptions, be signed, sealed, and enrolled, which is done accordingly.

Now it is to be noted that these instructions, from the first to the fifth inclusive, are in totidem verbis those which were passed upon and declared by this court as correctly expounding the law in the case of Balto. & Ohio R. R. Co. v. Wightman's adm'r (supra). With reference to them this court said in that case, "We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers and by the opinions of the most respectable courts in this country. The decisions on this subject are given in Wharton on Negligence, §§ 627 to 661, inclusive; also § 422 and the notes to these sections; Redfield on Carriers and Bailees, § 346. See also Farish & Co. v. Reigle, 11 Gratt., 697."

Upon mature consideration of the arguments addressed to us by the

agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case makes such carriers liable in damages under the statute.

3. The Baltimore and Ohio Railroad Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Charles L. Noell upon his journey.

4. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death.

5. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrange-
74 ments necessary to the safety of passengers.

6. Therefore, if the jury believe from the evidence that such prudence, foresight, and skill were not used by said company in respect to Narrow Passage bridge, by the breaking of which Charles L. Noell was killed, they should find for the plaintiff, and assess the damages for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damages not to exceed ten thousand dollars.

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Fourth. By adding such further sum as they may deem fair and just by way of solace and comfort to his said mother for the sorrow,
75 suffering, and mental anguish occasioned to her by his death.

To the giving of which instructions, and each of them, the defendant by its counsel objected; but the court overruled the objection and gave the said instructions to the jury; to which action and ruling of the court the defendant by its counsel excepted, and prayed that this, its bill of exceptions, be signed, sealed, and enrolled, which is done accordingly.

Now it is to be noted that these instructions, from the first to the fifth inclusive, are in totidem verbis those which were passed upon and declared by this court as correctly expounding the law in the case of Balto. & Ohio R. R. Co. v. Wightman's adm'r (supra). With reference to them this court said in that case, "We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers and by the opinions of the most respectable courts in this country. The decisions on this subject are given in Wharton on Negligence, §§ 627 to 661, inclusive; also § 422 and the notes to these sections; Redfield on Carriers and Bailees, § 346. See also Farish & Co. v. Reigle, 11 Gratt., 697."

Upon mature consideration of the arguments addressed to us by the

learned counsel in the case before us, and upon a careful review of the authorities, we have no hesitation in affirming that the first five instructions were properly given as correctly declaring the law upon the
76 facts proved in this case respecting the duties and liabilities of common carriers.

The seventh instruction, on the second, third, and fourth propositions therein affirmed, raises questions which were not raised or passed upon by this court in the case above referred to. That instruction is in these words:

VII. In ascertaining such damages the jury should find the same with reference—

1st. To the pecuniary loss sustained by Phoebe Ann Noell, the mother of said Charles L. Noell, by the death of said Charles L. Noell, fixing the the same at such sum as would be equal to the probable earnings of the said Charles L. Noell, taking into consideration the age, business capacity, experience, habits, health, energy, and perseverance of the deceased during what would probably have been his lifetime and the lifetime of Phoebe Ann Noell, if he had not been killed.

2nd. In ascertaining the probability of life the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

3rd. By adding thereto compensation for the loss of his care, attention, and society to his mother.

4th. By adding such further sum as they may deem fair and just by way of solace and comfort to his said mother for the sorrow, suffering, and mental anguish occasioned to her by his death.

To the first and second clauses of this instruction there can be no
77 valid objection. The first clause affirms a proposition which has received the sanction of nearly all the appellate courts of this country where the question has been considered, and was specifically affirmed by this court in Balt. & Ohio R. R. Co. v. Wightman's adm'r (supra). It simply informs the jury that in ascertaining the damages they shall assess the same with reference to the pecuniary loss sustained by the mother of the deceased by fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience, habits, health, energy, and perseverance of the deceased during what would probably have been his lifetime and the lifetime of his mother, if he had not been killed.

The only difference in this respect between this part of the seventh instruction and that given in Balt. & Ohio R. R. Co. v. Wightman's adm'r is that in that case the damages were to be assessed in reference to the pecuniary loss sustained by the wife and children of the deceased, while in this case the instruction, by the first clause thereof, pointed to that pecuniary loss sustained by the mother of the deceased. The deceased in this case was not a married man; his mother, with whom he lived, and whose farm he managed, was a widow, and he her only son; and it was proved that his services and earnings, as manager and cattle dealer, were worth from $1,000 to $1,400 per year; and she at the
78 time of his death, caused by the Narrow Passage bridge disaster, was fifty-eight years of age, and in sound health.

Although, therefore, the party for whose benefit the suit is brought is the wife and children in the one case, and the mother in the other, the instructions in this respect affirm the same principle in regard to the assessment of damages for the pecuniary loss sustained.

Nor is there any valid objection to the second clause of the seventh instruction, which declares that "in ascertaining the probability of life, the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life."

This, as an abstract proposition of law, is certainly true. (See Field on Damages, §632, and cases cited in note.) Neither the facts proved, nor all the evidence, were certified, and we are not informed by the record whether any such tables of the expectation of life were exhibited. It would certainly have been more regular if the court had specifically referred to the mortuary tables which are recognized by the courts of this commonwealth, relating to expectation of life, and to have placed such tables before the jury. This may have been done, so far as the record shows, but whether done or not, it stated correctly an abstract proposition of law which could not affect the verdict of the jury, and was not even to the prejudice of the plaintiff in error.

We come now to consider the last two clauses in the seventh
79 instruction, which present a question of much more difficulty.

By these it is affirmed that the jury may estimate the damages—

"3rd. By adding thereto compensation for the loss of his care, attention, and society to his mother.

"4th. By adding such further sum as they may deem fair and just by way of solace to his said mother for the sorrow, suffering, and mental anguish occasioned to her by his death."

Now, I am free to admit that but for the peculiar provisions of our statute and its phraseology, differing from those of all the other States in the Union, and differing in most essential particulars from the English statute, upon which most, indeed nearly all, of the statutes of other States are founded, the instructions given in the clauses quoted would be plainly erroneous, for it must be admitted that in construing the English act, and all those of the American States founded upon it, the courts have very uniformly held that the damages provided for and recoverable under them are only such as are pecuniary and actual. Nor can anything be allowed as damages under these statutes (*i. e.*, the English act and those which substantially follow it) in actions by or for the benefit of the persons entitled thereto, on account of the physical or mental sufferings of the deceased, or for the sorrow, suffering, or grief of the surviving relatives who may be entitled to recover. (See Field on Damages, §630, and cases and statutes there cited.)

The English act, and nearly all those of the American States,
80 limit the recovery of damages for the death or injury caused by negligence or wrongful act, either in express terms, or by necessary implication to such damages as are pecuniary or actual.

Now, the seventh section of our statute is totidem verbis with the corresponding section of the English act. But the Virginia statute differs in a most material particular from the English act, and those modeled after it, and, indeed, differs from the statutes of all the States. In the sections which define the character of the damages recoverable under those statutes, the English act declares that "in every such instance the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whose benefit such action shall be brought." In New York, and all other States in which their statutes are modeled after the English act, the following terms, or those of like import, are used: "The jury may give such damages as they may deem fair and just compensation with reference to the pecuniary injuries resulting from such death," &c. In our statute, instead of these words, or words of like import, being em-

ployed, it is declared that "the jury in any such action may award such damages as to it may seem fair and just," in no case the sum recovered to "exceed the sum of ten thousand dollars."

Certainly, in the Virginia statute, there are no words of limitation (except as to the amount of recovery) as in the English act, and
81 those modelled on it, confining the jury in the assessment of damages to merely pecuniary injury, but by the very terms of the statute the damages are "such as to the jury may seem fair and just."

We are bound to presume that the legislature was familiar with the English statute and that of the other States of the Union, and of the English and American decisions under them. And it is a most significant fact that, with the English and American statutes before them, and familiar, as we must presume they were, with the decisions under them, the legislature, after following the English statute and the New York statute up to the point where the measure of damages in the one case is declared to be "proportioned to the injury," and in the other "with reference to the pecuniary injuries resulting from such death," at that point discarded these terms, and in lieu thereof adopted the language, "such damages as to the jury shall seem fair and just." It is impossible to conceive that the omission of such language and the adoption of other terms meaning the very reverse could have been accidental. We must conclude that it was done with a design, and that design was plainly, by all the recognized rules of construction, to declare that in an action for the death of a party caused "by the
82 wrongful act, neglect or default of any person or corporation," the damages so recovered shall not be "merely pecuniary injuries resulting from such death," but "such damages as to the jury may seem fair and just" under the circumstances of each particular case.

One thing is certainly plain and palpable, under the true construction to be given to our statute, and that is, that the jury in assessing damages in such a case are not confined to the pecuniary injury merely resulting from such death. This precise point was decided by the unanimous judgment of this court (the president being absent) in Mathews v. Warner's adm'r, 29 Gratt., 570. In that case one error assigned was the refusal of the court to give the following instruction asked for by the defendant, as follows: "If the jury, from the evidence, should find for the plaintiff, then the measure of damages in this action is the pecuniary loss sustained by the mother of the plaintiff's intestate by reason of the death of said Warner, and the jury in assessing the damages must confine themselves to injuries of which a pecuniary estimate can be made in reference to a reasonable expectation of pecuniary benefit as of right or otherwise to his said mother from the continuance of the life of said Warner, and cannot take into consideration the mental suffering occasioned by his death to his said mother."

83 This court held that there was no error in the judgment of the circuit court in refusing to give this instruction, and affirmed the verdict and judgment for the damages assessed by the jury. By this decision, in which this court reviewed the English act and the statutes of the American States, and carefully construed our statute, the negative proposition was certainly affirmed, that the jury in assessing damages were not confined to injuries of which only a pecuniary estimate can by made in reference to a reasonable expectation of pecuniary benefit from a continuance of life of the deceased.

I think this case is conclusive of the case before us. If, as was held in that case, the jury is not confined in assessing their damages to the

mere pecuniary loss to the survivors by the death of the deceased, certainly they may be governed by other considerations than the mere pecuniary loss. It is fair to presume, indeed the conclusion is irresistible, that the legislature, familiar with the statutes of other States, and cognizant of the decisions under them that the damages under such statutes were confined by the courts to mere pecuniary loss, changed the phraseology of our statute so that the damages should not be proportioned to the pecuniary injuries only, but such "damages as to the jury may seem fair and just" under the circumstances of the particular case.

84 We must presume that the legislature knew the force and effect of its own enactments as compared with those of other States and the judicial instruction given these statutes. The words used, not by accident, but with evident design, as already construed by this court in Mathews v. Warner's adm'r (supra), certainly extended the statute beyond the scope of the English statute, and of all the American statutes in declaring in effect that the jury, in estimating the damages in cases of the death of a party caused "by the wrongful act, neglect or default of any person or corporation" should not be confined to the mere pecuniary loss of the survivors for whose benefit the action may be brought.

It was no doubt the intention of the legislature, by this enactment, differing so essentially from the English and American statutes, to cut the Gordian knot of the decisions which tied the jury down to a consideration of the mere pecuniary loss suffered by the survivors of the deceased, and to declare in effect that where any person's "death is caused by the wrongful act, neglect or default of any person or corporation," even if such person be one whose life conferred no pecuniary benefit, if such person be an aged or infirm father, or husband, or an invalid wife, or afflicted child (often dearer to its parents because it is

85 afflicted) the death of such a person so caused should be the subject for a recovery of damages.

It follows that there being no pecuniary loss in such cases, and the jury not being confined by the statute (as already construed by this court in Mathews, adm'r, v. Warner) to mere pecuniary loss to the survivors for whose benefit the action may be brought, it follows, I say, that mental suffering and anguish, want of comfort and solace, may be taken into consideration in the computation of damages sustained in the particular case. In other words, it is plain that under our statute the jury, not confined to mere pecuniary loss, "may award such damages as to them may seem fair and just," according to the facts and circumstances of each case. The only limit which the statute imposes is to confine the recovery in every case to a sum not exceeding $10,000. It is earnestly insisted that such a construction of the statute will result in great injustice and turn the jury in every case loose to award damages according to their own unrestrained notions as to compensation for the mental suffering and agony, and loss of comfort and solace, in the case of a mother losing her child, or of a wife losing her husband, and kindred cases, unchecked by statutory enactments confining them to the actual pecuniary loss resulting from death. The answer to this view is, first, that there is in cases of this kind, as in all others, the

86 same supervising power of the courts to correct verdicts rendered under manifest prejudice or passion, or grossly excessive, or obtained by fraud or corruption. But the better and all-prevailing answer is, "ita est scripta lex." The legislature certainly had the right so to declare what the law is. And if in guarding human life as so sacred that when it is destroyed "by the wrongful act, neglect or default

of any person or corporation," it holds such person or corporation to a strict accountability, and makes them liable in damages, not alone for the pecuniary loss (to the survivors entitled to the benefit of the action), but to "such damages as to the jury may seem fair and just" in the particular case, surely no one can gainsay the power of the legislature so to declare the law. If the law as it is written is unjust and oppressive, and contrary to the better statutes (as contended) of the other American States and of England, it is for the legislature to change the law. This court can neither amend or annul the statute law, unless it be unconstitutional. That is the province of the legislature. We can only interpret the law as we find it; and so interpreting it, we find no error in the construction given to it by the circuit court in its instructions.

It is proper to notice, before concluding this opinion, another objection very strenuously insisted on by the counsel for the plaintiff in
87 error to the instructions given by the court to the jury, in which the court says: "In ascertaining such damages, the jury should find the same with reference," &c. It is insisted that this is an imperative command to the jury that they must, in making up this verdict, consider certain facts, &c. I think this is a strained construction of the language of the court. The word, as used, taken in connection with the other numerous instructions asked on both sides, plainly means that it is proper that the jury should take into consideration the matters indicated in the instructions.

Upon the whole case, I am of opinion that there is no error in the judgment of the circuit court, and that the same ought to be affirmed.

STAPLES, J., said he did not concur entirely in the opinion of the majority in Mathews v. Warner, nor did he express any actual dissent. He then had, and still entertains, doubt whether the jury are authorized to award vindictive or exemplary damages in cases like the present. In other words, whether they are not confined to awarding damages with reference to the pecuniary loss sustained. A majority of the court have decided otherwise in Mathews v. Warner and in the present case. He, therefore, yielded his doubts, and concurred in the opinion just delivered.

88 ANDERSON and BURKS, Js., concurred in the opinion of Christian, J.

MONCURE, P., concurred in the results and most of the opinion of Christian, J., but only because the question was decided by this court in Mathews v. Warner, 29 Gratt., 576, when he was not present.

VIRGINIA:

In the clerk's office of the supreme court of appeals of Virginia, at Staunton, on the 16th day of November, 1880.

I, Jos. A. Waddell, clerk of the court aforesaid, do certify that the foregoing, beginning on page 1, and ending on page 69, is a true copy of the record in the cause of the Baltimore & Ohio Railroad Company versus Monroe Funkhouser, administrator of Reuben E. Hamman, dec'd, lately depending in said court; and that the foregoing, beginning on page 69, and ending on page 88, is a true copy of the opinion of said court in the cause of the Baltimore & Ohio Railroad Company versus Noel's administrator. I further certify that *that* the said court is the tribunal of last resort in the commonwealth of Virginia for the trial of causes in law and equity.

89 Given under my hand (the said court having no seal).

JOS. A. WADDELL, *Clerk.*

I herewith return the original writ of error awarded in this case by the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States, on the petition of the Baltimore & Ohio Railroad Company, against Monroe Funkhouser, administrator of Reuben E. Hamman, dec'd; the citation, with an affidavit of service thereon endorsed; and a copy of the appeal bond on file in my office.

JOS. A. WADDELL, *Clerk, &c.*

90 To the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States:

The petition of the Baltimore and Ohio Railroad Company respectfully represents:

That a final judgment has been rendered by the supreme court of appeals of Virginia in a suit therein pending, wherein Monroe Funkhouser, administrator of Reuben E. Hammon, deceased, is plaintiff, and the Baltimore and Ohio Railroad Company is defendant.

That the supreme court of appeals aforesaid is the highest court of law in the State of Virginia in which a decision in the said suit could be had.

That in said suit there is drawn in question the validity of a statute of, and of an authority exercised under the United States, and the decision is against the validity of such statute and of such authority.

That in said suit there is drawn in question the validity of a statute of and the validity of an authority exercised under the State of Virginia, on the ground of such statute being repugnant to the Constitution and laws of the United States, and the decision is in favor of such statute and authority.

That in said suit a right and privilege are claimed under the Constitution and statutes of the United States, and the decision is against the right and privilege set up and claimed by your petitioner under such Constitution and statutes.

91 All of which appears on the face of the record accompanying this application.

Wherefore, to the end that the said judgment may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, your petitioner prays that a citation may be issued in the same manner as if the said judgment had been rendered in a circuit court of the United States.

THE BALTIMORE & OHIO RAILROAD CO.,
By Counsel.

HUGH W. SHEFFEY.
JOHN K. COWEN.

The above petition is granted and writ of error allowed therein as prayed.

(Indorsed:) The Balto. & Ohio R. R. Co. vs. Hamman's . Petition.

92 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of appeals of the State of Virginia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Baltimore & Ohio Railroad Company, plaintiff in error, and Monroe

Funkhouser, administrator of Reuben E. Hamman, deceased, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such
93 their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

M. R. WAITE,
Chief Justice Sup. Ct U. S.

(Indorsed:) Filed December 3, 1880. Jos. A. Waddell, clerk of supreme court of appeals of Va., at Staunton.

94 The United States of America to Monroe Funkhouser, administrator of Reuben E. Hamman, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein The Baltimore & Ohio Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and eighty.

M. R. WAITE,
Chief Justice Sup. Ct U. S.

95 On this twenty-ninth day of November, in the year of our Lord one thousand eight hundred and eighty, personally appeared

Lewis M. Bumgardner before me, the subscriber, Edwin F. Surber, a notary public for the city of Staunton, in the State of Virginia, and makes oath that he delivered a true copy of the within citation to Monroe Funkhouser, administrator of Reuben E. Hammond, deceased, on the 29th day of November, 1880.

LEWIS M. BUMGARDNER.

Sworn to and subscribed the twenty-ninth day of November, A. D. 1880.

[SEAL.] EDWIN F. SURBER, *N. P.*

(Indorsed:) Rec'd and filed Nov. 30, 1880. J. A. W., cl'k.

96 Know all men by these presents, that the Baltimore & Ohio Railroad Company and Robert Garrett, Gilbert S. Meem, and John M. Miller are held and firmly bound unto Monroe Funkhouser, administrator of Reuben E. Hamman, deceased, in the just and full sum of thirteen thousand dollars, to be paid to the said Monroe Funkhouser, administrator of Reuben E. Hamman, deceased, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 20th day of November, 1880.

Whereas, lately, in the supreme court of appeals of Virginia, in a suit depending in said court between Monroe Funkhouser, administrator of Reuben E. Hamman, deceased, plaintiff in the court below, and the Baltimore and Ohio Railroad Company, defendant, and carried, on appeal, to the said supreme court of appeals, judgment was rendered against the said company; and the Baltimore & Ohio Railroad Company having obtained a writ of error, and filed a copy thereof in the office of
97 the clerk of said court, to reverse the judgment in the aforesaid suit, and a citation directed to Monroe Funkhouser, administrator of Reuben E. Hamman, deceased, citing and admonishing said plaintiff to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next:

Now the condition of the above obligation is such that if the said Baltimore & Ohio Railroad Company shall prosecute said writ to effect, and shall answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

{SEAL OF BALT. & OHIO R. R. CO.} THE BALTIMORE AND OHIO RAILROAD COMPANY,
By ROBERT GARRETT, *3d V. P.*
ROBERT GARRETT. [SEAL.]
GILBERT S. MEEM. [SEAL.]
JNO. M. MILLER. [SEAL.]

Attest:
W. H. IJAMS, *Sec.*
Witness:
A. GORDON JONES.
Witness:
W. G. KINNEY.

Approved Nov. 27, 1880.

M. R. WAITE,
Chief Justice Sup. Ct U. S.

98 I, Jos. A. Waddell, clerk of the supreme court of Virginia, at Staunton, do certify that the foregoing is a true copy of bond filed in my office December 3, 1880, endorsed "The Balto. & Ohio R. R. Co. vs. Hamman's adm., appeal bond."

Teste:

JOS. A. WADDELL,
Clerk.

(Indorsement on cover:) No. 1128. The Baltimore and Ohio Railroad Company, plaintiff in error, vs. Monroe Funkhouser, administrator of Reuben E. Hammon, deceased. Virginia sup. court of appeals. Filed 13th December, 1880.

REC. 1128—4

Supreme Court of the United

October Term, 1851.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,

vs.

GEORGE W. ROGERS, Administrator of [illegible] Wheeler, Deceased, Defendant in Error.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,

vs.

MONROE PURDY, Administrator of [illegible] Rose, Deceased, Defendant in Error.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,

vs.

MONROE PURDY, Administrator [illegible] Kasper, Deceased, Defendant in Error.

IN THE

Supreme Court of the United States.

October Term, 1881.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE W. KOONTZ, *Administrator of* WILLIAM A. WEIGHTMAN, Deceased, DEFENDANT IN ERROR.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MONROE FUNKHOUSER, *Administrator of* CHARLES L. NOEL, Deceased, DEFENDANT IN ERROR.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

MONROE FUNKHOUSER, *Administrator of* REUBEN E. HAMMON, Deceased, DEFENDANT IN ERROR.

Numbers 30, 460, 788.

In Error to the Supreme Court of Appeals of the State of Virginia.

STATEMENT OF CASES, ASSIGNMENT OF ERRORS, AND BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASES.

These cases, by order of this Court, January 27, 1881, were to be heard together, when No. 30 was reached. While the facts in each case are different, the questions involved in the writ of error are similar.

In the case of Koontz, administrator, &c., the action was brought in the Circuit Court of Shenandoah County, Virginia, on the twenty-sixth day of April, 1876, against the Baltimore and Ohio Railroad Company to recover damages for the death of plaintiff's intestate, caused on the sixth of March, 1876, by the alleged neglect and default of the defendant.

The declaration alleges that the defendant was the owner and proprietor of a certain railway known as the "Railway of the Valley Division of the Baltimore and Ohio Railroad Company," running through the counties of Frederick, Shenandoah, Rockingham and Augusta, in the State of Virginia, and in the State of West Virginia; that the plaintiff's intestate on the sixth day of March, 1876, purchased a ticket from the station of Edinburg, in Shenandoah county, Virginia, to Charlestown, West Virginia, and while a passenger on said railroad, lost his life through an accident at the Narrow Passage Bridge, in said county of Shenandoah, in the State of Virginia. The damages claimed in the declaration were ten thousand dollars. (Record, Koontz case, pages 4 to 12.)

In the case of Funkhouser, administrator of Noel, the declaration was similar to the one last mentioned, alleging that Charles L. Noel, deceased, was a passenger on the road, having purchased a ticket from Mount Jackson to the city of Washington, and lost his life through an accident at the Narrow Passage Bridge, and claimed

damages to the amount of ten thousand dollars. (Record in No. 460, pages 9 to 12.)

In the case of Funkhouser, administrator of Hammon, the allegations were similar; said Reuben E. Hammon having purchased a ticket from Mount Jackson to Washington, and lost his life by reason of the accident above mentioned, and the damages claimed were ten thousand dollars. (Record in No. 788, pages 8 to 11.)

Petitions were filed by the then defendant, the Baltimore and Ohio Railroad Company, asking that the causes be removed to the Circuit Court of the United States for the Western District of Virginia, held at Harrisonburg.

These petitions were filed upon the second day of September, 1876. The ground of removal in each case was, that the Baltimore and Ohio Railroad Company was, at the time of the bringing of the suits, and at the time of the filing of the petitions, a corporation incorporated under and by virtue of the laws of the State of Maryland, and was a citizen of said State of Maryland, and that the plaintiff in each case was, at said times, a citizen of the State of Virginia; that said petitions were filed at the first term of the Court at which said causes could be tried. Proper bonds were filed with each petition.

On the 9th of September, 1876, the Circuit Court for the county of Shenandoah, Virginia, overruled the motion, to which rulings the defendant excepted.

The cases were subsequently tried, and, in the first case, a verdict was rendered in favor of the plaintiff, May 2, 1877, for five thousand dollars.

In the second case, a verdict was rendered in favor of the plaintiff for four thousand nine hundred and twenty-five dollars, on April 29, 1878; and, in the third case, a verdict was rendered in favor of the plaintiff for six thousand dollars, on January 6, 1879.

Upon writ of error, each case was taken to the Supreme Court of Appeals for the State of Virginia, and the judgments affirmed. Said causes were then brought to this Court by writs of error to said Court of Appeals.

ASSIGNMENT OF ERRORS.

The sole question for the consideration of this Court is, *was there error in denying the petitions of the Baltimore and Ohio Railroad Company for removal of the causes from the Virginia State Court to the Circuit Court of the United States for the Western District of Virginia.*

The plaintiff in error respectfully submits that its petition for such removal should have been granted.

It was conceded that the plaintiff in each suit in the State Court was a citizen of the State of Virginia, and that the Baltimore and Ohio Railroad Company was a corporation, incorporated under, and by virtue of the laws of the State of Maryland. It was alleged that said corporation was the lessee of that part of the Washington City, Virginia Midland and Great Southern Railroad from the town of Strasburg in Shenandoah county to Harrisonburg in Rockingham county, Virginia, and was, at the time of the alleged accident, using and operating the same as lessee. The Virginia Midland Railway Company was incorporated by the State of Virginia.

The act of incorporation of the Baltimore and Ohio Railroad Company by the State of Maryland is printed in each record. In the first case upon pages from 15 to 20. The lease of the Strasburg Branch of the Virginia Midland Road, is printed in the Record in No. 460, pages 21 to 24.

The opinion of the Court of Appeals of the State of Virginia is found on pages 36, 37 first record and 43 to 50, second record, and 29 third record.

We cite the opinion of the Court in the first case, as in the succeeding cases the Court of Appeals followed its decision in the first case.

"A preliminary question in this case to be settled is, whether the Circuit Court erred in refusing to remove the case to the Circuit Court of the United States for the Western District of Virginia.

"The defendant, the Baltimore and Ohio Railroad Company, is a corporation chartered by the State of Maryland. It is also, and was when this suit was brought, the lessee of a railroad from Strasburg to Harrisonburg, in this State, belonging to the Virginia Midland Railroad Company, a Virginia corporation, and was controlling and operating said railroad under said lease as owner and proprietor at the time of the injuries committed, as set forth in the declaration.

"The defendant has not produced the lease nor given evidence of its contents. We are, therefore, not informed as to the precise terms and the conditions upon which the lease was granted. All that we know is that the defendant is operating the road as owner, and exercising the powers and privileges granted its lessee by the charter of incorporation. What then is the status in Virginia of the defendant, a Maryland corporation, with reference to this road?

"The cases generally agree that a corporation created by the law of one State, can have no legal existence, outside the limits of that State. It may, however, make contracts, transact business, and even exercise corporate functions in another State with the consent of the latter, express or implied. In the Baltimore and Ohio Railroad Company vs. Gallahue's administrator, 12 Gratt., this Court decided that under the statutes authorizing that company to construct its road across the territory of Virginia, the Baltimore and Ohio Railroad Company, as to such road, was to be regarded as a Virginia corporation.

"In Railroad vs. Harris, 12 Wall., 82, the Supreme Court of the United States decided that the Baltimore and Ohio Railroad Company, having, under an Act of Congress, constructed a lateral branch of its road in the District of Columbia, was by reason thereof, liable to suit in that District, as if it had been an independent corporation in that locality.

"The Court did not rest its decision upon the ground, however, that the Act of Congress had made the Baltimore and Ohio Railroad Company a corporation of the District, but upon the ground

that the Act operated as a license to the company to construct its road there; and having accepted the license, the company had placed itself in the position of a domestic corporation for all the purposes at least of being sued in that locality.

"The Court say that they could see no reason why one State may not make a corporation of another State, as there organized and conducted the corporation of its own *quo ad hoc* any property within its territorial limits. See also Maryland vs. Northern Central R. R. Co., 18 Md. Rep., 193; Sprague vs. Hartford and Prov. and Fishk. R. R. Co., 5 Rd. Island, 233; Goshen vs. Supervisors, 1 W. Va., 308; Pennsylvania R. R. Co. vs. Sly, 65 Penn St. Reps., 205; Pomeroy vs. New York & New Haven R. R. Co., 4 Blatchf. 122.

"The Baltimore and Ohio Railroad Company, as a corporation of Maryland, can, of course, have no legal existence outside of that State, but as a lessee of a Virginia railroad company, exercising all the functions and powers of the latter, it may be subject to all its duties and obligations. This must necessarily be upon the authority of the cases cited, if that company is acting under any license granted by the State of Virginia. Under such circumstances, so acting, it must be treated as a Virginia corporation *quo ad hoc* the line of railroad under its control, so far, at least, as its liability to our own citizens is concerned. It can only escape these consequences by showing that it is exercising corporate powers here without the permission of the State, and consequently that it is a tort feasor or trespasser. Whether the company obtained the lease under any statute or provision in the charter of Virginia, the roads do not appear: none was shown to the Court, and none was claimed in the argument. It may be a very grave question whether a corporation of this State can be permitted to convey its franchise to a foreign corporation, so as to enable the latter to exercise corporate rights and powers here without some such authority. The purposes of this case do not require a decision of this question.

"If the Baltimore and Ohio Railroad Company is controlling and operating the Valley Road without permission of the State, it certainly cannot, therefore, claim exceptions and immunities to which it could not be entitled if it had obtained such permission.

"The company derived all its powers and privileges from the charter of the company which owns the road. It must be subject to all the duties imposed on that company; and among these is the obligation to answer in our own Courts to our own citizens for any damages resulting from its conduct.

"If under authority of law or on principles of comity a foreign corporation is allowed to hold property and exercise corporate functions in this State, it must also submit to the jurisdiction of our Courts in controversies with our citizens. If it claims the privileges and immunities of a domestic corporation, it must also perform the duties and answer to all the liabilities of a Virginia corporation.

"It is estopped by its conduct—by its exercise of corporate functions here under a Virginia charter—to deny that it is a Virginia corporation for all the purposes of Virginia jurisdiction."

The Virginia Court of Appeals specifically decided that where a railroad company incorporated in another State was lessee of a railroad in Virginia, the company lessee could be sued in the State Court, and had no right of removal to the Federal Court.

BRIEF.

It being admitted that the Baltimore and Ohio Railroad Company was a corporation incorporated by the State of Maryland, when sued in the Circuit Court of Shenandoah County, by a citizen of Virginia, has it lost its right of removal to the United States Court because it was the lessee and operator of a railroad incorporated by and located in the State of Virginia?

I.

A corporation for the purpose of suing and being sued, is a citizen of the State which created it. It owes its existence to that State. It has no legal existence beyond its bounds. By a conclusive presumption of law as settled by this Court, a suit by it is regarded as the joint suit of the individual persons which compose the corporation. Further, the legal presumption is that its members and all of them are citizens of the State in which alone the corporate body has existence. When it sues or is sued by its corporate name, it must be presumed to be a suit by or against the citizens of that State which created such corporation, and no averment or evidence to the contrary is admissible for the purpose of withdrawing jurisdiction from a Court of the United States. A suit, therefore, by or against the Baltimore and Ohio Railroad Company for jurisdictional purposes, must be considered a suit by or against citizens of the State of Maryland. This doctrine has been fully established by this Court in the following cases:

The Louisville C. & C. R. R. Co. vs. Letson, 2 How., 497.
Marshall vs. B. & O. R. R. Co., 16 How., 314.
R. R. Co. vs. Wheeler, 1 Black, 286.
R. R. Co. vs. Harris, 12 Wall., 65.
R. R. Co. vs. Whitton, 13 Wall., 270.

In the case of R. R. Co. vs. Harris, 12 Wall., 65, this Court decided, having before it the Act of Incorporation of the plaintiff in error and the Virginia Statutes relied upon by the Virginia Court of Appeals in its decision in these cases, that the B. & O. R. R. Co. was for jurisdictional purposes, a citizen of the State of Maryland. The Court held (page 81) that the act of Virginia permitting the Railroad to be constructed in that State did not create a new corporation of that State.

"The Company was chartered to construct a road in Virginia as well as in Maryland. The latter could not be done without the

consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to this question before us, they were the same as to powers, privileges, obligations, restrictions and liabilities as those contained in the original charter.

"The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. In its name, locality, capital-stock, the election and power of its officers, in the mode of declaring dividends and doing all its business, its unity was unchanged, only the sphere of its operations was enlarged. * * * * For the purposes of Federal jurisdiction it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members will be permitted."

The Act of Virginia which gave the Baltimore and Ohio Railroad Company the license to construct its road within the territory of Virginia, was not in evidence in the first case. It was offered in evidence in the second and third cases and is to be found on the Record in the second case, on page 24. By that act the Railroad Company was granted the same privileges within the territory of Virginia as it had within the territory of Maryland, except that it could not make any lateral roads within Virginia without the consent of the Legislature. After the passage of this Act, the State of Virginia was divided, and the entire line of the Baltimore and Ohio Railroad is within the limits of the State of West Virginia; and no part of its road is within the State of Virginia. So that this Act has no bearing upon the questions involved in these cases. The Baltimore and Ohio Railroad Company does not operate any part of its line in that State. The Court of Appeals of Virginia did not base its decision upon the terms of this Act, but solely upon the ground that as lessee of a Virginia railroad company it occupied the position of the company it leased from, and should be

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treated as a Virginia corporation as to the railroad under its control, so far as its liability to citizens of Virginia is concerned.

The Baltimore and Ohio Railroad Company being a Maryland corporation, and a citizen of that State, when sued by a citizen of Virginia in a Court of that State was entitled to have the case transferred to the Federal Court.

Its corporate existence was not dependent upon any Act of the State of Virginia. By leasing or operating a railroad incorporated by and situated within that State, it no more became a citizen of that State than would a natural person, a citizen of another State, who should purchase a farm in Virginia. The jurisdiction of the Federal Courts is such as they have under the Constitution of the United States and the Acts of Congress passed in conformity therewith. This jurisdiction can neither be taken away or impaired by the State legislation or by the act of any party. If under the wording of the statutes, that party can have his suit transferred to a Federal Court, this is a right which he cannot waive nor can any legislature divest him of it. The implied assent spoken of by the Court of Appeals of Virginia in connection with the license to the plaintiff in error to act as a lessee of a Virginia railroad company, cannot be construed on the one hand as a requirement by the State of Virginia that the plaintiff in error should not exercise the right of removal, or on the other hand as a surrender of that right by the plaintiff in error.

This Court in the case of Insurance Company vs. Morse, 20 Wall., 445, 450, &c., has held that a statute of a State requiring an insurance company, before transacting any business in that State, to sign an agreement that it would not remove any suit into the Federal Courts is unconstitutional and void.

"Every citizen is entitled to resort to all the Courts of the country, and to invoke the protection which all the laws of all these Courts may afford him. A man may not barter away his life or his freedom, or his substantial rights."

A citizen by going to another State and there engaging in business, does not lose thereby his citizenship. This is a right of which he can be divested only in one manner. When sued in a State Court he may not assert his right of removal, but he none the less has it. While he remains a citizen of another State he may always assert it.

Railroad Co. vs. Harris, 12 Wall., 65, 81, 82, 83, 84.
Doyle vs. Continental Ins. Co., 94 U. S., 535.
Ex parte Schollenberger, 96 U. S., 369.
Cowles vs. Mercer County, 7 Wall., 118.

The Court of Appeals of Virginia in these cases held, that the Maryland corporation, operating under an implied license, the Manassas Gap Railroad in the State of Virginia as lessee thereof, is to be deemed for all jurisdictional purposes to be identical with said Manassas Gap Railroad, and as the latter company could not move to transfer a suit to the Federal Court, neither can the Baltimore and Ohio Company, its lessee, do so.

The error arises from confounding the idea that as lessee it may be sued in Virginia, with the very different idea that when sued, although conceded to be a citizen of Maryland, it cannot make a motion to remove.

The sounder view of this question is taken by the Supreme Court of Ohio in the case of B. & O. R. R. Co. vs. Cary, 28 Ohio St. 208.

That Court held that a foreign railroad corporation by merely leasing, possessing and operating the property of a railroad company of that State, did not thereby become a citizen of that State, nor lose its right of removal to the Federal Court. Also, that a statute providing that such leasing and operating should be regarded as a waiver of the right of removal, was unconstitutional.

If therefore the right of removal is such a right as cannot be specifically waived, or contracted away, or cannot be divested by a State statute, how can there be an implied waiver of this right by

the transaction of its business by the plaintiff in error in Virginia as lessee of a Virginia corporation.

The reasons which have led the Courts to raise the implication of assent to the institution of suits against a foreign corporation within the State in which it undertakes to do business, are clearly ~~already~~ given by this Court in the case of the Railroad Company vs. Harris, 12 Wallace, 81. The Court says, that "a corporation cannot migrate; but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to *be sued* there. If it do business there it will be presumed to have assented and will be bound accordingly." The Court however adds: "For the purposes of Federal jurisdiction, it is regarded as if it were a citizen of the State where it was created, etc.,"—and the Court approves the case of the B. & O. R. R. Co. vs. Gullahue's, Adm., 12 Grat., upon the same grounds: and not upon the grounds that the B. & O. Company was a citizen or corporation of Virginia for jurisdictional purposes, but that acting under a license to do business in Virginia, it was, on the principles referred to, suable in that State. And that citizens of Virginia, dealing with it, should not be compelled to go to Maryland to institute their actions. That is all that either case decides. Neither of them suggests the idea that when sued, the Company could not move to transfer the case to the Federal Court.

It is submitted that the case of Knapp vs. Railroad Company, 20 Wall., 117, is in point, in respect to the effect of a lease of a railroad to a non-resident corporation. It decides that such lease does not affect the citizenship of the corporation lessee.

The facts in the case were these: The Western Vermont Railroad Company, a corporation of Vermont, mortgaged the road to Knapp & Briggs, citizens of New York, to secure the payment of its bonds. The mortgage was regularly foreclosed, and Knapp & Briggs purchased it as trustees for the bondholders. They leased the railroad to the Troy and Boston Railroad Company, a corpor-

ation of New York. Suit was brought in the State Court of Vermont by Knapp, surviving trustee, against the Troy and Boston Railroad Company upon the covenants of the lease. The defendants applied to have the case removed, under the Act of March 2, 1867, on the ground of local prejudice, alleging that a certain corporation by the name of the Bennington and Rutland Railroad Company had been organized under Vermont law by a majority of the bondholders represented by Knapp & Briggs as trustees, and that this new corporation, Knapp, the surviving trustee being a nominal party, had become the real party in the suit. That therefore the subject matter of the controversy was between the Bennington and Rutland Railroad Company, (the Vermont corporation,) and the Troy and Boston Railroad Company, as lessee of the Vermont road. The case was removed to the Federal Court, a motion to remand was denied, and the Circuit Court proceeded to hear and adjudge the case, deciding it against Knapp, surviving trustee, who took the writ of error.

This Court held: that although the Troy and Boston Railroad Company was the lessee of the Vermont road, and held and operated it for a term of years, it did not thereby become a citizen of Vermont within the meaning of the Act of Congress, but was and continued to be a citizen of the State of New York, and that Knapp and Briggs being substantial and not merely formal parties, and likewise citizens of New York, the suit could therefore not be maintained in the Federal Court.

This case was followed in Brownell vs. Troy & Boston R. R., 3 Fed. Rep., 761.

II.

The record in each case shows that the petitions for removal were filed in due time, and the bonds tendered with them were unquestioned. When this was done, on the 2d September, 1876, the jurisdiction of the State Court was divested. By the 3d sec-

tion of the Act of March 3, 1875, it is provided that "it shall then be the duty of the State Court to accept said petition and bond, and proceed no further in said suit."

But the Virginia Court asserted its jurisdiction and decided that the plaintiff in error was for the purposes of these suits a citizen of that State. The plaintiff in error at no time acquiesced in this decision. On the contrary, by its motion to remove, by the exceptions reserved by it, by its assignment of error on this ground in the Court of Appeals of Virginia, it has persisted in its claim of right to have these cases tried in the only Court having jurisdiction. At all times and in all places, it has insisted upon its rights.

In the brief of counsel for defendant in error, they allege that the plaintiff in error, by reason of not filing copies of the record in the United States Court, has lost its right of removal, if at any time it had such right.

It is a sufficient answer to this, merely to say, that what may or may not have been done by the plaintiff in error in this respect, does not appear in the records. This Court will not consider any such matters.

Whether the plaintiff in error filed copies of the records in each case in time or not, is a question of fact. Whether by so doing, the defendants were prejudiced by such action, is also a question of fact. Questions of fact which may be different in each case. Hence this Court cannot pass upon all these matters which do not appear in the records. They might be cognizable in the Circuit Court of the United States on motions to remand.

We may be permitted, however, to observe that the defendant in error in each case now complains of *laches* resulting from a judgment of a State Court, procured by himself upon an issue tendered in his own answer to the statements contained in the petitions for removal. He obstinatety, persistently, and so far as the judgment of the State Court was concerned, successfully resisted and defeated the acceptance by the State Court

of the petitions filed, and a removal of the cases to the proper forum. He incited and encouraged the State Court to usurp authority over the cases, against the Act of Congress, and to continue that usurpation, and held the plaintiff in error under the dominion of that power, down to the date of the final judgment in the Court of Appeals of Virginia. His complaint now seems to be, that the plaintiff in error did not arrest his illegal purposes in the Court below, and did not at the risk of a conflict of jurisdiction prevent him from dragging the plaintiff in error through all this litigation. To say the least of it, the complaint of *laches* coming from the defendant in error, is inconsistent with his own contention, and should perhaps be supplemented by expressions of regret at the violation of law procured by himself, and by reason of which he now seeks to defeat the just rights of the plaintiff in error. There is no reason for such claim and it is wholly unsustained by the authorities.

Where a party entitled to removal is, notwithstanding his protests and exceptions, held for the trial of his case in the State Court, he loses none of his rights by defending against that action. He is not bound to desert the case and take the risk of such judgment as the State Court may pronounce against him by default, when by its solemn judgment it has determined that the case shall not be removed from its jurisdiction, but shall be proceeded in to final judgment.

Gordon vs. Longest, 16 Peters, 97.
Kanouse vs. Martin, 15 How., 198.
Ins. Co. vs. Dunn, 19 Wall., 214.
Removal Cases, 100 U. S., 457, 475.
Railroad Co. vs. Mississippi, 102 U. S., 135.
Kern vs. Huidekoper, 103 U. S., 485.

In the case of Railroad Co. vs. Mississippi, The party whose motion for removal was denied, remained in the State Court and contested the case. He did not file the record in the Federal

Court; as was done in Kern vs. Huidekoper, and in The Removal Cases. But as in the cases of Gordon vs. Longest and Kanouse vs. Martin he defended his rights in the State Court. The waiver of the right of removal must affirmatively appear, it cannot be inferred from the fact of contesting the case in the State Court.

The contention of the defendant in error has a double aspect.

(a.) He insists that the judgment of the State Court is right, and therefore should not be reversed.

(b.) That even if that judgment be erroneous, the plaintiff in error has no right to have that error corrected in this Court.

In addition to the authorities referred to, to show such an error must be corrected by this Court in conformity with the twenty-fifth section of the Judiciary Act, we remark that in the decision of neither of these cases did the Supreme Court of Appeals of Virginia take the ground that the plaintiff in error had been guilty of any *laches*, and in the recent cases decided by that Court, such as Beery vs. Irick, Newton vs. Bushong, and Continental Ins. Co. vs. Casey, 27 Grattan, 316, and other cases, has any such idea been suggested.

When such distinguished tribunals as the Appellate Courts of Virginia and Ohio, both recognizing the same mode of proceeding, differ so widely on the identical question here involved, that is to say, whether the Baltimore and Ohio Railroad Company, by reason of leasing the railroad of a domestic corporation does or does not lose its citizenship in Maryland, and thereby its right of removal under the Act of Congress, it is eminently right and proper that this very grave and important question should be settled by the only Court which can decide it.

HUGH W. SHEFFEY,
JOHN K. COWEN,
E. J. D. CROSS,
of Counsel for Plaintiff in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~738.~~ 460

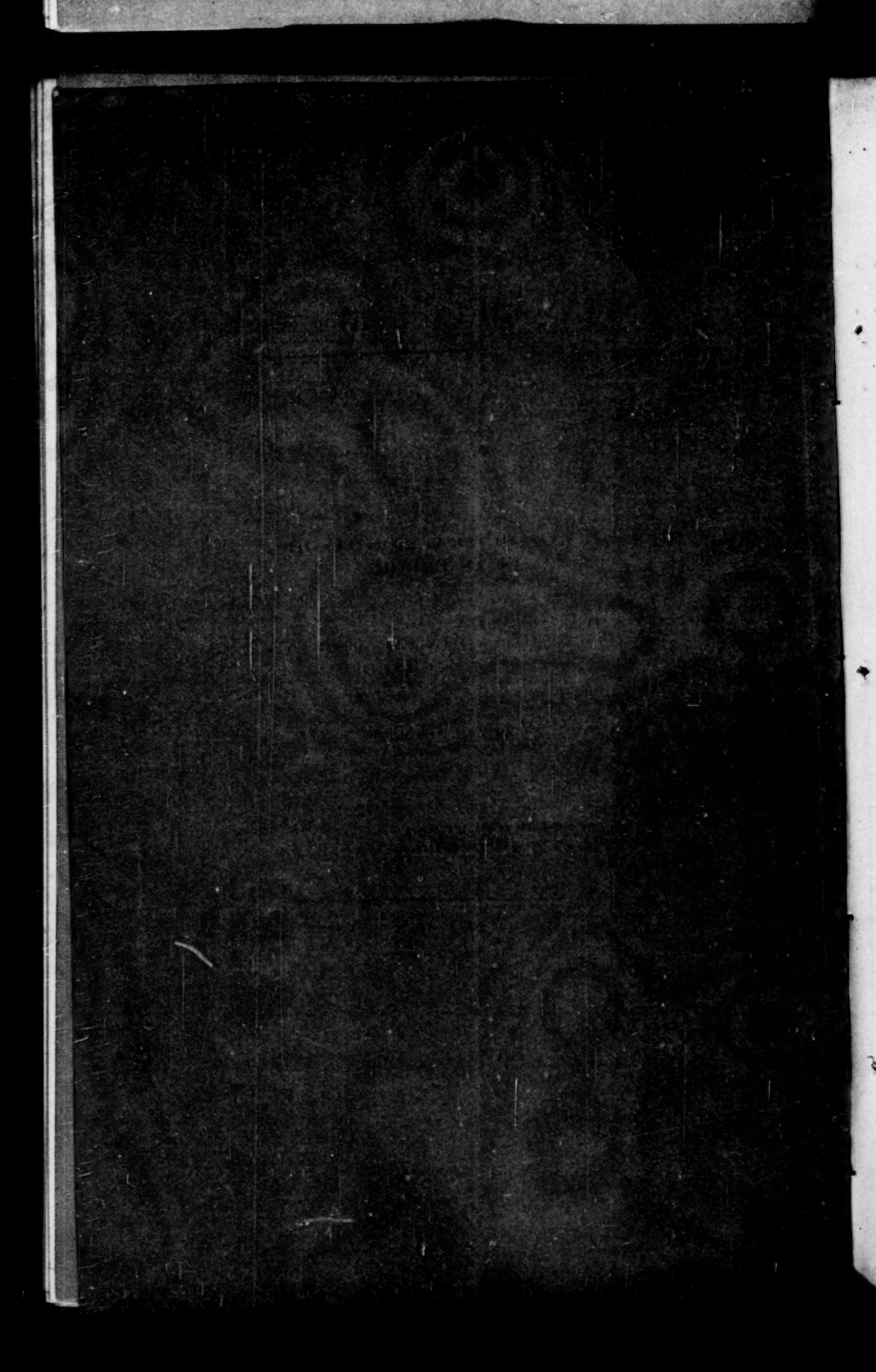
THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MONROE FUNKHOUSER, ADMINISTRATOR OF CHARLES L. NOEL, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED FEBRUARY 5, 1880.



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a VIRGINIA:

Clerk's Office of the Supreme Court of Appeals of Virginia, at Staunton:

Be it remembered that on the 3rd day of July, 1878, came the Baltimore & Ohio Railroad Company, by Sheffey & Bumgardner, their counsel, & presented to the Hon. Joseph Christian, one of the judges of this court, its petition for a writ of error from a judgment from the circuit court of Shenandoah County, recovered on the 30th day of April, 1878, in a suit in which Monroe Funkhouser, administrator of Charles L. Noel, dec'd, was plaintiff in said circuit court & the petitioner was defendant, which petition with the transcript of the record accompanying the same & therein referred to, is in the words & figures following, to wit:

1 *Petition.*

To the Hon. Judges of the supreme court of appeals of Virginia:

The petition of the Baltimore and Ohio Railroad Company respectfully represents that your petitioner is aggrieved by the rulings and final judgment of the circuit court of Shenandoah County, in an action at law instituted against your petitioner in said court by Monroe Funkhouser, administrator of Charles L. Noel, dec'd, on the 6th day of June, 1876. A transcript of the record of said action and of the final judgment therein is herewith exhibited, and prayed to be taken and considered as a part of this petition.

Said judgment was recovered on the 30th of April, 1878, and was for the sum of $4,925.00, with interest from its date.

The record shows that said Monroe Funkhouser, as administrator of Charles L. Noel, dec'd, on the said 6th day of June, 1876, instituted his action of trespass on the case against your petitioner, to recover ten thousand dollars damages. The gravamen of the plaintiff's action was that th'ough and by reason of the negligence of your petitioner and its employees, in running its train of railroad cars over and across the "Narrow Passage" bridge, in Shenandoah County, in the State of Virginia, on the 6th day of March, 1876, said bridge was broken down and petitioner's engine and cars were precipitated into the chasm below; and that said Charles L. Noel, being a passenger in one of said cars, was killed.

2 The tendencies of the evidence, as shown by the record, and in connection with which certain instructions prayed for by the plaintiff were given to the jury, were strong to show that the casualty was not the result of negligence on the part of your petitioner, or its employees, but was caused by an unforeseen and unavoidable accident; and that the prima facie presumption of negligence arising from the bare fact of the breaking of the bridge and the precipitatio of the train into the chasm below(2), and the consequent killing of th · plaintiff intestate, was repelled, and your petitioner, in view of these tendencies of the evidence, had just reason to expect of the court and the jury such action and rulings as would have resulted in its acquittal of all negligence, and in any event in an entire protection against prejudice, excitement and passion. There could be no controversy on one point: that is, if technically negligence were attributable to your petitioner at all it was not wilful, gross, or wanton negligence, and that there was nothing in the case to justify anything in the nature of punitive or vindictive damages; and yet, as will appear from the record,

the court so instructed the jury as to authorize them to give damages against your petitioner of a punitive or vindictive character.

Your petitioner need not inform your honors that the action was founded on sections 7, 8, & 9 of chapter 145 of the code of Virginia (1873), wherein it is provided that "the jury in any such action
3 may award such damages as to it may seem fair and just." The plaintiff's instructions, as modified by the court and as given to the jury, will be found on pp. 61 & 63 of the record, and are set forth in your petitioner's bill of exceptions to the action of the court in giving said instructions.

Your petitioner is advised that whilst exception might be taken to the extreme and almost superhuman care, foresight, and vigilance exacted of the common carrier of passengers in the first five instructions, verging as they do upon the ground of absolute warranty on the one hand, and disregarding on the other the recognized rule that the carrier is not bound by his undertaking to furnish other structures and machinery than such as the most prudent and judicious persons engaged in the same business employ for the safety of the passengers, these instructions (except the 4th) nevertheless turn upon the idea that the actual cause of the disaster or casualty must be the negligence of the carrier, but in the 4th instruction the jury have thrown open to them the wide field of conjecture.

1st. The language of that instruction is this: "The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, render such company liable in damages for such death." Had the words been "by reason of which his death was occasioned," &c., the instruction
4 would have been logical, and would have laid down the law of cause and effect as the true ground of liability. It will be observed from the tendencies of the evidence on behalf of the plaintiff that he did not rest upon the prima facie presumption of negligence arising out of the bare fact of the breaking down of the bridge, but that he introduced evidence at large in order to establish as (3) the cause of the casualty the unsoundness of some of the timbers in the bridge, and so to show negligence in not furnishing perfect timbers in the bridge structure, the imperfection of which caused, as he claimed, the disaster. And it will be further observed from the tendencies of the evidence on behalf of the defendant, and of some of the evidence introduced by the plaintiff himself, that unsoundness of part of the timbers in the bridge could not reasonably have caused the accident, nay, that in the judgment of all who spoke on that point it was impossible that the accident could have resulted from defects in the timbers; and in view of these divergent tendencies in the evidence it was surely error to say to the jury that however strong and overwhelming the preponderance of the testimony might be in favor of the theory of your petitioner, sufficiently so in ordinary cases to require the jury to find, upon such preponderance of probabilities, that the bridge was dragged down by an unforeseen and unavoidable accident to the machinery, and did not fall by reason of any defect or unsoundness in its
5 structures, they should nevertheless give a verdict for damages against your petitioner in case they should entertain an idea, perhaps a suspicion, that the accident "may have been occasioned" by the unsoundness of the timbers. That is to say, that whilst, if called upon to say whether under all the circumstances and in view of all the testimony in the case, the alleged neglect of petitioner in connection with the bridge timbers did occasion Charles L. Noel's death, the jury

would be constrained to say that the evidence heavily preponderated against that theory, and upon the ordinary rules of judgment that such was not the fact, the jury, nevertheless, were instructed that if, notwithstanding such preponderance of evidence and such customary mode of reaching conclusions as to matters of fact, the accident may have been occasioned by such neglect (how or why the jury need not inquire), if it were within the range of hidden or undeveloped possibility, rem otisima potentia, that decayed timbers may have caused the accident, then they must find against your petitioner. Now your petitioner need not say to your honors that it is always hazardous to allow a jury to guess or imagine their way to a conclusion, but it is particularly so when a railway company is a defendant, to throw the reins upon the necks of jurors in such wise is an almost certain precursor to a ruinous raid upon a railway company's treasury.

6 2*rd*. Your petitioner is further advised that the court erred in giving clause "second" of the 7th instruction in these words: "In ascertaining the probability of life, the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life." (4.) In the first place, this instruction authorized the jury, irrespective of the actual condition, health and individual prospects of life of Charles L. Noel and Phebe Ann Noel, to refer to scientific tables and to decide by them. In the second place, the jury were left to find out as best they could what tables to go by. They must be scientific; whether so or no, the jury must determine, and whatever their determination or revision of their judgment could ever be had, because no one could know the data upon which their conclusions rested. They must be "recognized scientific tables." "Recognized" by whom? by the courts, by the insurance companies, by the masters in chancery, or whom? The tables are either facts or the opinions of experts. In either aspect they should be proved before the jury. It is believed that the rules of calculation in such cases are shifting and variable, and in respect to contingent dower interests dependent, as here, upon two lines, the rules have been recently revolutionized. Your honors will remember the very able reports on this subject of

7 Master Commissioner Smith, based upon a masterly mathematical calculation by Professor Points, of the city of Staunton, in the case of Braxton Dair's creditors vs. Braxton Dair's widow, &c.

The court will observe that the tendencies of the evidence stated as pertinent to the instructions excepted to show that no evidence was given to the jury on the subject of "tables" at all, whether "Carlysle" or other tables of recognized scientific accuracy, relating to the expectation of life. It would by just as safe to refer a jury to the recognized views of the best informed persons on any other point, without proof of what they were, as to leave them inexpert guessers, to undertake to work out problems which perplex scientists of the greatest learning, without giving them specific rules to go by. The materials of judgment should be proven, and if the courts errs in furnishing the materials, or in allowing them to be furnished to the jury, the error may be corrected. In the case of Armstrong vs. the Southeastern Railway, 11th Jur., 758, it is held that "the tables" connected with the expectation of life are not proper guides for the jury, even when duly proved before them, and even in cases where the question turns strictly upon the ascertainment of the value of a fixed annuity, the tables must be proved before the jury in order to be admitted. Sedgwick on Damages, 6th ed., p. 697 (M), 522, in the note.

3rd. Your petitioner is further advised that the court erred in giving

8 the fourth clause of the 7th instruction, which in these words: "By adding such further sum as them may decree fair and just by way of solace and comfort to his said mother for the sorrow, suffering, and mental anguish occasioned by his death." This instruction was given, as your petitioners believes, reluctantly by the able and learned judge who presided at the trial, in mistaken deference to the supposed ruling of the supreme court of appeals in the case of Mathews v. Warner's adm'r, reported on page 741 Va. Law Journal, 1877. In that case Judge Christian says: "The certificate of facts show that Warner was shot and killed by Mathews under circumstances which, if not such as the law declares "to be murder in the second degree, or, at the very least, voluntary manslaughter, certainly must be held to be a wrongful act." The point in that case arose out of the refusal of the court below to give an instruction asked for by the defendant, to the effect that the jury would not be justified in taking into consideration the mental suffering occasioned by Warner's death to his mother; and as this court held the question raised by the instruction was whether in such cases as that presented by the record the jury are justified in giving punitive and exemplary damages, the court very properly holding that damages for the mental suffering of the mother occasioned by the death of the deceased son were on the footing of punitive

9 and exemplary damages. It will be noted further that, in the case referred to, the instructions did not assume the affirmative form as in the case now under consideration, of direction and order to the jury to find damages by way of solace and comfort to his mother for her sorrow, suffering, and mental anguish occasioned to her by the decedent's death. It will be further noted that the instruction in this case, taking the 7th instruction in connection with the six preceding instruction', was to the effect that the jury should add to their finding damages by way of solace and comfort to Noel's mother for her sorrow, suffering, and mental anguish occasioned by his death, even though the jury should believe from the evidence that Noel's death resulted from the slightest neglect on the part of your petitioner, against which human prudence and foresight might have guarded, and by reason of which said Noel's death may have been occasioned, and even though the jury should be satisfied that there had been no gross, reckless negligence, even though they should be satisfied that the accident occurred from some cause wholly unknown to your petitioner and its employees, and in connection with which they were free from any gross negligence or intentional wrong doing, and that the disaster was a casualty amounting, if not to an inevitable accident, at the most to a common calamity, in respect to which your petitioner could be blamed only upon the

10 technical ground (6) that said disaster had in fact happened, and that the excusing cause could not clearly be made out. It will be further noted that in the case of Mathews v. Warner's adm'r the court makes the distinction between a death caused by negligence and a death caused by wrongful act. Your petitioner, with profoundest respect for the judgments and decisions of this honorable court, and with no disposition to open for reconsideration the precise question adjudicated in the case referred to (one at least of the hon. judges, whilst concurring in the judgment of the court, did not concur in so much of the opinion rendered as conveyed the idea that the jury should give exemplary or punitive damages), begs leave to submit in connection with the case now brought to the attention of the court the following considerations:

1st. That it has been only recently in the history of the law that unitive or vindictive damages in cases of negligence have been held

under any circumstances to be authorized. In the case of Emblen v. Myers, 6 Hurlston, &c., 54, Pollock, C. B., says: "There is a difference between an injury which is the mere result of such negligence as amounts to little more than an accident and an injury, wilful or negligent, which is accompanied by expressions of insolence. I do not say that in actions for negligence there should be vindictive damages such as are sometimes given in action of trespass, but the measure of damages should be different according to the nature of the injury and the circumstances with which it is accomplished. It may, however, now be deemed to be (as your petitioner is advised) settled that under certain well-defined restric- punitive or vindictive damages may be imposed.

By reference to S. 32, Field on Damages (note and sections 347–356 inclusive, Field on Corporations), it will be seen that the struggle in the courts against the theory of punitive and vindictive damages is still maintained.

Your petitioner is further advised that at the time the act contained in sections 7, 8, & 9, of chapter 145 of the code of Virginia were enacted, and in view of which it is presumed the legislature acted in adopting the words in said act "such damages as to it may seem fair and just," the following general principles were recognized as law:

(*a.*) "Punitive or vindictive damages can be recovered only in cases where person or property has been injured by the wilful act of another, or where the act causing the injury was the result of wanton'ess or reckless indifference to rights of others." Hail v. Glauding, 42 Penn. St., 493; and Sherman & Redfield on Negligence, sec. 600, p. 605 (note).

(*b.*) To justify these damages (that is, punitive and vindictive damages), the negligence, according to the more carefully considered authorities, must be so great as to amount to recklessness, that is, to a decree where a generally malicious or malignant purpose, careless of consequences, might perhaps be presumed, although no hostile purpose was entertained against an individual.

(*c.*) "To justify them the act must be wilful or the negligence must amount to a reckless disregard of the safety of person or property." Sedgwick on Damages, 6th ed., p. 570 (m. 467), in note.

(*d.*) And in their text Sherman & Redfield on Negligence say (sec. 600), "that gross negligence is required to justify punitive or vindictive damages, and that gross negligence means in this connection 'such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequence of carelessness, and is indifferent or worse to the danger of injury to the person or property of others.' It is only in cases of such recklessness that punitive and exemplary damages should be allowed."

(*e.*) In a number of cases it has been held that in no case and upon no hypothesis of fact should the court instruct the jury to give vindictive damages. See Sedgwick on Damages, p. 572 (m. 467), note, citing Hawk vs. Ridgway, 33 Ill., 473; Southern R. R. Co. vs. Hendrick, 40 Miss., 374.

(*f.*) In addition to the authorities cited, reference is specially made to Field on Corporations, sections 351–'2; among other things it is said that "mere gross negligence is held not to be sufficient to warrant exemplary damages, even where the general doctrine is recognized, but the negligence must be so gross as to raise a presumption that the party in fault is conscious of the probable consequences of his negligence or carelessness, and is indifferent to the injury likely to follow."

Second. Such being the state of the law at the time the statute referred to was enacted, and taking it for granted that damages for solace and comfort to surviving relatives in the nature of exemplary and punative damages may, under the decision of this court in Mathews v. Warner's adm'r, be allowed, and conceding for the present that under the statute the court had the right, affirmatively, to instruct the jury as to what should be deemed by them "fair and just" considerations on which to found a verdict of damages, your petitioner respectfully submits that the court should have instructed the jury that they could not find against the defendant vindictive or punative damages unless they were satisfied not only that your petitioner had been guilty of negligence, but of such negligence as is spoken of in the foregoing authorities—that is, of such negligence as at least amounted to a reckless disregard of or indifference to the safety of person or property and the rights of others. And your petitioner deems that in this view of the error committed by the court below there is nothing in conflict with the true intent and meaning of the act of the general assembly or with the construction thereof given by this honorable court. The acts of
14 Victoria and the acts of New York and other States in the Union following the acts of Victoria have been construed by the courts in England and the United States as prohibiting the juries from giving vindictive and punitive damages in any state of facts. As construed by this court, the words "as to the jury may seem fair and just" are held to open the way for the finding of vindictive and punitive damages by the jury, but your petitioner hardly presumes that the legislature in using the language "the jury may award such damages as to it may seem fair and just" ever intended to give to the personal representation of a dead man the right to recover damages under circumstances such as would not have justified that dead man, had he lived, in asking for such damages. The law, on its face, gives the personal representative, by way of substitution, the right of action for his testator or intestate, thus abrogating the rule of the common law that personal actions of this kind died with the person, and it is not to be presumed that this court, in deciding the case of Mathews v. Warner's adm'r, intended to say that the jury, by virtue of the words "fair and just," should be authorized to give punitive and vindictive damages, except upon such grounds as the law then and theretofore authorized.

Your petitioner is further advised that whilst the language used by the Virginia legislature differs somewhat from that used in the English and New York acts, it cannot be deemed as to confer upon the
15 jury the unlimited power and right to determine what is "just and fair" independently of the guidance and direction of the court. Nay, the plaintiff below, by asking for the instruction, and the court in giving it, assumed that the court has the right to tell the jury what is "just and fair"; and the court undertook to inform the jury that, irrespective of the character of the negligence, it was their privilege and their duty to add to the verdict, which on other grounds they would have found, further damages, by way of punishment for the sorrow and mental anguish of the mother, caused by the death of her son; that is, that they must look to and furnish for the results alone, without regard to the motives of the actors or the circumstances of the transaction. The sorrow and mental suffering of the mother would necessarily be the same whether the calamity which caused the death of her son resulted from inevitable accident, or from some cause wholly unknown to the most faithful, vigilant, and attentive employees, and as to which, having done in all respects what they deemed to be their duty,

they were without conscious fault, but which, nevertheless, might technically be deemed to be prima facie, that is, merely presumptive negligence, or from gross negligence and recklessness. The results being the same, the sorrow and suffering would be the same, and the punishment, according to the court's instruction, ought to be the same.

16 And yet it is conceded that in case of inevitable accident no damages could be given at all, and why? Not because there was no sorrow or mental suffering as the result, not because there was no pecuniary loss sustained, but because there was no motive or purpose to do the injury, and because there was no wrongful omission to do what the most prudent and judicious men engaged in the same business might have done to prevent the casualty. The excuse here is complete, respect being had merely to the origin of the calamity, but it is held that if there be the least possible, the very slightest flaw in the structure of roadway or bridge or machinery, by reason of which the casualty may have happened (it matters not whether it did so happen or not), it makes no difference whether the company and its employees strove with the utmost zeal and vigilance to do their full duty, and though they had done it; it makes no difference that they suffered in life, limb, and the destruction of property, the utmost severity of an unforeseen and most unexpected common calamity, the same rule of punishment must be laid down for them as for the most reckless and wilful wrongdoers. If the sufferer had been maimed for life, and wrecked in body and mind, and doomed through weary years to bear the burden of a living death, he could only have asked for pecuniary compensation; he would have been tolerated in demanding vindictive and punitive damages,

17 and it is not deemed amiss to say that one of the survivors of the "Narrow Passage" disaster, upon evidence, the tendencies of which, as to the cause of the calamity, were identical with those disclosed in this record, has submitted his case to a jury of his country; and that there was for him, although he claimed to have suffered much, no serious demand for exemplary or vindictive damages, the clear and satisfactory instructions on this point given by the court at the instance of the able counsel for the plaintiff (a copy of which is appended to this petition), excluding the idea of that sort of damages in such case. One of the greatest lawyers in Virginia, whose voice was once heard in this court with the profoundest attention, Thomas J. Michie, in discussing before a jury the outrageous wrongs inflicted on the estate of dead men, once said with his usual forceful earnestness, "if such things be tolerated, if living wrongdoers be allowed thus to plunder dead men's estates, then, gentlemen, all I can say is die if you dare!!" Were he now living, and should have learned that the word, in the act referred to, "such damages as to it may seem fair and just," are supposed to mean that in case of death the jury may, nay must, give such vindictive damages as would not have been thought of had the injured person survived, although with a maimed and mangled body, he would have vigorously exclaimed, "If this be the law, then live if you dare."

18 Fourth. Your petitioner is further advised that the said circuit court erred in giving, as part of the 7th instruction, the third clause thereof, in these words: "By adding thereto compensation for the loss of his care, attention, and society of his mother."

Your commissioner is advised that, under the authorities on the statute of Victoria, and those following it, no such pecuniary compensation as is stated in this clause has been allowed, except where the relations involved such intimate, moral, or legal obligation as subsist between husband and wife, and parent and child, and not even then for

loss of society. Field on Corp., ss. 357-'8, states the doctrine thus (*a*) "That nothing can be allowed by way of solution for grief or loss of society"; & (*b*) damages may be recovered for "the loss of personal care and training and the intellectual and moral culture which would have been recovered had the deceased lived," clearly refers to a class of losses capable of being compensated in damages, and wholly different from those covered by this instruction.

Fifth. Your petitioner is further advised that said circuit court erred in refusing to remove said action to the circuit court of the United States as prayed for in its petition, to be found on page 12 of the record, and for the reason stated in your petitioner's bill of exceptions, beginning on page 13 of the record.

19 Sixth. Your petitioner suggests, as further errors in the action of the court, the overruling of petitioner's demurrer to the plaintiff's declaration, page 41, and the rejection of petitioner's special plea, page 43 of the record.

For the errors aforesaid and others apparent on the face of the record, and in view of the gravity and importance of some of the questions arising out of this record, deeply interesting as they must be to the profession and seriously affecting the vital interests of corporations as well as individuals, your petitioner is advised that said rulings and judgment of the circuit court of Shenandoah county should be reviewed and reversed.

And your petitioner accordingly prays that a writ of error be awarded, and that said final judgment be superseded until the question involved be adjudicated in this honorable court, and as in duty bound your petitioner will ever pray, &c.

THE BALTIMORE AND OHIO R. R. CO.,
By Counsel.

SHEFFEY & BUMGARDNER,
WILLIAMS & BRO.,
Of Counsel for Petitioner.

I am of opinion that the judgment complained of in the foregoing petition should be reviewed and reversed.

HUGH W. SHEFFEY.

JUNE 26, 1878.

20 Writ of error and supersedeas awarded. Bond required in the penalty of $6,000.00, conditioned as the law directs.

JOS. CHRISTIAN.

JULY 3D, 1878.

VIRGINIA:

Pleas before the circuit court of Shenandoah County, at the courthouse thereof, on the 6th day of June, 1876.

MONROE FUNKHOUSER, ADM'R OF CHA'S S. NOEL, dec'd, pl'ff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def'ts.
} In case.

Be it remembered, that on the 6th day of June, 1876, came the plaintiff, by his attorneys, and sued out of the clerk's office of Shenandoah circuit court a summons against the defendant, which, with the return thereon, is as follows:

In the name of the commonwealth of Virginia to the sheriff of Shenandoah County, greeting:

You are hereby commanded to summon Baltimore & Ohio Railroad Company to appear at the clerk's office of the circuit court of Shenandoah county, at rules to be held therein, on the first Monday in July next, to answer Monroe Funkhouser, adm'r of the estate of Charles L. Noel, dec'd, of a plea of trespass on the case, damages ten
21 thousand dollars, and have then there this writ.

Witness Geo. W. Miley, clerk of our said court, at the court house aforesaid, the 6th day of June, 1876, and in the 100th year of the commonwealth.

GEO. W. MILEY, *Clerk.*

Return.

Executed the within writ of summons upon the Baltimore & Ohio Railroad Company by delivering a true copy of the same to J. P. Nelson, an agent of said Baltimore & Ohio Railroad Company, residing in the county of Shenandoah and State of Virginia, such copy being delivered to him in said county where he resides, on the 12th day of June, 1876.

PETER HOUSHOUR, *D. S.*,
For W. H. RICE, *S. S. C.*

At rules held in the clerk's office of said court on the 3d day of July, 1876, the plaintiff by his attorneys filed the following declaration against the defendant, to wit:

Declaration.

STATE OF VIRGINIA,
Shenandoah County, to wit:

In the circuit court of the said county, Monroe Funkhouser, administrator of Charles L. Noel, pl'ff, complains of the Baltimore and Ohio Railroad Company, a corporation doing business in the State of Virginia, which has been duly summoned to answer the pl'ff, in this
22 action of a plea of trespass on the case; for this, that the def't before and at the time of the committing of the grievances hereinbefore mentioned, was the owner and proprietor of a certain railway known as, and called the railway of the Valley Division of the Baltimore & Ohio Railroad Company, running through and operated in, and doing business in the counties of Frederick, Shenandoah, Rockingham, and Augusta, in the State of Virginia and in the State of West Virginia, and was the owner and proprietor of certain other railways connected therewith as hereinafter stated, and of certain steam engines, cars, and carriages, used by the said def't in, upon, and along said railway in the transaction of the said business of def't and the operation of the same for the transportation and conveyance of passengers and their baggage upon and along said railway from a certain place, to wit, the city of Staunton, in Augusta county, State of Virginia aforesaid, to the town and station of Harper's Ferry, in West Virginia, and from and to all the intermediate stations between said city of Staunton and town and station of Harper's Ferry.

That thereupon, pl'f's intestate in his lifetime, to wit: on the 6th day of March, 1876, at the request of the said def't became and was a passenger in one of the said carriages of said def't, to be by the said def't safely &

securely carried thereon and thereby in a certain journey along
23 the said railway, to wit: from the town and station of Mt. Jackson, in said county of Shenandoah and State of Virginia, a station on the line of the said railway known as the Valley Division of the Baltimore and Ohio Railroad Company, as aforesaid, to the city of Washington, in the District of Columbia, another station upon the said Baltimore & Ohio Railroad; that the said def't then, to wit, on the 6th day of March, 1876, at the said town and station of Mt. Jackson, received the said pl'ff's intestate as such passenger aforesaid, from said town and station to Washington City, in the District of Columbia, another station of the said Baltimore & Ohio Railroad, and thereupon it became and was the duty of said def't to use all due and proper care that the said pl'ff' intestate should be safely and securely carried and conveyed by said def't by, upon and along said railway as aforesaid, from the said town and station of Mt. Jackson aforesaid in said county of Shenandoah and State of Virginia to said city of Washington in the District of Columbia, another station upon the said Baltimore & Ohio Railway, but the said pl'ff says and avers that the said def't did not use due care in that behalf, and that by reason of the negligence, default, and wrongful act of the said def't the said Charles L. Noel, the pl'ff intestate, while being so carried upon said railway was so greatly wounded and injured, to wit, at the county of Shenandoah, State of Virginia aforesaid, to wit, on the said 6th day of March,
1876, that he then and there, to wit, at the time and place
24 last aforesaid died, and that the death of the said Charles L. Noel was caused by said wrongful act, neglect, and default of the said railroad company as aforesaid. Wherefore the said pl'ff, administrator as aforesaid of said Charles L. Noel, says that he is entitled to recover damages against the said def't to the amount of ten thousand dollars under and by virtue of the laws of the State of Virginia, for such cases made and provided, and therefore he brings suit, &c.

2D COUNT. For this, that the def't before and at the time of the committing of the grievances hereinafter mentioned was the owner and proprietor of a certain railway known as and called the railway of the Valley Division of the Baltimore and Ohio Railroad Company running through and operated in and doing business in the counties of Frederick, Shenandoah, Rockingham, and Augusta, in the State of Virginia and in the State of West Virginia, and was the owner and proprietor of certain other railways connected therewith, as hereinafter stated, and of certain steam engines, cars, and carriages used by the said def't in, upon, and along said railway in the transaction of the said business of def't and the operation of the same for the transportation and conveyance of passengers and their baggage upon and along said railway from a certain place, to wit, the city of Staunton, in Augusta County, State of Virginia aforesaid, to the town and station of Harper's Ferry, in West Virginia, and from and to all the intermedi-
25 ate stations between said city of Staunton and town and station of Harper's Ferry.

That thereupon pl'ff' intestate, heretofore in his life, to wit, on the 6th day of March, 1876, at the request of the said def't, became and was a passenger in one of the said carriages of said def't, to be by the said def't safely and securely carried thereon and thereby in a certain journey along said railway, to wit, from the town and station of Mt. Jackson, in said county of Shenandoah and State of Virginia, a station on the line of the said railway known as the Valley Division of the Balti-

more & Ohio Railroad Company as aforesaid, to the city of Washington, in the District of Columbia, another station upon the said Baltimore & Ohio Railroad; that the said def't, to wit, on the 6th day of March, 1876, at the said town and station of Mt. Jackson, received the said pl'ff intestate as such passenger aforesaid from said town and station to Washington City, in the District of Columbia, another station of the said Baltimore & Ohio Railroad, and thereupon it became and was the duty of the said def't to have and to use good and safe engines, cars, and carriages, for the conveyance of passengers; to have the same well and carefully managed, and a good and safe tract and bridges upon said road upon which to run and operate said engines, cars, and carriages for the conveyance of passengers, and to use due and proper care that the pl'ff should be safely and securely carried and conveyed
26 by the said def't by, upon, and along said railway as aforesaid, from the said town and station of Mt Jackson, in Shenandoah County, State of Virginia aforesaid, on the line of the said railway, to the city of Washington, in the District of Columbia, another station upon said Baltimore & Ohio Railway, but the def't did not have good and safe engines, cars, and carriages, for the conveyance of passengers and have the same well and carefully managed, and a good and safe tracts and bridges upon said road, upon which to run and operate said engines, cars, and carriages for the conveyance of passengers, did not use due and proper care that pl'ff should be safely and securely carried and conveyed by the said def't upon and along said railway as aforesaid, from the said town and station of Mt. Jackson, in said county of Shenandoah, State of Virginia, to said city of Washington in the District of Columbia, another station of the said Baltimore & Ohio Railroad, but on the contrary thereof, had and then run engines, cars, and carriages that were not good and safe, and upon and over a tract and bridge of said railway that were not good and safe, and run said engines, cars, and carriages so negligently, carelessly, wilfully, and recklessly upon said tract and bridges, upon said railway, so defective and unsafe as aforesaid, from said town and station of Mt. Jackson aforesaid, upon the line of said road to the city of Washington, in the District of Columbia, another station upon said Baltimore and Ohio Rail-
27 road, that a certain bridge thereon, and over which the said tract and the said engines, cars, and carriages of said road ran, called and known as the Narrow Passage Bridge, constructed over a stream called and known as Narrow Passage Creek, in said county of Shenandoah aforesaid, that by reason of the wrongful act, neglect, and default of said def't, broke and fell down while the said engines, cars, and carriages thereto attached, in and upon which the said pl'ff intestate was riding as a passenger as aforesaid, were passing upon and over the same, whereby and by reason whereof the said engine, cars, and carriages thereto attached as aforesaid were precipitated and fell with great force and violence a great distance, to wit, 114 feet, and were thereby greatly wrecked and damaged, and the pl'ff's intestate greatly hurt, injured, maimed, disfigured, and wou'ded in his limbs and body, by reason whereof the said pl'ff's intestate suffered greatly, and finally died; and that the death of the said Charles L. Noel was caused by said wrongful act, neglect, and default of the said railroad company as aforesaid. Whereupon the said pl'ff, administrator as aforesaid of the said Charles L. Noel, dec'd, says that he is entitled to recover damages against the said defendant to the amount of $10,000 under and by virtue of the laws of the State of Virginia for such cases made and provided, and therefore he brings suit, &c.

3D COUNT.—Same as first count, except that the words "a cor-
28 poration doing business in the State of Virginia" omitted, and the following words substituted therefor, viz, a corporation of the State of Virginia.

4TH COUNT.—Same as second, except the addition of the words as added in the third count.

WALTON & WALTON & RIDDLEBERGER,
Attorneys for Plaintiff.

Common order.

And the defendant being duly summoned and not appearing, 'ne the motion of the plaintiff it is ordered that judgment be entered for the plaintiff against the defendant for what damages the plaintiff ought to recover, unless the said defendant shall appear at the next rules and answer the plaintiff's action.

At which day, to wit: Rules held in said office on the 7th day of August, 1876, the defendant still failing to appear, on the motion of the plaintiff, by his attorneys, it is ordered that the conditional judgment entered in this action at the last rules stand confirmed, and that the plaintiff's damages be ascertained by a jury at the next term.

At a circuit court continued and held for the county of Shenandoah, Saturday, September 2d, 1876.

MONROE FUNKHOUSER, ADM'R OF CHARLES L. Noel, dec'd, pl'ff,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY, def't. } In case.

29 The def't, by its counsel, moved the court to remove this cause to the circuit court of the United States for the western district of Virginia, upon the ground that the defendant is a corporation under the laws of the State of Maryland.

MONROE FUNKHOUSER, ADM'R OF CHARLES L. Noel, dec'd,
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

To the honorable the circuit court of Shenandoah County, State of Virginia:

The petition of Baltimore and Ohio Railroad Company, of the State of Maryland, respectfully shows that your petitioner is the defendant in this suit, and that the same was brought by Monroe Funkhouser, administrator of Charles L. Noel, dec'd, plaintiff, on or about the 6th day of June, 1876, in the circuit court of Shenandoah County, Virginia (the said county being in the 18th judicial circuit of said State); that the said plaintiff is now, and was at the time of the bringing of said suit, a citizen of the said State of Virginia, and that your petitioner is now, and was at the time of the bringing of this suit, a corporation duly incorporated under and by virtue of the laws of the State of Maryland, and as such corporation is now, and was at the time of the bringing of said suit, a citizen of said State of Maryland.

30 And your petitioner further represents that this suit is brough' to recover damages in the sum of ten thousand dollars by said plaintiff against the defendant for the alleged killing of his intestate whilst being carried as a passenger by the said defendant from the said county to and the amount in controversy and dispute exceeds the sum of five hundred dollars, exclusive of costs.

Petitioner further avers that this, the August term, 1876, of this said circuit court of said county is the first term of this court at which this said cause could be tried, if indeed it can be tried, at this term of said court, and your petitioner is ready now to give such good and sufficient surety as this court may require for its doing all acts required to be done by the provisions of the acts of Congress in such cases made and provided, and hereby offers its bond with good & approved security in the penal sum of two hundred & fifty dollars, conditioned according to law, upon application for removal of causes to the next circuit court of United States, which said bond your petitioner prays may be accepted as good and sufficient.

And your petitioner therefore prays that this cause may be removed to the circuit court of the United States for the western district of Virginia, held at Harrisonburg, pursuant to the statute of the United States in such cases made and provided, and that no proceedings may be had therein in this court. And your petitioner will ever

31 pray, &c.

BALTIMORE & OHIO RAILROAD COMPANY,
By WILLIAMS & BRO., *Att'ys.*

MONROE FUNKHOUSER, ADM'R OF CHAS. L. Noel, dec'd, pl'ff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def'ts.

In case. Motion for removal.

The motion of the defendants for a removal to the circuit court of the United States for the western district of Virginia, held at Harrisonburg, Virginia, made at a former day of this term, came on to be heard this 9th day of September, 1876, upon the petition of said defendant then filed, together with the bonds of said defendant with approved security in the penalty of two hundred fifty dollars (the amount fixed by the court), acknowledged before and accepted by the court at the time said petition was filed, to wit, on the 2d day of September, 1876, the answer of the plaintiff to said petition admitting the fact that the said defendant was a corporation duly incorporated under and by virtue of the laws of the State of Maryland, but averring that it was also a corporation of the State of Virginia duly incorporated under and by virtue of the laws of said State of Virginia, and was at the time of the institution of said suit, and is now, lessee of that part of the Washington City, Virginia Midland and Great Southern Railroad from the town of Strasburg, in Shenandoah County, to Harrisonburg, in Rockingham

32 County, Virginia, and replication thereto, and the evidence offered by said defendant, and by said court admitted, and after argument by counsel the court overruled said motion and refused to grant said removal as prayed for, and to said ruling of the court in refusing to grant said removal, the defendant, by its counsel, excepted, and tendered a bill of exceptions, which, as prayed by the defendant, was signed, sealed, enrolled and made part of the record, and which is in the words and figures following, to wit:

Deft's bill of exceptions, No. 1.

MONROE FUNKHOUSER, ADM'R OF CHAS. L. Noel, dec'd, pl'ff,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, def't.
} On a motion for removal.

Be it remembered that the defendant, in suport of its motion for the removal of this suit to the circuit court of the United States for the western district of Virginia, made in pursuance of a formal petition filed in this suit by the Baltimore & Ohio Railroad Company, claiming to be a citzen of the State of Maryland, against the plaintiff, Monroe Funkhouser, adm'r of Charles L. Noel, dec'd, who is and whose intestate was a citizen of Shenandoah County, in the State of Virginia, said petition being accompanied by a bond required by law duly
33 executed and acknowledged and accepted by the court, offered in evidence the charter of incorporation of the said Baltimore and Ohio Railroad Company, being an act of the legislature of the State of Maryland, which appeared in the public laws of said State of Maryland, and which was read to the court without objection or exception, and which is in the words and figures following, to wit:

AN ACT to incorporate the Baltimore and Ohio Railroad Company, passed Feb'y 28th, 1827.

SEC. 1. Be it enacted by the general assembly of Maryland, That Isaac McKim, Thomas Ellicott, Joseph W. Patterson, John McKim, jr., Wm. Stewart, Talbot Jones, Roswell L. Colt, George Brown, and Evan Thomas be and they are hereby appointed commissioners, under the direction of a majority of whom subscriptions may be received to the capital stock of the Baltimore and Ohio Railroad Company hereby incorporated. And they or a majority of them may cause books to be opened at such times and places as they may direct, for the purpose of receiving subscriptions to the capital stock of said company, after having given such notice of the times and place of opening the same as they may deem proper; and that upon the first opening of said books they shall be kept open for at least ten successive days, from 10 o'clock a. m. until 2 o'clock p. m., and at the expiration of that
34 period such a subscription to the capital stock of said company as is necessary to its incorporation shall not have been obtained, the said commissioners, or a majority of them, may cause the said books to be opened from time to time, after the expiration of said ten days, for the space of twelve months thereafter, or until the sum necessary to the incorporation of the company shall be subscribed, if sooner subscribed; and if any of the said commissioners shall die, resign, or refuse to act during the continuance of the duties devolved upon them by this act, another may be appointed in his stead by the remaining commissioners, or a majority of them.

SEC. 2. And be it enacted, That the capital stock of the said Baltimore & Ohio Railroad Company shall be three millions, in shares of one hundred dollars each, of which ten thousand shares shall be reserved for subscription by the State of Maryland, and five thousand for the city of Baltimore, for the space of twelve months after the passage of this act by the legislature of Maryland, and the remaining fifteen thousand shares may be subscribed for by any other corporation, or by

individuals; and that as soon as ten thousand shares of the said capital stock shall be subscribed, the subscribers of the said stock, their successors and assigns, shall be, and they are hereby declared to be, incorporated into a company by the name of the Baltimore & Ohio Railroad Company, and by that name shall be capable in law of purchasing, holding, selling, leasing, and conveying estates, real, personal and mixed, so far as shall be necessary for the purposes hereinafter mentioned, and no farther, and shall have perpetual succession, and by said corporate name sue and be sued, and may have and use a common seal, which they shall have power to alter or renew at their pleasure, and shall have, enjoy, and may exercise all the powers, rights, and privileges which other corporate bodies may lawfully do for the purpose mentioned in this act.

SEC. 3. And be it enacted, That if more than fifteen thousand shares shall be subscribed to the capital stock of said company, not reserved to the State of Maryland, or to the city of Baltimore, the said commissioners, or a majority of them, shall reduce the subscription to fifteen thousand shares by striking off from the largest number of shares, in succession, until the subscriptions are reduced to fifteen thousand shares, or all the subscriptions to one share, and if there still be an excess, then lots shall be drawn by the commissioners to determine who are to be excluded.

SEC. 4. And be it enacted, That upon every such subscription there shall be paid, at the time of subscribing, to the said commissioners, or their agents appointed to receive such subscriptions, the sum of one dollar on every share subscribed, and the residue thereof shall be paid in such instalments and at such times as it may be required by the president and directors of said company: Provided, That not more than one-third of the subscription be demanded in any one year from the commencement of the work, nor any payment demanded until at least sixty days' public notice of such demand shall have been given by the said president and directors, and if any subscriber shall fail or neglect to pay any instalment or part of said subscription thus demanded for the space of sixty days next after the time the same shall be due and payable, the stock on which it is demanded shall be forfeited to the company, and may be sold by the said president and directors for the benefit of the company; but the president and directors may remit any such forfeiture on such terms as they shall deem proper.

SEC. 5. And be it enacted, That if the subscription herein made necessary to the incorporation of the said company shall not be obtained within twelve months after the first opening of the subscription books by the said commissioners, this act and all the subscription under it shall be null and void, and the said commissioners, after discharging the expenses of opening the books, shall return the residue of the money paid in upon such subscriptions to the several subscribers in proper proportions to the sum respectively paid in by them.

SEC. 6. And be it enacted, That at the expiration of the ten days for which the books are first opened, if ten thousand shares of said capital stock shall have been subscribed, or if not, as soon thereafter as the same shall be subscribed, if within one year after the first opening of the books the said commissioners, or a majority of them, shall call a general meeting of the subscribers, at such time and place as they may appoint, and shall give at least twenty days' public notice thereof, and at such meeting the said commissioners shall lay the subscription books before the subscribers then and there present, and thereupon the said subscribers, or a majority of them, shall elect twelve

directors, by ballot, to manage the affairs of said company, and these twelve directors, or a majority of them, shall have the power of electing a president of said company, either from amongst the director or others, and of allowing him such compensation for his services as they may deem proper, and that in said election, and on all other occasions wherein a vote of the stockholders of said company is to be taken, each stockholder shall be allowed one vote for every share owned by it, him, or her; and every stockholder may depute any other person to vote and act for it, him, or her as its, his, or her proxy; and the commissioners aforesaid, or any three or more of them, shall be judges of the said first election of directors.

SEC. 7. And be it enacted That to continue the succession of the president and directors of said company, twelve directors shall be chosen annually on the second Monday of October in every year, in the city of Baltimore, by the stockholders of said company, and that
38 the State of Maryland and the city of Baltimore may each appoint one additional director of said company for every twenty-five hundred shares of stock of said company by them respectively owned at the time of such election, but shall not be permitted to vote upon their stock in the election of the directors by the stockholders in general meeting; and that the directors of said company, or a majority of them, shall have power to appoint judges of all elections, and to elect a president of said company, either from amongst the directors or others, and to allow him such compensation for his services as they may deem proper; and if any vacancy shall occur by death, resignation or refusal to act, of any president or director before the year for which he was elected has expired, a person to fill such vacant place for the residue of the year may be appointed by the president and directors of said company or a majority of them, and that the president and directors of the company shall hold and exercise their offices until a new election of president and directors; and that all elections which are by this act or the by-laws of said company to be made on a particular day or at a particular time, if not made on such day or at such time, may be made at any time within thirty days thereafter.

SEC. 8. And be it enacted, That a general meeting of the stock-
39 holders of said company shall be held annually at the time and place appointed for the election of the president and directors of said company; that they may be called at any time during the interval between said annual meeting by the president and directors, or a majority of them, or by the stockholders owning at least one-fourth of the whole stock subscribed, upon giving thirty days' public notice of the time and place of holding the same, and when any such meetings are called by the stockholders, such notice shall specify the particular object of the call; and if at any such called meeting a majority (in value) of the stockholders of said company are not present in person or by proxy, such meeting shall be adjourned from day to day without transacting any business for any time not exceeding three days, and if within said three days stockholders having a majority (in value) of the stock subscribed do not thus attend such meeting shall be dissolved.

SEC. 9. And be it enacted, That at the regular annual meeting of the stockholders of said company, it shall be the duty of the president and directors in office for the preceeding year to exhibit a clear and distinct statement of the affairs of the company; that at any called meeting of the stockholders, a majority of those present may require similar statements from the president and directors, whose duty it shall be to furnish them when thus required; and that at all general meetings of the

stockholders, a majority (in value) of all the stockholders in said
40 company may remove from office any president or any of the directors of said company, and may appoint others in their stead.

SEC. 10. And be it enacted, That every president and director of said company before he acts as such shall swear or affirm, as the case may be, that he will well and truly discharge the duties of his said office to the best of his skill and judgment.

SEC. 11. And be it enacted, That if any of the said fifteen thousand shares of the capital stock of the said company, not reserved to the city of Baltimore or to the State of Maryland, shall remain unsubscribed until the organization of the said company; or if the shares of said capital stock hereinbefore reserved to the said State or city, or any part of them, shall not be subscribed by said State or city respectively, during the time for which such stock is reserved for them, in either case the president and directors of the said company, or a majority of them, shall have power to open books and to receive subscriptions to any of the capital stock of said company which may thus remain unsubscribed for, or to sell or dispose of such unsubscribed stock, for the benefit of the company, for any sum not under its par value; and the purchaser or subscriber of such stock shall have all rights, powers, and privileges of original subscribers, and shall be subject to the same regulations.

SEC. 12. And be it enacted, That the said president and direct-
41 ors, or a majority of them, may appoint all such officers, engineers, agents or servants whatsoever, as they may deem necessary for the transaction of the business of the company, and may remove any of them at their pleasure; that they, or a majority of them, shall have power to determine by contract the compensation of all the engineers, officers, agents or servants, in the employ of said company, and to determine by their by-laws the manner of adjusting and settling all accounts against the company, and also the manner and evidence of transfers of stock in said company; and that they or a majority of them shall have power to pass all by-laws which they may deem necessary or proper for exercising all the powers vested in the company hereby incorporated, and for carrying the object of this act into effect, provided only, that such by-laws shall not be contrary to the laws of the United States, or the laws of any of the States asserting to this act or any of the provisions of this act.

SEC. 13. And be it enacted, That if the capital stock of said company shall be deemed insufficient for the purpose of this act, it shall and may be lawful for the president and directors of said company, or a majority of them, from time to time, to increase the said capital stock by the addition of as many shares as they may deem necessary, for which they may, at their option, cause subscriptions to be received in the manner prescribed by them, or may sell the same for the bene-
42 fit of the company for any sum not under their par value; and that they, or a majority of them, shall have power to borrow money for the object of this act, to issue certificates or other evidence of such loans, and to pledge the property of the company for the payment of the same, and its interest.

SEC. 14. And be it enacted, That the president and directors of said company shall be and they are hereby invested with all the rights and powers necessary to the construction and repair of a railroad from the city of Baltimore to some suitable point on the Ohio River to be by them determined, not exceeding sixty feet wide, with as many sets of tracks as the president and directors, or a majority of them, may deem neces-

sary; and they, or a majority of them, may cause to be made or contract with others for making said railroad or any part of it, and they, their agents, or those with whom they may contract for making any part of the same, or their agents, may enter upon and use and excavate any land which may be wanting for the site of said road, or the erection of warehouses or other works necessary to said road, or for any other purpose necessary or useful in the construction or repair of said road or its works; and that they may build bridges, may fix scales and weights, may lay rails, may take & use any earth, timber, gravel, stone, or other materials which may be wanted for the construction or repairs of any part of said road or any of its works, and may make and
43 construct all works whatsoever, which may be necessary and expedient in order to the proper completion of said road, and that they, or a majority of them, may make or cause to be made, lateral railroads in any direction whatsoever in connection with said railroad from the city of Baltimore to the Ohio River; and in the construction of the same or their works shall have, possess, and may exercise all the rights and powers hereby given them in order to the construction or repairs of the said railroad from the city of Baltimore to the Ohio River.

SEC. 15. And be it enacted, That the president and directors of said company, or a majority of them, or any person or persons authorized by a majority of them, may agree with the owner or owners of any land, earth, timber, gravel, stone, or other material, or any improvements which may be wanted for the construction or repair of any of said roads or any of their works for the purchase or use and occupation of the same, and if they cannot agree, or if the owner or owners, or any of them, be a feme covert, under age, non compos mentis, or out of the county in which the property wanted may lie when such land or materials shall be wanted, application may be made to any justice of the peace of such county, who shall thereupon issue his warrant under hand and seal, directed to the sheriff of said county, directing him to summon a jury of twenty inhabitants of said county not related or anywise interested to meet on the land or near to the other property or ma-
44 terials to be valued on a day named in said warrant not less than ten nor more than twenty days after the issuing of the same; and if at said time and place any of said jurors summoned do not attend the said sheriff shall immediately summon as many jurors as may be necessary with the jurors in attendance to furnish a panel of twenty jurors in attendance, and from them each party or its, his, her, or their agent, if either be not present in person or by agent, the sheriff, for him, her, it, or them, may strike off four jurors, and the remaining twelve shall act as the jury of inquest of damages, and before they act as such the said sheriff shall administer to each of them an oath or affirmation, as the case may be, that he "will justly and impartially value the damages which the owner or owners will sustain by the use or occupation of the same required by the company," and the jury in estimating such damages shall take into the estimate the benefit resulting to said owner or owners from conducting such railroad through, along, or near to the property of said owner or owners, but only in extinguishment of the claim for damages; and the said jury shall reduce their inquisition to writing, and shall sign and seal the same, and it shall then be returned by said sheriff to the clerk or prothonotary of his county, as the case may be, and by such clerk or prothonotary filed in his court, and shall be confirmed by said court at its next session if no sufficient
45 cause to the contrary be shown, and when confirmed shall be recorded by said clerk or prothonotary at the expense of said com-

pany, but if set aside the said court may direct another inquisition to be taken in the manner above prescribed, and such inquisition shall describe the property taken or the bounds of the land condemned and the quantity or duration of the interest in the same valued for the company, and such valuation, when paid or tendered to the owner or owners of said property, or his, her, or their legal representatives, shall entitle the said company to the estate and interest in the same thus valued as fully as if it had been conveyed by the owner or owners of the same, and the valuation, if not received when tendered, may at any time thereafter be received from the company without costs by the said owner or owners, his, her, or their legal representative or representatives.

SEC. 16. And be it enacted, That whenever in the construction of said road or roads, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the president and directors of said company so to construct the said road across such established road or way as not to impede the passage or transportation of persons or property along the same; or when it shall be necessary to pass through the lands of an individual, it shall also be their duty to provide for such individual proper wagon ways across said road or roads, from one part of the land to the other.

46 SEC. 17. And be it enacted, That whensoever it shall be necessary for said company to have, use or occupy any lands, materials, or other property, in order to the construction or repair of any part of said road or roads, or their works, or necessary buildings, the president and directors of said company or their agents, or those contracting with them for making or repairing the same, may immediately take and use the same, they having first caused the property wanted to be viewed by a jury (formed in the manner hereinbefore prescribed in those cases, where the property is to be changed or altered by admixture with other substances before such alteration is made), and that it shall not be necessary, after such view, in order to the use or occupation of the same, to wait the issue of the proceedings upon such view; and the inquest of the jury after confirmation and after payment or tender of the valuation shall be a bar to all actions for taking or using such property, whether commenced before or after such confirmation, on the payment of said valuation.

SEC. 18. And be it enacted, That the said president and directors, or a majority of them, shall have power to purchase with the funds of said company, and place on any railroad constructed by them under this act, all machines, wagons, vehicles, or carriages of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and they shall have power to charge for tolls upon (and the transportation of persons) goods, produce, merchan-

47 dise or property of any kind whatsoever, transported by them along said railway from the city of Baltimore to the Ohio River, any sum not exceeding the following rates, viz: on all goods, produce, merchandise, or property, of any description whatsoever transported by them from west to east, not exceeding one cent a ton per mile for toll, and three cents a ton per mile for transportation; on all goods, produce, merchandise, or property of any description whatsoever, transported by them from east to west, not exceeding three cents a ton per per mile for tolls, and three cents a ton per mile for transportation; and for the transportation of passengers, not exceeding three cents per mile for each passenger; and it shall not be lawful for any other company, or person, or persons whatsoever, to travel upon or use any of the roads, of said company, or to transport persons, merchandise, pro-

duce or property of any description whatsoever, along said roads, or any of them, without the license or permission of the president and directors of said company; and that the said road or roads, with all their works of improvements and profits, and all the machinery of transportation used on said road, are hereby vested in the said company incorporated by this act, and their successors forever; and the shares of the capital stock of the said company, shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burthen by the States assenting to this law.

SEC. 19. And be it enacted, That the said president and direct-
48 ors shall annually or semi-annually declare and make such dividend as they may deem proper, of the nett profits arising from the recources of the said company, after deducting the necessary current and probable contingent expenses; and that they shall divide the same amongst the proprietors of the stock of said company in proper proportions to their respective shares.

SEC. 20. And be it enacted, That if any person or persons shall wilfully, by any means whatsoever, injure, impair or destroy any part of any railroad constructed by said company under this act, or any of their necessary works, buildings, carriages, vehicles, or machines of said company, such person or persons so offending shall each of them for every such offence forfeit and pay to the said company the sum of five hundred dollars, which may be recovered in the name of said company by an action of debt in the county court of the county wherein the offence shall be committed, and shall also be subject to indictment in said court, and upon conviction of such offence shall be punished by fine and imprisonment in the discretion of the court.

SEC. 21. And be it enacted, That as soon as this act shall have been passed by the legislature of Maryland books may be opened, subscriptions received, and the said company organized, and that when organ-
ized the said company and the president and directors of the same
49 shall have all the powers, rights, and privileges granted by this act, and shall be subject to all of its regulations in constructing or repairing any of the said railroads or other necessary works or buildings, which may or can be constructed within the limits of the State of Maryland, and in transporting persons, goods, merchandise, or property of any description along any of said roads; and that the provisions of this act shall be wholly in force as to all of the property of the company which may be situated or may be within the State of Maryland, and which said company is permited to hold under this act.

SEC. 22. And be it enacted, That if said road shall not be commenced in two years from the passage of this act, and shall not be finished within the State in ten years from the time of the commencement thereof, then this act shall be null and void.

SEC. 23. And be it enacted, That full right and privilege is hereby reserved to the citizens of this State, or any company hereafter to be incorporated under the authority of this State, to connect with the road hereby provided for, any other railroad leading from the main route to any part or parts of this State; provided that in forming such connection no injury shall be done to the work of the company hereby incorporated.

And the plaintiff also admitting that the said defendant was duly incorporated by and under the laws of the said State of Maryland, but
proved that the defendant was at the time of the institution
50 of this suit, and is now lessee of the Washington City, Vir-

ginia Midland and Great Southern Railroad Company, from the town of Strasburg, in the county of Shenandoah, to the town of Harrisonburg, in the county of Rockingham, both in the State of Virginia, and was using, managing, operating and controlling the same along said line and in said county of Shenandoah, in the State of Virginia, where said cause of action arose, under and by virtue of a lease in the words and figures following, to wit:

Lease.

This deed, made this 20th day of August, in the year eighteen hundred and seventy-three, between the Washington City, Virginia Midland, and Great Southern Railroad Company, of the one part, and the Baltimore and Ohio Railroad Company, of the other part.

Whereas the road of the said party of the first part lying between Strasburg Junction and Harrisonburg, in Virginia, forms, in point of fact, with the Baltimore and Ohio Railroad at Harper's Ferry, and the railroads between that place and Strasburg, a continuous line of railroad from Baltimore, in the State of Maryland, to Harrisonburg, as aforesaid; and

Whereas the said party of the second part is desirous that its road should be connected with the road of the said party of the first part in such manner as to place the entire line under the same control, in
51 which desire the said party of the first part fully participates, and for that purpose has agreed to lease to the said party of the second part that portion of its line lying between Strasburg and Harrisonburg aforesaid, being a distance of fifty-one miles, for the term of ninety-nine years, renewable forever, at the annual rent of eighty-nine thousand two hundred and fifty dollars, gold; and whereas at a meeting of the board of directors of said Washington City, Virginia Midland and Great Southern Railroad Company, held at their office in the city of Alexandria, and State of Virginia, on the 19th day of August, A. D. 1873, the following resolution was unanimously adopted:

Resolved, That this company lease to the Baltimore & Ohio Railroad Company that portion of its railroad lying between Strasburg and Harrisonburg, in the State of Virginia, at the annual rental of eighty-nine thousand two hundred and fifty dollars, gold, payable semi-annually, from the 1st day of September, A. D. 1873, for the term of ninety-nine years, renewable forever; and that the president of this company be, and he is hereby directed to sign, execute and acknowledge, on behalf of this company, a lease as aforesaid, duly prepared according to law; and

Whereas, at a meeting of the board of directors of said Baltimore and Ohio Railroad Company, held in the office of said company, in the city of Baltimore, on the 3d day of July, A. D. 1873, the following reso-
lution was unanimously adopted:
52 Resolved, That the proposition of the Washington City, Virginia Midland and Great Southern Railroad Company, to lease permanently that portion of its line lying between Strasburg and Harrisonburg, in Virginia, a distance of fifty-one miles, at an annual rental of eighty-nine thousand two hundred and fifty dollars, gold, be excepted, commencing the first day of September, A. D. 1873:

Now this deed witnesseth that the said party of the first part has leased, and by these presents doth lease unto the Baltimore and Ohio Railroad Company, all that portion of the road of the said party of the first part that lies between Strasburg & Harrisonburg, in Virginia, for

the term of ninety-nine years, renewable forever, being a distance of fifty-one miles, at and under the yearly rental of eighty-nine thousand two hundred and fifty dollars, gold, payable in equal semi-annual instalments on the first days of March and September in every year.

To have and to hold the said road between Strasburg and Harrisonburg, together with all and singular the rights and privileges and appurtenances thereto belonging for the exclusive use of the said party of the second part, in as ample a manner, to all intents and for all purposes, as the said party of the first part could have held and enjoyed the same had this lease never been made, for and during
53 the full term of ninety-nine years, with the benefit of renewal forever, accounting from the 1st of September, in the year eighteen hundred & seventy-three. And the party of the second part hereby covenants and agrees that it will pay the rent aforesaid upon the terms and at the times aforesaid, mentioned during the continuance of this lease, and during the continuance of all and every renewal thereof.

And the party of the first part hereby covenants & agrees with the said party of the second part that it will at all times execute and deliver to the said party of the second part all such additional instruments of writing as may be required to confirm these presen ts, and covenants; that it will execute such further assurances of the said road and franchises herein granted and demised as may be requisite; and that it will renew the present lease and every succeeding lease at the expiration of the term of ninety-nine years, of each of them respectively, to the end that the lease now made may be renewed forever.

And the party of the first part doth hereby covenant and agree that it will at all times lend its aid, should it become necessary, to procure from the legislature of Virginia *and* additional legislation to carry out the spirit and intent of these presents, and that it will at all times permit the said party of the second part to use its name, should it become necessary, to enable the said last-named party to enjoy to the
54 fullest extent all the rights and franchises of the said party of the first part in the same way that they might or could have been enjoyed by the latter had their lease never been executed.

And in order to pertect this lease the same is to be submitted to a meeting of the stockholders of each of said companies parties hereto called by the directors thereof, and to be approved and assented to by at least two-thirds of the said stockholders of each of said companies represented at such meeting and voting thereat.

And the party of the first part doth hereby authorize and appoint William H. Marbury, esq., as its attorney to acknowledge this instrument of writing as and for the act and deed of the party of the first part aforesaid in order that the same may be duly recorded according to law.

In witness whereof the said party of the first part has caused its corporate seal to be hereto affixed and its president to sign his name hereto; and the said party of the second part aforesaid has caused its seal to be affixed hereto and these presents to be signed by its president.

THE WASHINGTON CITY, VIRGINIA MIDLAND & GREAT SOUTHERN RAILROAD COMPANY,

{ SEAL W. C., VA. M. & G. SO. R. R. CO. }

By JOHN S. BARBOUR, *President.*

{ SEAL OF B. & O. R. R. CO. }

JOHN KING, JR., *President pro tem. Baltimore & Ohio Railroad Company.*

55 STATE OF MARYLAND,
Baltimore City, to wit:

Personally appeared before me Th. Harris Hodges, notary public of the State of Maryland, in and for Balto. City, W. H. Marbury, attorney, and acknowledged the within instrument of writing or agreement to be the act and deed of the Washington City, Virginia Midland and Great Southern Railroad Company.

{ SEAL TH. HARRIS HODGES, NOTARY PUBLIC, BALTIMORE. } TH. HARRIS HODGES,
Notary Public.

At an annual meeting of the stockholders of the Washington City, Virginia Midland and Great Southern Railroad Company, held at the city of Lynchburg, on Wednesday, the 26th day of November, 1873, pursuant to appointment of the directory, and notice duly published in the newspapers,

* * * * * * *

The following resolution was unanimously adopted:

Resolved, That the action of the president and board of directors, whereby this company entered into a contract of lease of so much of this road as lies between the town of Strasburg and Harrisonburg to the Baltimore and Ohio Railroad Company, which contract bears
56 date the 20th day of August, 1873, be, and hereby is, ratified, approved and confirmed.

* * * * * * *

A true extract from the minutes, as witness the corporate seal of the said Washington City, Virginia Midland and Great Southern Railroad Company, and the signature of L. W. Reid, secretary thereof.

{ SEAL OF W. C., VA. M. & G. R. R. CO. } L. W. REID,
Sec. W. C., V. M. & G. S. R. R. Co., and Ex-Officio Sec'y of Annual Meeting.

Resolved by the stockholders of the Baltimore and Ohio Railroad Company, in general meeting assembled, That they do ratify and confirm the contract or deeds of lease executed by the Washington City, Virginia Midland and Great Southern Railroad Company to and with the Baltimore and Ohio Railroad Company, which said contract or deed of lease is to the tenor and effect following:

Resolved, That the president pro tempore of this company be, and he is hereby, authorized to sign & acknowledge, on the part of this company as lessee, the deed or contract of lease contained in the above resolution, and said president pro tempore is hereby authorized and empowered to sign, execute, and acknowledge on behalf of this company, as lessee of that part of the railroad so agreed to be leased, any other instrument or contract of lease which in the opinion of counsel may be necessary, upon the terms and conditions set forth in said
57 contract or deed of lease.

It appearing that the holders of at least two-thirds of the stock of the company represented at the meeting and voting thereat in person or by proxy assented to said resolution, they were therefore declared to be adopted. The chairman announced that 39,226 shares were voted in favor and none in opposition thereto.

The contract and deed of lease mentioned in the first resolution is the lease herewith filed of record.

The above is a true and correct extract from the minutes of the meeting of the stockholders of the Baltimore and Ohio Railroad Company, called by directors thereof to ra'ify and perfect the lease above named.

{ SEAL B. & O. R. R. CO. } W. H. IJAMS,
Sec. Balto. & Ohio Railroad Co.

As set forth in the plaintiff's declaration. And the plaintiff further answered that the def't was a corporation of the State of Virginia, by virtue of an act of the legislature of said State of date the 8th day of March, 1827, which was offered in evidence and read to the court, without objection, in the following words and figures, to wit:

An act passed by the legislature of Virginia to confirm a law passed at the present session of the general assembly of Maryland, entitled "An act to incorporate the Baltimore and Ohio Railroad Company," passed March 8th, 1827.

58 Whereas an act has passed the legislature of Maryland, entitled "An act to incorporate the Baltimore and Ohio Railroad Company," in the following words and figures, viz:

(Same as Maryland act.)

Therefore, be it enacted by the general assembly, That the same rights and privileges shall be and are hereby granted to the aforesaid company within the territory of Virginia as are granted to them within the territory of Maryland. The said company shall be subject to the same pains, penalties, and obligations as are imposed by said act; and the same rights, privileges, and immunities which are reserved to the State of Maryland or to the citizens thereof are hereby reserved to the State of Virginia and her citizens, except that the said company shall not make or authorize to be made any lateral road or roads within the territory of Virginia without the consent of this legislature; that the said shall not strike the Ohio at a point lower than the mouth of the Little Kanawha in said river; that the words "or other property," in the seventeenth section of the above recited act, shall in no case be construed to extend to any property other than material necessary for the construction or repairs of said road or other works or necessary buildings, and that in obtaining a right to any lands through which the con-
59 templated railroad may extend, or to any timber, gravel, stone, or earth which be necessary to the construction or repair of said road, or other works or necessary buildings within this commonwealth.

"The Baltimore and Ohio Railroad Company" shall proceed in the same manner as is prescribed in the seventh, eighth, ninth, tenth, and twelve sections of an act entitled "An act prescribing certain general regulations for the incorporation of turnpike companies," passed February the seventh, one thousand eight hundred and seventeen; except also that any injury which may at any time be done within the limits of Virginia to the said road, or other works or necessary buildings, shall at all times be punished according to the laws which may be in force in this commonwealth for the protection of the public works of the commonwealth of Virginia.

And also referred and relied upon the following acts of the legislature of Virginia, relating to the Baltimore and Ohio Railroad Company, viz:

1st. Act of Feb'y 13, 1838, acts of 1838, ch. 158, p. 112.
2d. Act of March 19, 1839, acts of 1839, ch. 98, p. 66.
3d. Act of March 19, 1841, ch. 87 of acts of 1841, page 97.
4th. Act of 25th Feb'y, 1841, ch. 97 of acts of 1841, p. 107.
5th. Acts of 1844 & 5, p. 69, ch. 88, date 19th Feb'y, 1845.
6th. Acts of 1847 & 8, p. 179, ch. 148, date March 20, 1848.

And this was all the evidence offered on said motion.

60 And the court, upon consideration whereof, overruled said motion, and refused to remove said suit, to which ruling of the court in refusing to remove this suit as aforesaid, and as asked for in said petition, the defendant excepted and tendered its bill of exceptions, and prayed that the same be signed, sealed and enrolled which is here done accordingly.

MARK BIRD. [SEAL.]

And at a circuit court continued and held for the county of Shenandoah, on Tuesday, December 19, 1876.

MONROE FUNKHOUSER, ADM'R OF CHARLES L. Noel, dec'd, plff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def'd't. } In case.

On the motion of the defendant by its attorneys the office judgment and writ of enquiry entered against said defendant, at rules, are set aside; whereupon said defendant says that it is not guilty of the trespass as in the pl'ff's declaration is alleged, and of this it puts itself upon the country, and the plaintiff likewise, and issue is joined. And the def't, by counsel, demurred to the pl'ff's declaration, in which demurrer the pl'ff joined. And on the further motion of defendant, by its attorneys, it has leave to plead specially within thirty days, and this cause is continued generally until the next term.

61 At a circuit court continued and held for the county of Shenandoah on Thursday, May 3, 1877.

MONROE FUNKHOUSER, ADM'R OF CHAS. L. Noel, dec'd, pl'ff,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY, def'd't.

Upon the application of the pl'ff in this cause, leave is given him to file a bill or statement of particulars with his declaration, setting forth the names and ages of the mother and other relations of said Charles L. Noel, dec'd, who will be the beneficiaries of any recovery that may be had in this cause, within thirty days from the adjournment of this court, subject to objection at the next term, except upon the ground of time.

Bill of particulars.

MONROE FUNKHOUSER, ADM'R OF CHAS. L. Noel, dec'd, plaintiff,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY, defendant.

Statement of particulars.

Charles L. Noel, who died intestate and unmarried, left as his heirs at law his mother, Phebe Ann Noel, aged years, who claims as

beneficiary in said suit as such mother and heir-at-law of her said son, for whom the administrator, the said Monroe Funkhouser, institutes the said suit as beneficiary aforesaid, also for the following sisters,
62 constituting the family, all of whom received and had a right to expect support from the said defendant, viz: Phebe Ann Noel, Elizabeth Ann Noel, aged 33 years; Lydia Catharine Noel, aged 25.

And at a circuit court, continued and held for the county of Shenandoah, on Tuesday, April 9th, 1878.

MONROE FUNKHOUSER, ADM'R OF CHARLES L. Noel, dec'd, plaintiff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, defendant. } In case.

This day came the parties, by their attorneys, and the defendants, by counsel, demurred to each count of the declaration, and the plaintiff joined in said demurrer.

Whereupon it is considered by the court that the demurrer to the declaration and said demurrer to each count thereof be overruled.

Thereupon the defendant offered a plea in the words and figures following:

Special plea A.

THE BALTIMORE AND OHIO RAILROAD COMPANY
vs.
CHARLES L. NOEL'S ADM'R.

And for a further plea in this behalf the defendant says: That on the 6th day of March, 1876, the said Charles L. Noel, the plaintiff intestate, applied to the def't for what is commonly known and called a "free pass" from the town of Mt. Jackson, in the State of
63 Virginia, to city of Washington, in the District of Columbia, by means of which the said Charles L. Noel was to be allowed the privilege of going aboard of and riding on the def't's cars from the said town of Mt. Jackson to said city of Washington without the payment of any fare, money, or compensation to the said def't by the said Noel, and the def't avers that then and there, on said day, said "free pass" was given to the said Noel, and that in consideration of the said "free pass" so given and delivered, with the privilege attaching thereto as aforesaid, the said Noel signed and sealed an agreement on the back of said "free pass," in these words, to wit: "In consideration of the within free pass I take all risks of injury to my person or of loss to my baggage while upon the journey indicated by this free pass, hereby covenanting not to sue the Baltimore & Ohio Company for any damage, injury, or loss I may sustain on said route, in any manner whatsoever, and releasing the said company hereby from every and all claim for damages therefor." That in pursuance of and by reason of said agreement thus given, the said Charles L. Noel did go upon the cars of said def't and did proceed upon his journey aforesaid, and did thus, and did in no other way or manner, become or was a passenger on, in, and of the cars of the said def't on the said 6th day of March, 1876. And the said def't avers that it was only by and in pursuance of said contract

64 aforesaid that it undertook and promised to carry said Noel from said town of Mt. Jackson to said city of Washington, and that it was on said journey aforesaid that the said Noel sustained the injuries complained of, if any were at all by him sustained. And this the def't is ready to verify; wherefore it prays judgment if the said def't ought to have or maintain his action against it.

SHEFFEY & WILLIAMS & BRO.,
For the Def't.

To the filing of which the pl'ff objected, and moved to reject the same; which objection and motion the court sustained, and refused to permit said plea to be filed, to which action and ruling of the court the defendant, by its counsel, excepted and tendered a bill of exceptions, which, as prayed by the defendant, was signed, sealed, and enrolled, and made part of the record in the cause, and which is in the words and figures following, to wit:

Def't bill of exception No. 2.

CHAS. L. NOEL'S ADM'R, PL'FF,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY,
def't.

MEMO.—That before this case was called for trial the defendant, by its counsel, offered to file a special plea, in the words and figures following, to wit:

"And for a further plea in this behalf, the defendant says that
65 on the 6th day of March, 1876, the said Charles L. Noel, the plaintiff's intestate applied to the def't for what is commonly known and called a free pass from the town of Mt. Jackson, in the State of Virginia, to the city of Washington, in the District of Columbia, by means of which the said Charles L. Noel was to be allowed the privilege of going aboard of and riding on the def't cars from said town of Mt. Jackson to said city of Washington without the payment of any fare, money, or compensation to the said def't by the said Noel; and the def't avers that then and there, on said day, said free pass was given to the said Noel, and that in consideration of said free pass so given and delivered with the privilege attaching thereto as aforesaid, the said Noel signed and sealed an agreement on the back of said free pass, in these words, to wit: 'In consideration of the within free pass, I take all risks of injury to my person or of loss to my baggage while upon the journey indicated by this free pass, hereby covenanting not to sue the Baltimore and Ohio Company for any damage, injury, or loss I may sustain on said route in any many whatsoever, and releasing the said company hereby from every and all claim for damages therefor.' That in pursuance of and by reason of said agreement thus given, the said Charles L. Noel did go upon the cars of said def't, and did proceed upon his journey aforesaid, and did thus, and did in no other way or manner, become or was a passenger on, in, and of the said def't on the said 6th day of March, 1876; and the said def't avers that it was only by and in
66 pursuance of said contract aforesaid that it undertook and promised to carry said Noel from said town of Mt. Jackson to said city of Washington, and that it was on said journey aforesaid that the said Noel sustained the injuries complained of, if any were at all by him sustained. And this the def't is ready to verify; wherefore it prays judgment of the said def't ought to have or maintain his action against it."

To the filing of which special plea the plaintiff, by his counsel, objected, on the ground that the same presented no defence to his action, and thereupon, the court sustaining said objection, refused to allow said special plea to be filed; to which action and ruling of the court the defendant, by its council, excepted, and prayed that this its bill of exceptions be signed, sealed, and enrolled, which is here done accordingly.

MARK BIRD. [SEAL.]

On the motion of the defendant, by its attorneys, it is ordered that the following named persons be summoned to appear before this court immediately as a panel for a special jury for the trial of this cause, to wit: Raphael Foltz, Joseph Hawkins, Henry Carper, Amos K. Grim, John W. Swaney, William Gochenour, John Wisman, Sam'l D. Bowden, heir, W. Senner, Jacob Shokey, Henry Maphis, Wm. T. Wright, Wm. A. Mohler, Melton H. Saum, Robt. J. Lutholtz, Samuel Maphis, John W. Bowman, L. D. Funkhouser, Wm. P. Stultz, and Erasmus Bowman, who ap-
67 peared in court pursuant to their summons, and upon examination by the court said Joseph Hawkins, Henry Carper, Amos K. Grim, John W. Swaney, William Gochenour, John Wisman, Sam'l D. Bowden, heir, W. Senner, Jacob Shokey, Henry Maphis, Wm. T. Wright, Wm. A. Mohler, Melton H. Saum, Robert J. Lutholtz, Samuel Maphis, John W. Bowman, and Wm. P. Stultz were found free from all legal exemptions, and qualified to serve as jurors, acording to law, and said Raphael Foltz, L. D. Funkhouser, and Erasmus Bowman were found not so qualified. Thereupon it is ordered by the court that the sheriff summon Henry Kerns, Henry Moreland, and Sam'l Ritnour to appear before this court immediately for the completion of the panel for the special jury for the trial of this cause, who appeared in court pursuant to their summons, were examined by the court, found free from all legal exceptions and qualified to serve as jurors according to law, completing the panel for a special jury for the trial of this cause to wit, Joseph Hawkins, Henry Carper, Amos K. Grim, Samuel D. Bowden, Jno. W. Swaney, William Gochenour, heir, W. Senner, Wm. T. Wright, Henry Maphis, Melton H. Saum, Wm. P. Stultz, John W. Bowman, Jacob Shokey, Samuel Maphis, Robert J. Lutholtz, Henry Moreland, John Wiseman, Wm. A. Mohler, Samuel Ritnour, and Henry Kerns.

Whereupon the following sixteen were selected by lot, viz: Amos K. Grim, Joseph Hawkins, Henry Carper, Samuel D. Bowden, John W. Swaney, William Gochenour, John Wisman, heir, W. Senner, Wm. T. Wright, Henry Maphis, William A. Mohler, Melton H. Saum,
68 Wm. P. Stultz, John W. Bowman, Samuel Ritnour, and Henry Kerns, and the parties, beginning with the plaintiff, struck off John Wisman, Henry Kern, Sam'l Ritnour, and Wm. A. Mohler, when the following twelve remained, to wit, Amos K. Grim, Joseph Hawkins Henry Carper, Samuel D. Bowden, John W. Swaney, William Gochenour, heir, W. Senner, Wm. T. Wright, Henry Maphis, Melton H. Saum, Wm. P. Stultz, and John W. Bowman, to whom there was no exception, and were sworn well and truly to try the issue joined, and having been charged by the court were adjourned until to-morrow morning at 10 o'clock.

And at the circuit court continued and held on the following days, to wit: On the 10th, 11th, 12th, 13th, 15th, 16th, 17th, 18th, 19th, 20th, 22d, 23d, 24th, 26th, 27th, 29th days of April, 1878, the jury heard the evidence of witnesses and the arguments of counsel.

And at a circuit court continued and held for the county of Shenandoah, on Monday, April 29th, 1878.

MONROE FUNKHOUSER, ADM'R OF CHARLES L. Noel, dec'd, pl'ff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, def'd. } In case.

This day came again the parties by their attorneys, and the jury adjourned on yesterday appeared in court pursuant to their adjournment, and retired to their room to consider further on a verdict, and after some time returned, and in solemn form do say:

69 We, the jury, find for the plaintiff on the issue joined and assess his damage at four thousand nine hundred and twenty-five dollars, with interest from this date.

MOSES K. GRIM,
Foreman.

The following instructions were given by the court:

Plaintiff's instructions.

I. When injury or damage happens to a passenger by the braking down or overturning of a railroad train or braking down of a bridge, or wheel or axel, or by any other accident occurring on the road, the presumption prima facie is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

II. The law in tenderness to human life and limbs holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proof every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety requires that they be held to the greatest possible care and diligence. Any negligence or default in such case makes such carriers liable in damages under the statute.

70 III. The Baltimore & Ohio Railroad Company, as a common carrier of passengers was bound to exercise the utmost degree of diligence and care in safely transporting Charles L. Noel upon his journey.

IV. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occationed, renders such company liable in damages for such death.

V. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

VI. Therefore if the jury believe from the evidence that such prudence, foresight, and skill were not used by said company in respect to Narrow Passage bridge, by the breaking of which Charles L. Noel was killed, they should find for the plaintiff, and assess the damages for such killing at such sum as they may deem fair and just under *the* all the

circumstances of the case, such damages not to exceed ($10,000) ten thousand dollars.

VII. In ascertaining such damages the jury should find the same with reference—

1st. To the pecuniary loss sustained by Phoebe Ann Noel, the mother of said Carles L. Noel, by the death of said Charles L. Noel, fixing the same at such sum as would be equal to the probable earnings of
71 the said Charles L. Noel, taking into consideration the age, business capacity, experience, habits, health, energy, and perseverance of the deceased during what would probably have been his lifetime, and the lifetime of Phoebe Ann Noel, if he had not been killed.

2d. In ascertaining the probability of life, the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

3rd. By adding thereto compensation for the loss of his care, attention, and society to his mother; and—

4th. By adding such further sum as they may deem fair and just, by way of solace and comfort to his said mother for the sorrow, suffering, and mental anguish occasioned to her by his death.

Defendant's instructions.

1. The jury are instructed that in this case the burden of proof of the alleged wrongful act, neglect, or default of the defendant, is upon the plaintiff; and unless the jury are satisfied, by the evidence, that the plaintiff's intestate was killed by the wrongful act, neglect, or default of the defendant, they must find for the defendant; but the breaking of the bridge and the precipitation of the cars and the killing of the plaintiff's intestate by reason thereof, if proved to the satisfaction of the jury, make out a prima-facie case of neglect, and impose upon the defendant the burden of proving that the utmost care and diligence had
72 been exercised by said defendant to prevent said occurrence.

2d. If an accident occurs from the breaking down or overturning of a railroad train or the breaking down of a bridge or wheel or axle, or by any other casualty occurring on the road, from which injury happened to a passenger, then, whilst without explanation, the law presumes, prima facie, that there was negligence on the part of the railroad company, that presumption of negligence will be repelled by evidence to satisfy the jury that the road or bridge was sufficiently strong and secure to carry the trains over it, and the machinery employed was in good order and was of the best kind manufactured and used by the most prudent and careful railroad men in the country, and that absolute perfection is not required in such structures or machinery, but only such as the utmost skill and foresight of prudent men, engaged in such business, can attain.

3rd. A railroad company is not responsible for an injury caused purely by accident while engaged in the lawful prosecution of their business, even where the injury was the direct consequence of the act of the said company, and even where the party injured was free from fault.

4. The jury are instructed that the contract for the conveying of passengers is one neither of general or limited warranty or insurance, but is an obligation undertaken by the carrier to take due care, in-
73 cluding in that term the use of skill and foresight to carry the passenger safely.

5. The law requires from railroad companies as carriers of passengers

only such diligence and care as are required of individuals in conducting the same business; that is, the utmost care and diligence.

6. In the absence of evidence to the contrary the defendant and its agents and employers are presumed to have acted as prudent, competent and honest persons act under similar circumstances.

7. The law does not require of railroad companies superhuman foresight, but only such diligence and care as is required of individuals engaged in the same business.

8. Negligence is not actionable unless it be the proximate cause of the injury complained of, and hence if the jury from the evidence shall believe that the defendant's bridge at the Narrow Passage Creek, by the breaking down of which the plaintiff's intestate was killed, as stated in the evidence, had in it timber rotten or defective, if such fact be proved, yet if they shall further believe from the evidence that the breaking of the bridge was not caused by the defectiveness or unsoundness of such timbers, but by something else as the proximate cause of such breaking, they cannot find for the plaintiff by reason of such default or neglect of the defendant in respect to such timbers.

9. That if the jury shall believe from the evidence that the de-
74 fendant, on the 6th day of March, 1876, was lawfully engaged in running its trains through the county of Shenandoah, the Narrow Passage bridge, 465 feet long, constituting part of its railroad tract in said county; that on the night of the 6th day of March, 1876, a stock and freight train belonging to said defendant, consisting of the engine, tender, sixteen loaded freight cars, with a passenger car and caboose in the rear, under the control, direction, and management of careful and competent employees, was slowly and prudently run on upon said bridge, and that the plaintiff's intestate was a passenger in said passenger car; that after the engine and a portion of the train had been run north of the south abutment, the train moving northwardly passing at about 125 feet over the first or south pier and onwards as far as the centre or new pier, about one hundred feet from said south pier; that the bridge structure between said piers was precipitated to the ground below, the lowest part being about one hundred and ten feet below the track, and that the engine, tender and cars on said span, as well the freight, passenger and caboose cars in the rear, were in like manner precipitated into the chasm below, whereby said plaintiff's intestate was killed, as stated in the evidence, then, although the law presumes prima facie that the disaster resulted from the wrongful act, neglect or default of the defendant; yet if the jury shall further believe
75 from the evidence that the train was prudently and carefully run on and upon said bridge by competent and reliable employees of the defendant; that the bridge itself was sufficiently strong to carry said train safely over it, the freight cars not being unduly or improperly loaded, and the engine being the engine theretofore daily run over said bridge twice in each twenty-four hours; that the bridge was not crushed or borne down, or broken by the weight of said engine and of the cars then upon it, or by reason of any mismanagement, carelessness or neglect of any employee on said train, and if the jury shall further believe from the evidence that said engine, tender, and cars, and the wheels and axles and other machinery in and constituting part of said train were of the best material and of the most improved manufacture, and as well fitted for such service as the best-known skill, foresight and care could provide for the purpose; and that said engine, tender, cars, wheels, axles, and other machinery were at the time in good condition and order, and were prudently & properly managed

and directed, and with the utmost care and foresight and diligence of cautious persons engaged in the same business; and that said accident occurred from and was caused by the sudden, unexpected and unfor'seen breaking of an axle, wheel, or other part of said machinery, whereby the track was displaced, torn up and thereby the bridge was pulled down in the line and direction of the track, and that said accident could
76 not have been prevented by the utmost care and diligence of cautious persons engaged in railroad transportation, then the jury must find for the defendant.

10. In ascertaining whether the 'jury to the plaintiff's intestate as stated in the evidence resulted from wrongful act, neglect, or default of the defendant, the jury is bound in the light of the evidence to consider the conduct of the defendant, its agents and employees, according to the rules of conduct adopted by and *and* acted on in like cases by prudent, descreet, and cautious railroad companies' agents and employees; and if the jury in view of the evidence in respect to the mode of running the defendant's train on the 6th day of March, 1876, when the plaintiff's intestate was killed as stated in the evidence, on and upon the Narrow Passage bridge, and in respect to the condition and order of the defendant's engines and cars at the time, the conduct of the defendant's agents and employees, the sufficiency of the track, superstructure and its condition, and the capacity of the bridge structure and Ballman truss to carry over them, in safety, the engine and train of cars, and the condition of said engine, cars and machinery, are satisfied that everything had been done, and was at the time done, for the safety of the train
77 and passengers, which in the experience of discreet, judicious, and cautious railway men and engineers have found to be sufficient for safety, the jury cannot hold the defendant responsible for any unforeseen accident which could not under the circumstances have reasonably prevented.

11. In this case, if the jury should be of opinion that the defendant has been guilty of negligence, so as to entitle the plaintiff to recover damages, then they are instructed that the whole amount of the damages found by them will belong to the mother of Charles L. Noel, dec'd, and in estimating such damages the jury have a right to consider the extent of the mother's dependence upon or independence of said Charles L. Noel, net income for her comfortable maintenance and support, and to what extent she would have been benefited by his continued life or has been injured by his death, and taking into consideration these circumstances and all others developed by the testimony, they will find such verdict as they will deem fair and just to said Charles L. Noel's mother, and they have no right to find a verdict for damages in favor or for the benefit of any other person or persons than said mother.

And at a circuit court continued and held for said county on Tuesday, April 30th, 1878.

78 CHARLES L. NOEL'S ADM'R, PL'FF,
v.
BALTO. & OHIO R. R. CO., DEF'D'T.

This day came again the parties, by their attorneys, and the defendant, by its attorneys, having at the proper time objected to the rulings and action of the court in giving to the jury certain instructions prayed for by the plaintiff, tendered its bill of exceptions thereto, which, being duly signed and sealed by the court, is ordered to be enrolled and made part of the record.

Def't's bill of exception No. 3.

C. L. NOEL'S ADM'R, PL'FF,
v.
BALTO. & OHIO R. R. CO., DEF'D'T.

MEMORANDUM.—That after the jury in this case had been sworn to try the issue joined, evidence was introduced by the plaintiff tending to show that on the 6th day of March, 1876, the defendant was engaged as lessee in running its trains upon the Manasses Gap Railroad, in the county of Shenandoah, of which the Narrow Passage bridge in said county was a part; that one of said trains, in which Charles L. Noel, the plaintiff's intestate, was a passenger, was by the breaking down of one of the spans of said bridge 102 feet in length and *and* between two piers of said bridge (called the
79 south and new pier) precipitated to the ground below, and that thereby Charles L. Noel was killed; that said Charles L. Noel was between thirty-five and forty years of age, and was unmarried; that he resided upon a valuable farm in Shenandoah County, containing about 275 acres and valued at about $10,000, and very productive; that with him lived his mother from 55 to 60 years of age, and his two sisters; that his mother Phebe Ann Noel kept the house and was the female head of the family; that said farm descended from Samuel Noel, the father of said C. L. Noel, the said Noel having died intestate in the year 1864; that by the will of the grandfather of said C. L. Noel, whose name was Jacob Noel, said farm had been devised to said Samuel Noel, subject to certain charges thereon, and among other to the support of Mrs. Elizabeth Noel, the wife of said Jacob Noel, she, the said Elizabeth Noel, being entitled under the will of her husband to the management of said farm during her lifetime, and being alive, altho' about 80 years of age and very infirm, the will of said Jacob Noel being in the words following, to wit:

Jacob Noel's will.

In the name of God, amen. I, Jacob Noel, of the county of Shenandoah, and State of Virginia, being weak in body but sound in mind, and wishing to dispose of my worldly effects which it hath pleased God to bless me with:

80 First. I give and bequeath unto my wife Elizabeth her house and meat, with all the contents therein belonging to her, to be at disposal without any appraisement whatever. I also give her my riding mare and the management of my farm during her widowhood. I give and bequeath unto my son Jacob the land on the south side of Mill Creek as far up as the Rader's Spring and there to intersect Painter's line, containing eight or nine acres, it being the same land on which the carding-machine and saw-mill stands, and also two thousand dollars in due paper. The balance of the farm I give unto my son Samuel, also my road wagon, the young black horse, and the Ruby traces. All the rest of my personal property not heretofore specified and bequeathed to be sold one year after my dece'se without any appraisement whatever.

I further direct that my son Samuel pay unto my daughter Catharine Ann $2,500.00 out of the land heretofore bequeathed to him as fast as he can without injuring himself. I give and bequeath unto my son William the farm I purchased of Steinburgan's trustees, known as the Barb

farm, containing 212¼ acres, he paying $421.00; and lastly I constitute and appoint my two sons Samuel and William Noel my executors
81 to this my last will and testament without giving any security whatever. I acknowledge this to be my last will and testament and no other.

Given under my hand this 9th day of December, 1850.

JACOB NOEL. [SEAL.]

Witnesses:
MOSES GETZ.
JACOB PAINTER.

At a court held for Shenandoah on Monday, the 11th day of February, 1850.

The last will and testament of Jacob Noel, dec'd, was produced into court and proven by the oath sof Moses Getz and Jacob Painter, witnesses thereto, and ordered to be recorded.

On motion of Samuel Noel and William Noel, the executors therein named, who were sworn and entered into bond in the penalty of eight hundred dollars (the will requiring no security to be given and no appraisement to be made), a certificate for obtaining a probate thereof in due form is granted them.

Teste:

SAM'L C. WILLIAMS, *C. S. C.*

That said Jacob's widow resides on said farm, in a house separate from the mansion-house occupied by said C. L. Noel and his mother and sister; that said C. L. Noel was an industrious, energetic, and good business man; that since his father's death he has had the control
82 and management of said farm; was a good and successful farmer, and was also engaged in the cattle business, and that his income from the farming operations and the cattle business was about $1,000 a year; there being no evidence tending to show how said C. L. Noel's earnings were applied or appropriated, or that any part thereof was applied to the use and benefit of his mother, the said Phebe Ann Noel.

And the plaintiff introduced further evidence tending to show that the timbers in said bridge were more or less rotten or decayed, the estimates of witnesses as to the proportion of said timbers more or less rotten or decayed ranging from one-tenth to one-half thereof; and the defendant introduced evidence tending to show that owing to the structture strength, and condition of said bridges at the time of its wreck (notwithstanding the fact that decayed timbers were found in said wreck), and owing to other circumstances, detailed in the evidence, it was impossible for the engine, tender, and cars, moving as they were at the time, at the rate of about four miles an hour, to have crushed or broken down said bridge; that said bridge was a very strong trestle-bridge, with a large quantity of surplus timber in it; that the track and superstructure were in good condition, level, smooth, and
83 straight; that said bridge had been and was, up to the time
83 of the accident, used by the defendant with the same engine and tender and with trains similar to that which was wrecked, with the belief and assurance of its officers and employees that the same was sufficient and was safe, strong, and secure, and without any knowledge on their part to any latent defects in the timber thereof, and further evidence tending to show that said wreck was caused by an unforeseen and inevitable accident arising from the breaking of an axle in the first or second car in rear of the tender; that the engine weighed 74,100 lbs.,

the tender 48,000, the freight cars each 40,000, and the length of the engine and tender was 51 feet, and that of the freight cars was 31 feet each; the distance from the centre of the south pier to that of the new pier being 102 feet; that by reason of the wrecking of said axle the superstructure of the bridge was torn up and the trestles dragged down, and that from like cause a How truss bridge or an iron bridge would, in like manner, have been wrecked; that said train was run over said bridge carefully and prudently, and by competent, faithful, and skilful employees of defendant; that the engine, tender and cars were in good condition, and were of the best kind, used by the most prudent, judicious and skilful persons engaged in railroad business in the United
84 States; and such being the tendencies of the evidence pertinent to the matter of the instructions hereinafter set forth, the plaintiff, by his counsel, moved the court to give the jury the following instructions, to wit: The court having modified the 7th instruction as offered by the plaintiff by inserting the words in one place after the word "sustained" by Pheba Ann Noel, the mother of said Charles L. Noel, and in another place after words "his lifetime" the words "and the lifetime of said Phebe Ann Noel."

Plaintiff's instructions.

I. When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption, prima facie, is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

II. The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proof every imputation of such negligence. When
85 carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case makes such carriers liable in damages under the statute.

III. The Baltimore and Ohio Railroad, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Charles L. Noel upon his journey.

IV. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death.

V. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

VI. Therefore, if the jury believe from the evidence that such prudence, foresight, and skill were not used by said company in respect to Narrow Passage bridge, by the breaking of which Charles L. Noel was killed, they should find for the plaintiff, and assess the damages for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damages not to exceed ($10,000) ten thousand dollars.

86 VII. In ascertaining such damages, the jury should find the sum with reference—

First. To the pecuniary loss sustained by Phoebe Ann Noel, the mother of said Charles L. Noel, by the death of said Charles L. Noel, fixing the sum at such sum as would be equal to the probable earnings of the said Charles L. Noel, taking into consideration the age, business capacity, experience, habits, energy, and perseverance of the deceased during what would probably have been his lifetime, and the lifetime of said Phoebe Ann Noel, if he had not been killed.

Second. In ascertaining the probability of life the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

Third. By adding thereto compensation for the loss of his care, attention, and society to his mother.

Fourth. By adding such further sum as may deem fair and just by way of solace and comfort to his said mother for the sorrow, suffering, and mental anguish occasioned to her by his death.

To the giving of which instructions, and each of them, the defendant, by its counsel, objected, but the court overruled the objection and gave the said instructions to the jury; to which action and ruling of
87 the court the defendant, by its counsel, excepted, and prayed that this its bill of exception be signed, sealed, and enrolled, which is done accordingly.

MARK BIRD. [SEAL.]

The following part of the record of said cause is copied and certified as part of said cause at the instance and request of the plaintiff, by his counsel:

At a circuit court continued and held for the county of Shenandoah, on Tuesday, April 30th, 1878.

CHAS. L. NOEL'S ADM'R, PL'FF,
v.
B. & O. R. R. COMPANY, DEF'D'T. } In case.

This court certifies that during the trial of this cause, and after all the evidence had been introduced by the plaintiff and defendant before the jury, but before the commencement of the argument, the pl'ff, by his counsel, excepted to the action and ruling of the court in refusing to grant certain instructions offered by them in behalf of said pl'ff and granting such instructions in another and modified form as set forth in pl'ff's bill of exception No. 1.

Plaintiff's bill of exception No. 1.

CHAS. L. NOEL'S ADM'R, PL'FF,
v.
B. & O. R. ROAD CO., DEF'D'T. } In case.

88 Be it remembered that upon the trial of this cause before the jury, the plaintiff, by his counsel, after offering and introducing evidence tending to prove that Charles L. Noel, the decedent, was 35 years of age, in good health, active, energetic, persevering, and successful in the business of a cattle dealer and the management of a farm

devised by his grandfather, Jacob Noel, to his father, subject to certain incumbrances and restrictions, which will was in the following words and figures, to wit:

Jacob Noel's will.

In the name of God, amen. I, Jacob Noel, of the county of Shenandoah, and State of Virginia, being weak in body, but sound in mind, and wishing to dispose of my worldly effects, which it hath pleased God to bless me with:

First. I give and bequeath unto my wife, Elizabeth, her house and meat, with all the contents therein belonging to me, to be at disposal without any appraisement whatever. I also give her my riding mare and the management of my farm during her widowhood. I give and bequeath unto my son Jacob the land on the south side of Mill Creek, as far up as the Rader's spring, and there to intersect Painter's line, containing eight or nine acres, it being the same land on which the carding-machine and saw-mill stands, and also two thousand dol-
89 lars in due paper. The balance of the farm I give unto my son Samuel, also my road waggon, the young black ho'se, and the Ruby traces. All the rest of my personal property, not heretofore specified and bequeathed, to be sold one year after my dece'se, without any appraisement whatever.

I further direct that my son Samuel pay unto my daughter Catharine Ann $2,500.00 out of the land heretofore bequeathed to him, as fast as he can without injuring himself. I give and bequeath unto my son William the farm I purchased of Steinburgan's trustees, known as the Brab farm, containing 212¼ acres, he paying $421.00; and lastly I constitute and appoint my two sons, Samuel and William Noel, my executors of this my last will and testament without giving any security whatever.

I acknowledge this to be my last will and testament and no other.

Given under my hand this 9th day of December, 1850.

JACOB NOEL. [SEAL.]

Witnesses:
MOSES GETZ.
JACOB PAINTER.

At a court held for the county of Shenandoah on Monday, the 11th day of Feb'y, 1850.

The last will and testament of Jacob Noel, dec'd, was produced into court and proven by the oaths of Moses Getz and Jacob Pain-
90 ter, witnesses thereto, and ordered to be recorded.

On motion of *of* Samuel Noel and William Noel, the executors therein named, who were sworn and entered into bond in the penalty of eight hundred dollars (the will requiring no security to be given and no appraisement to be made), a certificate for obtaining a probate thereof in due form is granted them.

Teste:

SAM'L C. WILLIAMS, *C. S. C.*

And offering and introducing evedence tending to prove further that said Noel had made and was capable of making as such cattle dealer and manager of said farm from $1,000 to $1,400 per year; that he lived with and managed for his mother, who was a widow and had been since May or June, 1864, when her husband was killed in the military service

of the Confederate States, in the Hunter campaign near Lexington, Va.; that she was on or about the 6th of March, 1876, when her said son Charles L. Noel was killed in the Narrow Passage accident, 58 years of age and in good health then and now; that he was her only son, had never married, and was one of the adm'rs of her husband's estate; that two sisters of said Charles L. Noel lived with his said mother long prior to and at the time of his said death, one of whom afterwards mar-
91 ried, but in a short time became and is now a widow; and after all the other evidence in the case had been introduced asked the court to instruct the jury in the following words and figures, to wit, viz:

Original seventh instruction.

In ascertaining such damages the jury should find the same with reference—

First. To the pecuniary loss sustained by the death of Charles L. Noel, fixing the same at such sum as would be equal to the probable earnings of the said Charles L. Noel, taking in consideration the age, business capacity, experience, habits, health, energy and perseverance of the deceased during what would probably have been his lifetime if he had not been killed.

Second. In ascertaining the probability of life the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

Third. By adding thereto compensation for the loss of his care, attention and society of his mother, and—

Fourth. By adding such further sum as they may deem fair and just by the way of solace and comfort to his said mother for the sorrow, suffering and mental anguish occasioned to her by his death.

92 Which instruction the court refused to grant in manner and form as asked, but granted in the following form, viz:

Modified seventh instruction.

In ascertaining such damages the jury should find the same with reference—

First. To the pecuniary loss sustained by Phœba Ann Noel, the mother of said Charles L. Noel, by the death of said Charles L. Noel, fixing the same at such sum as would be equal to the probable earnings of the said Charles L. Noel, taking into consideration the age, business capacity, experience, habits, health and perseverance of the deceased during what would probably have be n his lifetime and the lifetime of said Phœba Ann Noel if he had not been killed.

Second. In ascertaining the probability of life the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

Third. By adding thereto compensation for the loss of his care, attention and society to his mother, and—

Fourth. By adding such further sum as they may deem fair and just by way of solace and comfort to his said mother for the sorrow, suffering and mental anguish occasioned to her by his death.

To which ruling and action of the court in refusing to grant
93 said instruction as asked for, and granting the same as changed and modified, the plaintiff excepted and prayed that this his ex-

ception be signed, sealed and enrolled as part of the record, which is accordingly done.

MARK BIRD. [SEAL.]

And also excepted to the action and ruling of the court in granting the instructions asked for by the def't, as set forth in the pl'ff's bill of exceptions No. 2.

Plaintiff's bill of exception No. 2.

CHAS. L. NOEL'S ADM'R, PL'FF, }
v. } In case.
B. & O. R. R. COMPANY, DEF'D'T. }

Be it remembered that upon the trial of this cause, after all the evidence of p'ff was offered and introduced, including that mentioned in the first bill of exceptions of the pl'ff, and which is referred to and made part of this bill of exception as fully as if copied herein, also after the introduction of all other evidence offered by the def't, the def't the offered the following instructions, to wit:

Def't's instructions.

1. The jury are instructed that in this case the burden of proof of the alleged wrongful act, neglect, or default of the defendant is upon the plaintiff, and unless the jury are satisfied by the evidence that the plaintiff's intestate was killed by the wrongful act, neglect, or de-
94 fault of the defendant, they must find for the defendant; but the breaking of the bridge and the precipitation of the cars and the killing of the plaintiff's intestate by reason thereof, if proved to the satisfaction of the jury, make out a prima facie case of neglect, and impose upon the defendant the burden of proving that the utmost care and diligence had been exercised by said defendant to prevent said occurrence.

2. If an accident occurs from the breaking down or overturning of a railroad train, or the breaking down of a bridge, or wheel or axle, or by any other casualty occurring on the road from which injury happens to a passenger, then whilst, without explanation, the law presumes prima facie that there was negligence on the part of the railroad company, that presumption of negligence will be repelled by evidence to satisfy the jury that the road or bridge was sufficiently strong and secure to carry the train over it, and that the machinery employed was in good order and was of the best kind manufactured and used by the most prudent and careful railroad men in the country, and that absolute perfection is not required in such structures or machinery, but only such as the utmost skill and foresight of prudent men engaged in such business can attain.

3d. A railroad company is not responsible for an injury caused
95 purely by accident while engaged in the lawful prosecution of their business, even where the injury was the direct consequence of the act of the said company, and even where the party injured was free from fault.

4. The jury are instructed that the contract for the conveying of passengers is one neither of general or limited warranty or insurance, but is an obligation, undertaking by the carrier to take due care, including

in that term the use of skill and foresight, to carry the passenger safely.

5th. The law requires from railroad companies as carriers of passengers only such diligence and care as are required of individuals in conducting the same business; that is, the utmost care and diligence.

6. In the absence of evidence to the contrary, the defendant and its agents and employees are presumed to have acted as prudent, competent, and honest persons act under similar circumstances.

7. The law does not require of railroad companies superhuman foresight, but only such diligence and care as is required of individuals engaged in the same business.

8. Negligence is not actionable unless it be the proximate cause of the injury complained of, and hence, if the jury, from the evidence, shall believe that the defendant's bridge at the Narrow Passage Creek,
96 by the breaking down of which the plaintiff's intestate was killed, as stated in the evidence, had in it timber rotten or defective, if such fact be proved, yet, if they shall further believe from the evidence that the breaking of the bridge was not caused by the defectiveness or unsoundness of such timbers, but by something else as the proximate cause of such breaking, they cannot find for the plaintiff by reason of such default or neglect of the defendant in respect to such timbers.

9. That if the jury shall believe from the evidence that the defendant, on the 6th day of March, 1876, was lawfully engaged in running its trains through the county of Shenandoah, the Narrow Passage bridge, 465 feet long, constituting part of its railroad track in said county; that on the night of the 6th day of March, 1876, a stock and freight train belonging to said defendant, consisting of the engine, tender, sixteen loaded freight cars with a passenger car, and caboose in the rear, under the control, direction, and management of careful and competent employees, was slowly and prudently run on and upon said bridge, and that the plaintiff's intestate was a passenger in said passenger car; that after the engine and a portion of the train had been run north of the south abutment, the train moving northwardly, passing at about 125 feet over the first or south pier and onward as far as the centre or
97 new pier, about one hundred feet from said south pier; that the bridge structure between said piers was precipitated to the ground below, the lowest point being about one hundred and ten feet below the track, and that the engine, tender, and cars on said span, as well as the freight, passenger, and caboose cars in the rear, were in like manner precipitated into the chasm below, whereby said plaintiff's intestate was killed, as stated in the evidence; then, although the law presumes prima facie that the disaster resulted from the wrongful act, neglect, or default of the defendant; yet, if the jury shall further believe from the evidence that the train was prudently and carefully run on and upon said bridge by competent and reliable employees of the defendant; that the bridge itself was sufficiently strong to carry said train safely over it, the freight cars not being unduly or improperly loaded, and the engine being the engine theretofore daily run over said bridge twice in each twenty-four hours; that the bridge was not crushed or borne down or broken by the weight of said engine and of the cars then upon it, or by reason of any mismanagement, carelessness, or neglect of any employee on said train; and if the jury shall further believe from the evidence that said engine, tender, and cars, and the wheels and axles and other machinery in and constituting part of said train
98 were of the best materials and of the most approved manufacture, and as well fitted for such service as the best known skill, fore-

sight, and care could provide for the purpose, and that said engine, tender, cars, wheels, axles, and other machinery were at the time in good condition and order, and were prudently and properly managed and directed, and with the utmost care and foresight and diligence of cautious persons engaged in the same business, and that said accident occurred from and was caused by the sudden, unexpected, and unfor'seen breaking of an axle, wheel, or other part of said machinery whereby the track was displaced, torn up, and thereby the bridge was pulled down in the line and direction of the track, and that said accident could not have been prevented by the utmost care and diligence of cautious persons engaged in railroad transportation, then the jury must find for the defendant.

10. In ascertaining whether the injury to the plaintiff's intestate, as stated in the evidence, resulted from the wrongful act, neglect, or default of the defendant, the jury is bound, in the light of the evidence, to consider the conduct of the defendant, its agents and employees, according to the rules of conduct adopted by and acted on in like cases by prudent, discrete, and cautious railroad companies' agents and employees; and if the
99 jury, in view of the evidence in respect to the mode of running the defendant's train on the 6th of March, 1876, when the plaintiff's intestate was killed, as stated in the evidence, on and upon the Narrow Passage bridge, and in respect to the condition and order of the defendant's engines and cars at the time, the conduct of the defendant's agents and employees, the sufficiency of the track, superstructure, and its condition, and the capacity of the bridge, structure, and Bollman truss to carry over them in safety the engine and train of cars, and the condition of said engine, cars, and machinery, are satisfied that everything had been done, and was at the time done, for the safety of the train and passengers, which in the experience of discreet, judicious, and cautious railway men and engineers have found to be sufficient for safety, the jury cannot hold the defendant responsible for any unforeseen accident which could not under the circumstances have reasonably been prevented.

11. In this case, if the jury should be of opinion that the defendant has been guilty of negligence, so as to entitle the plaintiff to recover damages, then they are instructed that the whole amount of damages found by them will belong to the mother of Charles L. Noel, dec'd; and in estimating such damages the jury have a right to consider the extent of the mother's dependence upon or independence of
100 Charles L. Noel's net income for her comfortable maintenance and support; and to what extent she would have been benefited by his continued life, or has been injured by his death; and taking into consideration these circumstances and all others develope' by the testimony, they will find such verdict as they will deem fair and just to said Charles L. Noel's mother, and they have no right to find a verdict for damages in favor or for the benefit of any other persons than said mother.

To the granting of each and every one of which said instructions the plaintiff by his counsel objected, but the court overruled the objection of the plaintiff to said instructions and granted the same in the form in which they were offered, to which action and ruling of the court the plaintiff by his counsel excepted, and prayed that this his bill of exception be signed, sealed, and enrolled as part of the record of this cause, which is accordingly done.

MARK BIRD. [SEAL.]

Which action and ruling of the court is ordered to be made part of the record of this cause.

And at a circuit court continued and held for said county of Shenandoah, on said 30th day of April, 1878.

101 MONROE FUNKHOUSER, ADM'R OF Chas. L. Noel, dec'd, pl'ff, *vs.* BALTIMORE & OHIO RAILROAD COMPANY, def'd. } In case.

This day came again the parties by their attorneys, and it is considered by the court that the plaintiff recover of against the defendant the sum of four thousand nine hundred and twenty-five dollars with interest thereon, to be computed after the rate of six per centum per annum from the 29th day of April, 1878, and the costs of plaintiff by him in this behalf expended.

On motion of the defendant, by its attorneys, it is ordered that the execution of the judgment aforesaid be suspended for seventy days from this day, upon the execution by said defendant before the clerk of this court of a bond in a penalty of $500.00 with conditions reciting said judgment and the intention of said company to present a petition for a supersedeas to said judgment, and providing for the payment of all such damages as any person may sustain by reason of the said suspension, in case a supersedeas to such judgment should not be allowed and be effectual in the time above specified.

STATE OF VIRGINIA,
County of Shenandoah, to wit:

102 I, Geo. W. Miley, clerk of the circuit court of the county of Shenandoah in the State of Virginia, do certfy that the foregoing is a true and complete transcript of the record of the cause therein named, as the same appears on file and record in my office.

Given under my hand as clerk of said court, this 10th day of June, 1878.

GEO. W. MILEY, *Clerk.*

Costs: B. & O. R. R. Co., def't, $21.00.
" Monroe Funkhouser, adm'r of Chas. L. Noel, "deca." p'ff, $3.00.

VIRGINIA:

In the supreme court of appeals held at the State court-house in the city of Richmond, on Thursday the 27th day of November, 1879.

THE BALTIMORE & OHIO RAILROAD COMPANY, plaintiff, *vs.* MONROE FUNKHOUSER, ADMINISTRATOR OF Charles L. Noel, dec'd, defendant.

Upon a writ of error and supersedeas to a judgment rendered by the circuit court of Shenandoah County, on the 6th of June, 1876.

This cause which is pending in this court at its place of session at Staunton, having been fully heard but not determined at said
103 place of session: This day came here the parties by their coun. sel, and the court having maturely considered the transcrip' of

the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said judgment. Therefore it is considered that the same be affirmed, and that the defendant in error recover against the plaintiff in error damages according to law and his costs by him about his defense herein expended.

Which is ordered to be entered in the order book here and forthwith certified to the clerk of this court at Staunton, who shall enter the same in his order book and certify it to the said circuit court of Shenandoah County.

A copy. Teste:

GEO. K. TAYLOR, *C. C.*

A copy.

JOS. A. WADDELL,
C. C., at Staunton.

Opinion of Christian, J.

BALTIMORE & OHIO R. R. CO.
v.
NOEL'S ADM'R.

This is a writ of error to a judgment of the circuit court of Shenandoah County.

The action was brought by the personal representative of Charles L. Noel, who was killed on the cars of the Baltimore & Ohio R. R.
104 Company at Narrow Passage bridge in the county of Shenandoah. There was a verdict and judgment for the plaintiff for the sum of $4,925, with interest from the date of the verdict, April 30th, 1878, and to this judgment a writ of error was awarded by one of the judges of this court.

Several specific grounds of error are alleged in the petition, and relied upon in argument at the bar. Each will be duly considered, though not in the precise order presented in the petition.

The first question raised in bills of exceptions filed is whether the circuit court erred in refusing to remove the case, on motion of the plaintiff in error, to the circuit court of the United States for the western district of Virginia.

This question was determined by this court in the case of the Baltimore & Ohio R. R. Co. v. Mightman's adm'r, 29 Gratt., 431. The plaintiff in error in that case was the same corporation against whom suit was brought and damages were recovered in the case at bar. It was a suit, too, brought by the personal representative of a party killed at the same time and place at which the intestate of defendant in error was killed, both having lost their lives in the fearful calamity known as the "Narrow Passage Bridge disaster." In that case it was held that
105 there a railroad company which was incorporated in another State leases a railroad lying in this State and operates the same as owner thereof and an injury occurs on said railroad the person having the right of action for such injury may sue the railroad company in the courts of this State, and such company has no right to remove the suit to the Federal Court.

It was further held that while the Baltimore & Ohio R. R. as a corporation of the State of Maryland could have no legal existence outside of that State, yet as the lessee of a Virginia railroad company, exercis-

ing all the functions and powers of the latter, it may be subject to all its duties and obligations, and that so acting it must be treated as a Virginia corporation qou ad hoe, the line of railroad under its contract, so far at least as its liability to its own citizens is concerned.

The company derives all its powers and privileges from the charter of the company which owns the road; it must be subject to all the duties imposed on that company, and among them is the obligation to answer in our own courts to our own citizens for any damage resulting from its conduct.

Without any further discussion of this question, it is sufficient to refer to the well-considered opinion of Judge Staples in this very recent case against the same defendant, and to the cases cited in that opinion.

106 I am therefore of opinion that the circuit court did not err in refusing to remove the case to the circuit court of the United States.

I am further of opinion that the circuit court did not err in overruling the demurrer to the plaintiff's declaration. The questions raised by the demurrer are the same as those decided by this court in the case of Balto. & Ohio R. R. Co. v. Wightman's adm'r, and reaffirmed in Mathews *v.* Warner's adm'r, 29 Gratt., 570, which cases are conclusive in support of the judgment of the circuit court upon the demurrer.

Having disposed of those preliminary questions, we now proceed to consider the more important and difficult questions affecting the merits of the case.

And, first, it is to be noted that there was in this case no motion to set aside the verdict as contrary to the evidence; consequently we have no certificate of the facts proved, but only of so much of the evidence as may be necessary to give application to the instructions asked for on both sides. These were numerous, and very fully presented the legal propositions contended for by the counsel on each side.

The defendant in the court below (pl'ff in error here) asked for eleven specific instructions; all of which were given by the circuit court

107 and of course need not be considered by this court.

The questions we have to determine arise upon the instructions given at the instance of the plaintiff in the court below, and which were assailed here as not expounding the law correctly. These instructions are as follows:

I. When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or breaking down of a bridge, or wheel, or axle, or by any other accident occurring on the road, the presumption prima facie is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty or by some cause which human care and foresight could not prevent.

II. The law in tenderness to human life and limbs holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proof every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case makes such carriers liable in damages under the statute.

3. The Baltimore and Ohio Railroad Company, as a common

108 carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Charles L. Noel upon his journey.

4. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death.

5th. Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

6. Therefore if the jury believe from the evidence that such prudence, foresight, and skill were not used by said company in respect to Narrow Passage bridge, by the breaking of which Charles L. Noel was killed, they should find for the plaintiff and assess the damages for such killing at such sum as they may deem fair and just under all the circumstances of the case, such damages not to exceed $10,000, ten thousand dollars.

7. In ascertaining such damages, the jury should find the sum with reference—

First. To the pecuniary loss sustained by Phoebe Ann Noel, the mother of said Charles L. Noel, by the death of said Charles L. Noel, fixing the sum at such sum as would be equal to the probable
109 earnings of the said Charles L. Noel, taking into consideration the age, business capacity, experience, habits, energy, and perseverance of the deceased during what would probable have been his lifetime, and the lifetime of said Phoebe Ann Noel if he had not been killed.

Second. In ascertaining the probability of life the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

Third. By adding thereto compensation for the loss of his care, attention, and society to his mother, and

Fourth. By adding such further sum as they may deem fair and just by way of solace and comfort to his said mother for the sorrow, suffering, and mental anguish occasioned to her by his death.

To the giving of which instructions and each of them the defendant by its counsel objected, but the court overruled the objection and gave the said instructions to the jury; to which action and ruling of the court the defendant by its counsel excepted and prayed that this its bill of exceptions be signed, sealed, and enrolled, which is done accordingly.

Now it is to be noted that these instructions from the first to the fifth inclusive are in todedene vertas those which were passed upon and declared by this court as correctly expounding the law in the case of Balto. & Ohio R. R. Co. vs. Wightman's adm'r (supra) With
110 reference to them this court said in that case: "We do not deem it necessary to enter into any discussions of the propositions of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers and by the opinions of the most respectable courts in this country. The decisions on this subject are given in Wheaton on Negligence, § 627 to 661 inclusive, also § 422 and the notes to these sections; Redfield on Carries & Barliers, § 346; see also Farish & Co vs. Reeglee, 11 Grat., 697.

Upon mature consideration of the arguments addressed to us by the learned counsel in the case before us, and upon a careful review of the authorities, we have no hesitation in affirming that the first five instructions were properly given as correctly declaring the law upon the facts proved in this case respecting the duties and liabilities of common carriers.

The seventh instruction in the 2d, 3d, & 4th propositions therein offerred raises questions which were not raised or passed upon by this court in the case above referred to.

That instruction is in these words:

VII. In ascertaining such damages, the jury should find the same with reference,

1st. To the pecuniary loss sustained by Phoebe Ann Noel, the
111 mother of said Charles L. Noel, by the death of said Charles L. Noel, fixing the same at such sum as would be equal to the probable earnings of the said Charles L. Noel, taking into consideration the age, business capacity, experience, habits, health, energy, and perseverance of the deceased during what would probably have been his lifetime, and the lifetime of Phoebe Ann Noel, if he had not been killed.

2nd. In ascertaining the probability of life, the jury have a right to determine same with reference to recognized scientific tables relating to the expectation of human life.

3d. By adding thereto compensation for the loss of his care, attention, and society to his mother; and

4th. By adding such further sum as they may deem fair and just by way of solace and comfort to his said mother for the sorrow, suffering, and mental anguish occasioned to her by his death.

To the 1st and 2d clauses of this instruction there can be no valid objection. The first clause affirms a proposition which has received the sanction nearly all the appellate courts of this country. Where the question has been considered and was specifically affirmed by this court in Balto. & Ohio R. R. Co. vs. Wightman's adm'r (supra), it simply informs the jury that in ascertaining the damages they shall assess the same with reference to the pecuniary loss sustained by the mother
112 of the deceased by fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience, habits, health, energy, and perseverance of the dec'ased during what would probably have been his lifetime and the lifetime of his mother if he had not been killed.

The only difference in this respect between this part of the 7 instruction and that given in Balto. & Ohio R. R. Co. vs. Wightman is that in that case the damages were to be assessed in reference to the pecuniary loss sustained by the wife and children of the deceased, while in this case the instruction by the 1st clause thereof pointed to that pecuniary loss sustained by the mother of the deceased. The deceased in this case was not a married man; his mother with whom he lived and whose farm he managed was a widow and he her only son, and it was proved that his services and earnings as manager and cattle dealer were worth from $1,000 to 1,400 per year, and she, at the time of his death, caused by the "Narrow Passage Bridge disaster," was 58 years of age and in sound health.

Although therefor' the party for whose benefit the suit is brought is the wife and children in the one case and the mother in the other,
113 the instructions in this respect affirm the same principal in regard to the assessment of damages for the pecuniary loss sustained. Nor is there any valid objection to the 2d clause of the 7th instruction, which declares that, "In ascertaining the probability of life the jury have a right to determine the same with reference to recognized scientific tables relating to the expectation of human life." This as an abstract proposition of law is certainly true. See Field on Damages, § 632, and cases cited in note; neither the facts proved nor all the evidence were certified, and we are not informed by the record whether any such tables of the expectation of life were exhibited. It would certainly have been more regular if the court had specifically referred to the mortuary tables which are recognized by the courts of this Com-

monwealth relating to expectation of life and to have placed such tables before the jury. This may have been done so far as the record shews; but whether done or not, it stated correctly an abstract proposition of law, which could not affect the verdict of the jury, and was not error to the judgment of the plaintiff in error.

We come now to consider the last 2 clauses in the 7th instruction, which present a question of much more difficulty. By these it is affirmed that the jury may estimate the damages—

114 "3d. By adding thereto compensation for the loss of his care, attention, and society to his mother.

"4th. By adding such further sum as they may deem fair and just by way of solace to his said mother for the sorrow, suffering, and mental anguish occasioned to her by his death."

Now I am free to admit that but for the peculiar provisions of one statute, and its phraseology differing from those of all other States of the Union, and differing in most essential particulars from the English statute, upon which most, indeed nearly all, of the statutes of other States are founded, the instructions given in the clauses quoted would be plainly erroneous. For it must be admitted that in construing the English act, and all those of the American States founded upon it, the courts have very uniformly held that the damages provided for and receivable under them are only such as are pecuniary and actual, nor can anything be allowed as damages under these statutes (in the English act and those which substantially follow it) in actions by or for the benefit of the persons entitled thereto on account of the physical or mental sufferings of the deceased, or for the sorrow, suffering, or grief of the surviving relatives who may be entitled to recover. (See Field on Damages, § 630, and cases and statutes there cited.)

115 The English act, and nearly all those of the American States limit the recovery of damages for the death or injury caused by negligence or wrongful act either in express terms or by necessary implication to such damages as are pecuniary or actual.

Now the 7th section of our statute is todidem verbis with the corresponding section of the English act. But the Virginia statutes differs in a most material particular from the English act and those modeled after it, and indeed differs from the statutes of all the States.

In the sections which define the character of the damages receivable under those statutes the English act declares that "in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whose benefit such action shall be brought." In New York, and all other States in which their statute act mod*d*elled after the English act, the following term', or those of like import, are used: "The jury may give such damages as they may deem fair and just compensation with reference to the pecuniary injuries resulting from such disaster," &c. In our statute, instead of these words or words of like import being employed, it is declared that "the jury in any such action may

116 award such damages as to it may seem fair and just," * * * in no case the sum recovered to "exceed the sum of ten thousand dollars." Certainly in the Virginia statute there are no words of limitation (except as to the amount of recovery) as in the English act and those mod*d*elled on it, confining the jury in the assessment of damages to merely pecuniary injury, but by the terms of the statute the damages are such as to the jury may seem fair and just.

We are bound to presume that the legislature was familiar with the English statute and those of the other States in the Union, and of the

English and American decisions under them. And it is a most significant fact that with the English and American statutes before them, and familiar, as we must presume they were, with the decisions under them, the legislature, after following the English statute and the New York statute up to the point where the measure of damages in the one case is declared to be "proportioned to the injury," and in the other "with reference to the pecuniary injuries resulting from such death," at that point, discarded those terms, and in lieu thereof adopted the language "such damages as to the jury shall seem fair and just."

It is impossible to conceive that the omission of such language and the adoption of other terms meaning the very reverse could have been accidental. We must conclude that it was done under a design,
117 and that design was plainly, by all the recognized rules of construction, to declare that in an action for the death of a party caused "by the wrongful act, neglect, or default of any person or corporation," the damages so recovered shall not be merely "pecuniary injuries resulting from such death," but "such damages as to the jury shall seem fair and just" under the circumstances of such particular case.

One thing is certainly plain and palpable under the true construction to be given to our statute, and that is, that the jury in assessing damages in such a case are not confined to the pecuniary injury merely resulting from such a death. This precise point was decided by the unanimous judgment of this court (the president being absent) in Matthews vs. Warner, adm'rs, 29th Grat., 570.

In that case one error assigned was the refusal of the court to give the following instructions asked for by the defendant, as follows: "If the jury from the evidence should find for the plaintiff, then the measure of damages in this action is the pecuniary loss sustained by the mother of the plaintiff's intestate, by reason of the death of said Warner, and the jury in assessing the damages must confine themselves to injuries of which a pecuniary estimate can be made, in reference to a reasonable expectation of pecuniary benefit as of right or otherwise to his said mother, from the continuance of the life of said Warner, and cannot take into consideration the mental suffering occasioned by his death to his said mother."

118 This court held that there was no error in the judgment of the cir. court in refusing to give this instruction, and affirmed the verdict and judgment for the damages assessed by the jury. By this decision, in which this court reviewed the English act, and the statues of the American States, and carefully combined our statute, the negative proposition was certainly affirmed, that the jury in assessing damages were not confined to injuries, of which only a pecuniary estimate can be made, in reference to a reasonable expectation of pecuniary benefit, from a continuance of the life of the deceased. I think this case is conclusive of the case before us. If, as was held in that case, the jury was not confined in assessing their damages to the mere pecuniary loss to the survivors by the death of the deceased, certainly they may be governed by other considerations than the mere pecuniary loss. It is fair to presume, indeed the conclusion is inevitable, that the legislature, familiar with the statutes of other States, and cognizant of the decisions under them that the damages under such statutes were confined by the courts to mere pecuniary loss, changed the phraseology of our statute, so that the damages should not be proportioned to the pecuniary injuries only, but such "damages as to the jury may seem fair and just," under the circumstances of the particular case.

We must presume that the legislature knew the force and effect of its own enactments, as compared with those of other States,
119 and thejudicial construction given these statutes.

The words used, not by accident but by evident design, as already construed by this court in Matthews vs. Warner's admr's (supra), certainly extended the statute beyond the scope of the English statute, and of all the American statutes, in declaring in effect that the jury, in estimating the damages in cases of the death of a party caused "by the wrongful act, neglect, or default of any person or corporation," should not be confined to the mere pecuniary loss of the survivors, for whose benefit the action may be brought.

It was no doubt the intention of the legislature, by this enactment, differing so essentially from the English and American statutes, to cut the Gordian knot of the decisions, which tied a jury down to a consideration of mere pecuniary loss, suffered by the survivors of the deceased; and to declare in effect, that where any person's "death is caused by the wrongful act, neglect, or default of any person or corporation," even if such person be one whose life conferred no pecuniary benefit; if such person be an aged or infirm father, or husband, or an invalid wife, or afflicted child (often dearer to its parents because it is afflicted), the death of such person so caused should be the subject for a recovery of damages.

It follows that there being no pecuniary loss in such cases, and the jury not being confined by the statute (as already construed by this court, in Matthews, adm'r, vs. Warner) to mere pecuniary loss to the sur-
120 vivors for whose benefit the action may be brought, it follows, I say, that mental suffering and anguish, want of comfort and solace may be taken into consideration in the computation of damages sustained in the particular case.

In other words it is plain that under our statute the jury, not confined to mere pecuniary loss, "may award such damages as to them may seem fair and just," according to the facts and circumstances of each. The only limit which the statute imposes is to confine the recovery in every case to a sum not exceeding $10,000.

It is eminently insisted that such a construction of the statute will result in great injustice, and turn the jury in every case loose to award damages according to their uncertain notions as to compensation for the mental suffering and agony, and loss of benefit and solace, in the case of a mother losing a child, or a wife losing her husband and kindred cases, unchecked by statutory enactments, confining them to the actual pecuniary loss resulting from death.

The answer to this view is, first, that there is, in cases of this kind, as in all others, the same supervisory power of the courts to annul verdicts rendered under manifest prejudices, or passion, or grossly excessive, or obtained by fraud or corruption. But the better and all prevailing answer is "Sta est Scriptalex." The legislature certainly had the right so to declare what the law is, and if in guarding hu-
121 man life as so sacred that when it is destroyed "by the wrongful act, neglect, or default of any person or corporation," it holds such person or corporation to a strict accountability, and makes them liable in damages, not alone for the pecuniary loss (to the survivors entitled to the benefit of the action), but to "such damages as to the jury may seem fair and just," in the particular case, surely no one can gainsay this power of the legislature so to declare the law.

If the law as it is written is unjust and oppressive, and contrary to the better statutes (as contended) of the other American States and of England, it is for the legislature to change the law. This court can neither amend nor annul the statute law, unless it be unconstitutional. That is the province of the legislature. We can only interpret the law as we find it, and so interpreting it we find no error in the construction given to it by the circuit court in its instructions.

It is proper to notice, before concluding this opinion, another objection very strenuously insisted on by the counsel for the plaintiff in error to the instructions given by the court to the jury, in which the court says: "In ascertaining such damages the jury should find the sum with reference," &c. It is insisted that this is an imperative command to the jury that they must in making up their verdict consider certain facts, &c. I think this is a strained construction of the language of the court. The words used, taken in connection with the other necessary instructions asked on both sides, plainly means that it is proper
122 that the jury should take into consideration the matters indicated in the instructions.

Upon the whole case, I am of opinion that there is no error in the judgment of the circuit court, and that the same ought to be affirmed.

123 STATE OF VIRGINIA,

Clerk's Office of the Supreme Court of Appeals, at Staunton:

I, Jos. A. Waddell, clerk of the supreme court of appeals of Virginia, at Staunton, do certify that the foregoing manuscript, beginning on page 1 and ending on page 103, is a true transcript of the record in the case of the Baltimore & Ohio Railroad Company, plaintiff in error, against Monroe Funkhouser, administrator of Charles L. Noel, dec'd, defendant in error, as the same remains on file in the clerk's office of the said court; and that the writing beginning on page 103 and ending on page 122 is a true copy of the opinion of the said court in the said case. I do further certify that the said court is the highest court of law or equity in the State of Virginia in which a decision can be had.

In testimony whereof I hereunto subscribe my name as clerk of said court (there being no official seal of said court) this 17th day of January, 1880.

JOS. A. WADDELL, *Clerk, &c.*

I herewith return the original writ of error awarded in this cause by the Hon. M. R. Waite, Chief Justice of the Supreme Court of the
124 United States, the citation with an affidavit of service thereon indorsed, and a copy of an appeal bond on file in my office.

JOS. A. WADDELL, *Clerk, &c.*

125 To the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States:

The petition of the Baltimore & Ohio Railroad Company respectfully represents:

That a final judgment has been rendered by the supreme court of appeals of Virginia in a suit therein pending, wherein Monroe Funkhouser, administrator of Charles S. Noel, deceased, is plaintiff, and the Baltimore & Ohio Railroad Company is defendant.

That the supreme court of appeals aforesaid is the highest court of law in the State of Virginia in which a decision in said suit could be had.

That in said suit there is drawn in question the validity of a statute

of and of an authority exercised under the United States, and the decision is against the validity of such statute and of such authority.

That in said suit there is drawn in question the validity of a statute of and the validity of an authority exercised under the State of Virginia on the ground of such statute being repugnant to the Constitution and laws of the United States, and the decision is in favor of such statute and authority.

That in said suit a right and privilege are claimed under the Constitution and statutes of the United States, and the decision is against the right and privilege set up and claimed by your petitioner under such Constitution and statutes.

All of which appears on the face of the record accompanying this application.

Wherefore, to the end that said judgment may be re-examined
126 and reversed or affirmed in the Supreme Court of the United States upon a writ of error, your petitioner prays that a citation may be issued in the same manner as if the said judgment had been rendered in a circuit court of the United States.

THE BALTIMORE & OHIO RAILROAD COMPANY,
By Counsel.

HUGH W. SHEFFEY,
Of Counsel for the Petitioner.

The above petition is granted and a writ of error is allowed therein as prayed.

M. R. WAITE,
Chief Justice Sup. Ct. U. S.

(Indorsed:) Balt'o & Ohio R. R. Company vs. Charles L. Noel, adm'r. Petition for writ of error.

127 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of appeals of the State of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Baltimore & Ohio Railroad Company, plaintiff in error, and Monroe Funkhouser, administrator of Charles L. Noel, deceased, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United
128 States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-first day of January, in the year of our Lord one thousand eight hundred and eighty.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

M. R. WAITE,
Chief Justice Sup. C't U. S.

128½ Rec'd by me and copy filed in my office January 24, 1880.

JOS. A. WADDELL,
Clerk of Supreme Court of Appeals of Va., at Staunton.

129 The United States of America to Monroe Funkhouser, administrator of Charles L. Noel, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein the Baltimore & Ohio Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, chief justice of the Supreme Court of the United States, this twenty-first day of January, in the year of our Lord one thousand eight hundred and eighty.

M. R. WAITE,
Chief Justice Sup. C't U. S.

130 On this twenty-second day of January, in the year of our Lord one thousand eight hundred and eighty, personally appeared J. W. Zirkle, D. S., for Jos. Stickley, S. S. C., before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Monroe Funkhouser, administrator of Charles L. Noel, deceased, on the 22nd day of January, 1880.

Sworn to and subscribed the twenty-second day of January, before me, A. D. 1880.

JOHN M. PENA, *J. P.*

J. W. Z., D. S.: My fee, 50c.; magistrate, 25—75.

Rec'd January 24, 1880.

JOS. A. WADDELL, *Clerk, &c.*

131 Know all men by these presents that the Baltimore & Ohio Railroad Company and John W. Garrett and William Keyser, Gilbert S. Meem, Jas. M. Miller, are held and firmly bound unto Monroe Funkhouser, administrator of Charles L. Noel, deceased, in the full

and just sum of twelve thousand dollars, to be paid to the said Monroe Funkhouser, administrator of Charles L. Noel, dec'd, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals and dated this 15th day of January, 1880.

Whereas lately in the supreme court of appeals of Virginia in a suit depending in said court between Monroe Funkhouser, administrator of Charles L. Noel, dec'd, plaintiff, and the Baltimore & Ohio Railroad Company, defendant, and carried on an appeal to the said supreme court of appeals judgment was rendered against the said company, and the said Baltimore & Ohio Railroad Company having obtained a writ of error and filed a copy thereof *thereof* in the office of the clerk of said court to reverse the judgment in the aforesaid suit, and a citation directed to Monroe Funkhouser, administrator of Chas. L. Noel, dec'd,
132 citing and admonishing said plaintiff to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in October next:

Now, therefore, the condition of the above obligation is such that if the said Baltimore & Ohio Railroad Company shall prosecute said writ to effect and shall answer all damages & costs if it fail to make its plea good, then the obligation to be void, else to remain in full force and virtue.

Witness the signature of the Baltimore & Ohio Railroad Company, by John W. Garrett, president thereof, and the corporate seal of said company hereto annexed, and the signatures & seal of the other obligors hereinbefore named.

[SEAL] THE BALTIMORE & OHIO RAILROAD CO.,
By JOHN W. GARRETT, *President.*
JOHN W. GARRETT. [SEAL.]
WM. KEYSER. [SEAL.]
GILBERT S. MEEM. [SEAL.]
JNO. M. MILLER. [SEAL.]

Attest:
W. H. IJAMS, *Treas.*

Approved.

M. R. WAITE,
Chief Justice.

JANUARY, 21, 1880.

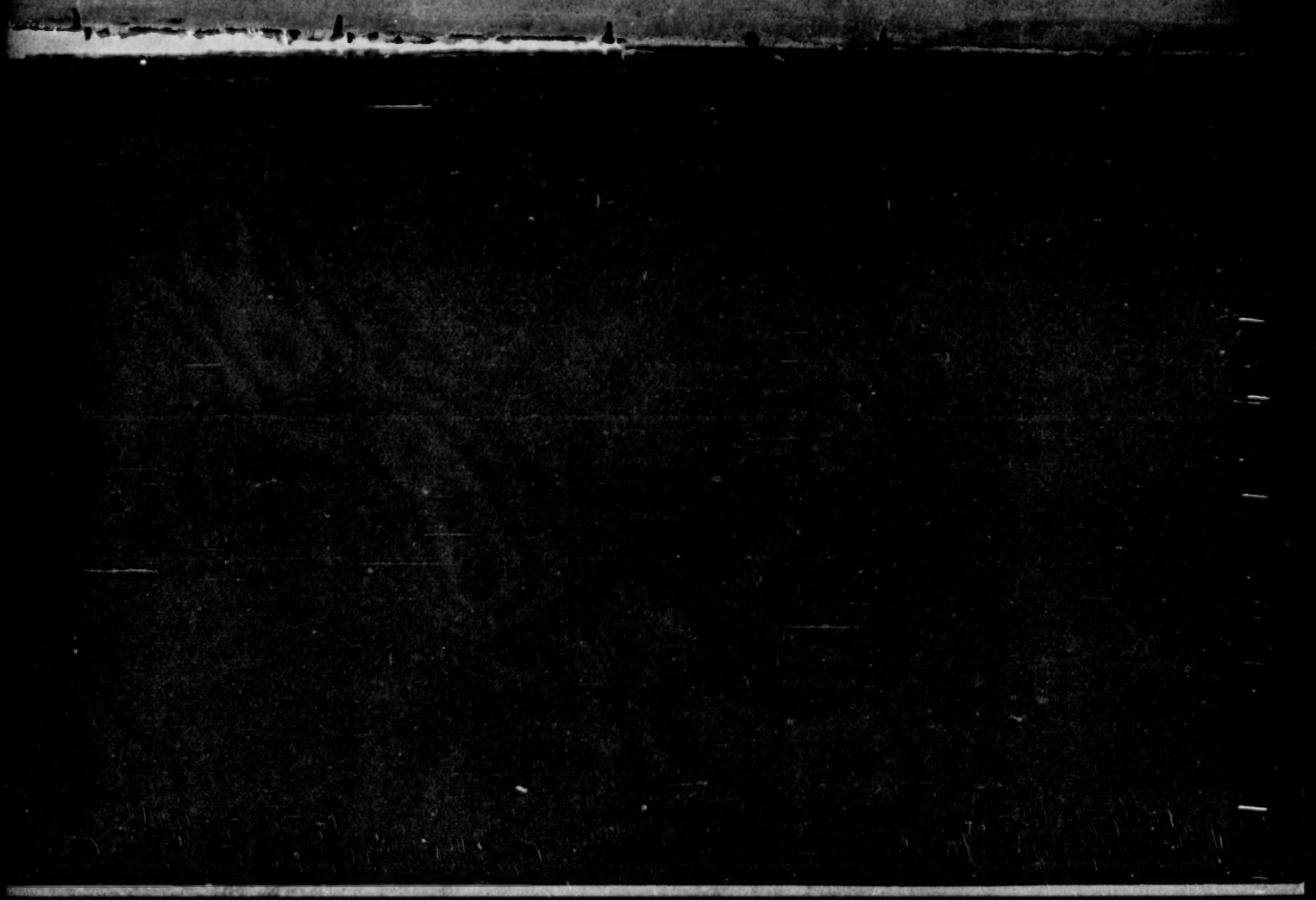
133 I, Jos. A. Waddell, clerk of the supreme court of appeals of Virginia, at Staunton, do hereby certify the foregoing to be a true copy of the appeal bond in the case of the Baltimore & Ohio Railroad Company against Monroe Funkhouser, administrator of Charles L. Noel, dec'd, this day filed in my office.

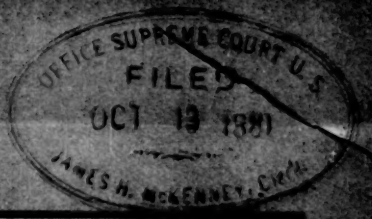
Given under my hand this January 24, 1880.

JOS. A. WADDELL, *Clerk.*

(Indorsement on cover:) No. 738. The Baltimore and Ohio Railroad Company, plaintiff in error, vs. Monroe Funkhouser, adm'r of Charles L. Noel, dec'd. Virginia sup. c't of appeals. Filed 5th February, 1880.

REC. 738—5





IN THE

Supreme Court of the United States.

October Term, 1881.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE W. KOONTZ, *Administrator of* WILLIAM A. WEIGHTMAN, Deceased, DEFENDANT IN ERROR.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MONROE FUNKHOUSER, *Administrator of* CHARLES L. NOSE, Deceased, DEFENDANT IN ERROR.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

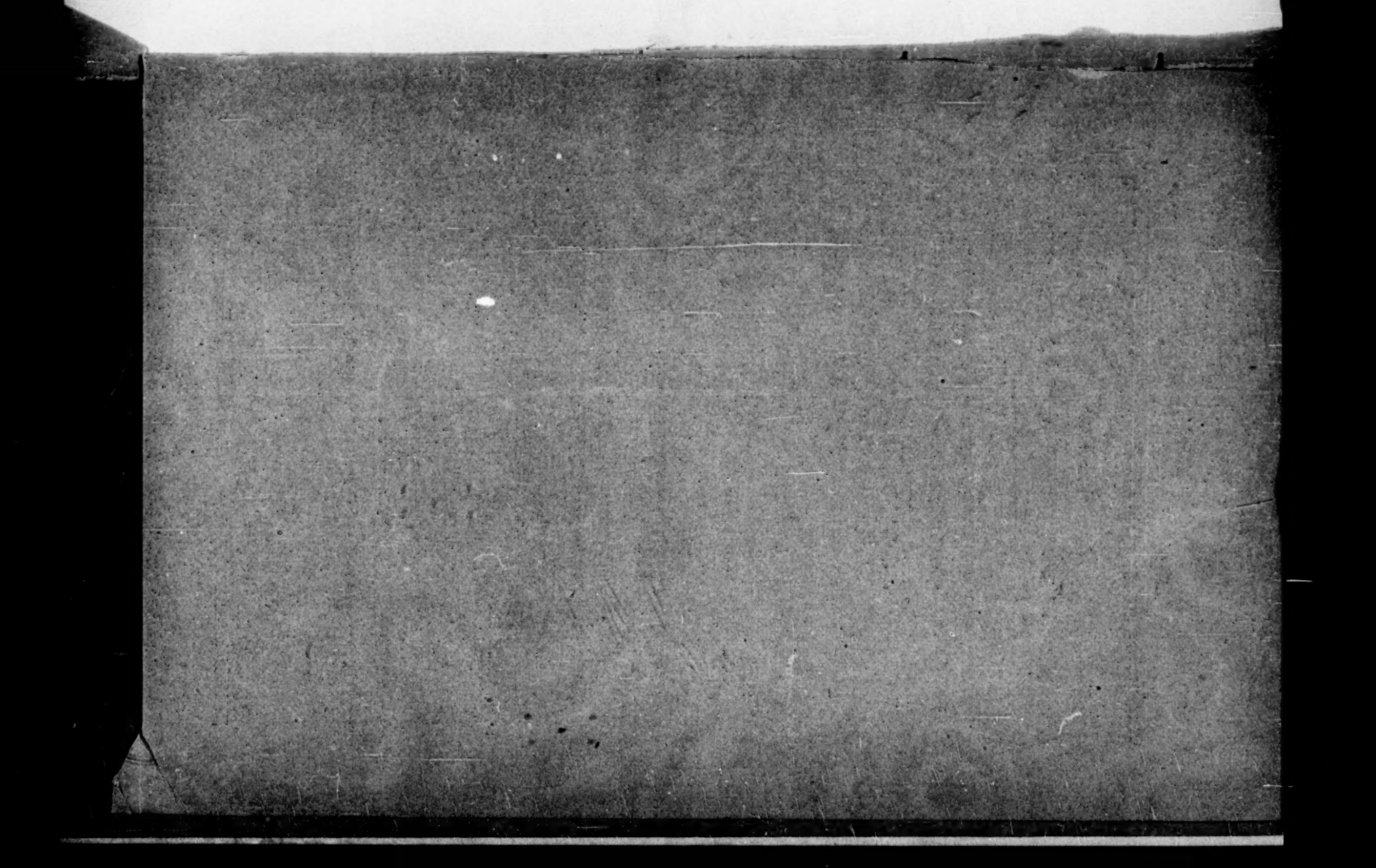
MONROE FUNKHOUSER, *Administrator of* [illegible] K. HAMMER, Deceased, DEFENDANT IN ERROR.

Numbers 902, 903, 904.

In Error to the [illegible] Court of Appeals of the State of Virginia.

STATEMENT OF CASES, ASSIGNMENT OF ERRORS, AND BRIEF FOR PLAINTIFF IN ERROR.

ROBERT W. SHEFFEY,
JOHN K. COWEN,
W. L. D. CROSS,
of Counsel for Plaintiff in Error.



IN THE

Supreme Court of the United States.

October Term, 1881.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE W. KOONTZ, *Administrator of* WILLIAM A. WEIGHTMAN, Deceased, DEFENDANT IN ERROR.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MONROE FUNKHOUSER, *Administrator of* CHARLES L. NOEL, Deceased, DEFENDANT IN ERROR.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

MONROE FUNKHOUSER, *Administrator of* REUBEN E. HAMMON, Deceased, DEFENDANT IN ERROR.

Numbers 30, 460, 788.

In Error to the Supreme Court of Appeals of the State of Virginia.

STATEMENT OF CASES, ASSIGNMENT OF ERRORS, AND BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASES.

These cases, by order of this Court, January 27, 1881, were to be heard together, when No. 30 was reached. While the facts in each case are different, the questions involved in the writ of error are similar.

In the case of Koontz, administrator, &c., the action was brought in the Circuit Court of Shenandoah County, Virginia, on the twenty-sixth day of April, 1876, against the Baltimore and Ohio Railroad Company to recover damages for the death of plaintiff's intestate, caused on the sixth of March, 1876, by the alleged neglect and default of the defendant.

The declaration alleges that the defendant was the owner and proprietor of a certain railway known as the "Railway of the Valley Division of the Baltimore and Ohio Railroad Company," running through the counties of Frederick, Shenandoah, Rockingham and Augusta, in the State of Virginia, and in the State of West Virginia; that the plaintiff's intestate on the sixth day of March, 1876, purchased a ticket from the station of Edinburg, in Shenandoah county, Virginia, to Charlestown, West Virginia, and while a passenger on said railroad, lost his life through an accident at the Narrow Passage Bridge, in said county of Shenandoah, in the State of Virginia. The damages claimed in the declaration were ten thousand dollars. (Record, Koontz case, pages 4 to 12.)

In the case of Funkhouser, administrator of Noel, the declaration was similar to the one last mentioned, alleging that Charles L. Noel, deceased, was a passenger on the road, having purchased a ticket from Mount Jackson to the city of Washington, and lost his life through an accident at the Narrow Passage Bridge, and claimed

damages to the amount of ten thousand dollars. (Record in No. 460, pages 9 to 12.)

In the case of Funkhouser, administrator of Hammon, the allegations were similar; said Reuben E. Hammon having purchased a ticket from Mount Jackson to Washington, and lost his life by reason of the accident above mentioned, and the damages claimed were ten thousand dollars. (Record in No. 788, pages 8 to 11.)

Petitions were filed by the then defendant, the Baltimore and Ohio Railroad Company, asking that the causes be removed to the Circuit Court of the United States for the Western District of Virginia, held at Harrisonburg.

These petitions were filed upon the second day of September, 1876. The ground of removal in each case was, that the Baltimore and Ohio Railroad Company was, at the time of the bringing of the suits, and at the time of the filing of the petitions, a corporation incorporated under and by virtue of the laws of the State of Maryland, and was a citizen of said State of Maryland, and that the plaintiff in each case was, at said times, a citizen of the State of Virginia; that said petitions were filed at the first term of the Court at which said causes could be tried. Proper bonds were filed with each petition.

On the 9th of September, 1876, the Circuit Court for the county of Shenandoah, Virginia, overruled the motion, to which rulings the defendant excepted.

The cases were subsequently tried, and, in the first case, a verdict was rendered in favor of the plaintiff, May 2, 1877, for five thousand dollars.

In the second case, a verdict was rendered in favor of the plaintiff for four thousand nine hundred and twenty-five dollars, on April 29, 1878; and, in the third case, a verdict was rendered in favor of the plaintiff for six thousand dollars, on January 6, 1879.

Upon writ of error, each case was taken to the Supreme Court of Appeals for the State of Virginia, and the judgments affirmed. Said causes were then brought to this Court by writs of error to said Court of Appeals.

ASSIGNMENT OF ERRORS.

The sole question for the consideration of this Court is, *was there error in denying the petitions of the Baltimore and Ohio Railroad Company for removal of the causes from the Virginia State Court to the Circuit Court of the United States for the Western District of Virginia.*

The plaintiff in error respectfully submits that its petition for such removal should have been granted.

It was conceded that the plaintiff in each suit in the State Court was a citizen of the State of Virginia, and that the Baltimore and Ohio Railroad Company was a corporation, incorporated under, and by virtue of the laws of the State of Maryland. It was alleged that said corporation was the lessee of that part of the Washington City, Virginia Midland and Great Southern Railroad from the town of Strasburg in Shenandoah county to Harrisonburg in Rockingham county, Virginia, and was, at the time of the alleged accident, using and operating the same as lessee. The Virginia Midland Railway Company was incorporated by the State of Virginia.

The act of incorporation of the Baltimore and Ohio Railroad Company by the State of Maryland is printed in each record. In the first case upon pages from 15 to 20. The lease of the Strasburg Branch of the Virginia Midland Road, is printed in the Record in No. 460, pages 21 to 24.

The opinion of the Court of Appeals of the State of Virginia is found on pages 36, 37 first record and 43 to 50, second record, and 29 third record.

We cite the opinion of the Court in the first case, as in the succeeding cases the Court of Appeals followed its decision in the first case.

"A preliminary question in this case to be settled is, whether the Circuit Court erred in refusing to remove the case to the Circuit Court of the United States for the Western District of Virginia.

"The defendant, the Baltimore and Ohio Railroad Company, is a corporation chartered by the State of Maryland. It is also, and was when this suit was brought, the lessee of a railroad from Strasburg to Harrisonburg, in this State, belonging to the Virginia Midland Railroad Company, a Virginia corporation, and was controlling and operating said railroad under said lease as owner and proprietor at the time of the injuries committed, as set forth in the declaration.

"The defendant has not produced the lease nor given evidence of its contents. We are, therefore, not informed as to the precise terms and the conditions upon which the lease was granted. All that we know is that the defendant is operating the road as owner, and exercising the powers and privileges granted its lessee by the charter of incorporation. What then is the status in Virginia of the defendant, a Maryland corporation, with reference to this road?

"The cases generally agree that a corporation created by the law of one State, can have no legal existence, outside the limits of that State. It may, however, make contracts, transact business, and even exercise corporate functions in another State with the consent of the latter, express or implied. In the Baltimore and Ohio Railroad Company vs. Gallahue's administrator, 12 Gratt., this Court decided that under the statutes authorizing that company to construct its road across the territory of Virginia, the Baltimore and Ohio Railroad Company, as to such road, was to be regarded as a Virginia corporation.

"In Railroad vs. Harris, 12 Wall., 82, the Supreme Court of the United States decided that the Baltimore and Ohio Railroad Company, having, under an Act of Congress, constructed a lateral branch of its road in the District of Columbia, was by reason thereof, liable to suit in that District, as if it had been an independent corporation in that locality.

"The Court did not rest its decision upon the ground, however, that the Act of Congress had made the Baltimore and Ohio Railroad Company a corporation of the District, but upon the ground

that the Act operated as a license to the company to construct its road there; and having accepted the license, the company had placed itself in the position of a domestic corporation for all the purposes at least of being sued in that locality.

"The Court say that they could see no reason why one State may not make a corporation of another State, as there organized and conducted the corporation of its own *quo ad hoc* any property within its territorial limits. See also Maryland vs. Northern Central R. R. Co., 18 Md. Rep., 193; Sprague vs. Hartford and Prov. and Fishk. R. R. Co., 5 Rd. Island, 233; Goshen vs. Supervisors, 1 W. Va., 308; Pennsylvania R. R. Co. vs. Sly, 65 Penn St. Reps., 205; Pomeroy vs. New York & New Haven R. R. Co., 4 Blatchf. 122.

"The Baltimore and Ohio Railroad Company, as a corporation of Maryland, can, of course, have no legal existence outside of that State, but as a lessee of a Virginia railroad company, exercising all the functions and powers of the latter, it may be subject to all its duties and obligations. This must necessarily be upon the authority of the cases cited, if that company is acting under any license granted by the State of Virginia. Under such circumstances, so acting, it must be treated as a Virginia corporation *quo ad hoc* the line of railroad under its control, so far, at least, as its liability to our own citizens is concerned. It can only escape these consequences by showing that it is exercising corporate powers here without the permission of the State, and consequently that it is a tort feasor or trespasser. Whether the company obtained the lease under any statute or provision in the charter of Virginia, the roads do not appear: none was shown to the Court, and none was claimed in the argument. It may be a very grave question whether a corporation of this State can be permitted to convey its franchise to a foreign corporation, so as to enable the latter to exercise corporate rights and powers here without some such authority. The purposes of this case do not require a decision of this question.

"If the Baltimore and Ohio Railroad Company is controlling and operating the Valley Road without permission of the State, it certainly cannot, therefore, claim exceptions and immunities to which it could not be entitled if it had obtained such permission.

"The company derived all its powers and privileges from the charter of the company which owns the road. It must be subject to all the duties imposed on that company; and among these is the obligation to answer in our own Courts to our own citizens for any damages resulting from its conduct.

"If under authority of law or on principles of comity a foreign corporation is allowed to hold property and exercise corporate functions in this State, it must also submit to the jurisdiction of our Courts in controversies with our citizens. If it claims the privileges and immunities of a domestic corporation, it must also perform the duties and answer to all the liabilities of a Virginia corporation.

"It is estopped by its conduct—by its exercise of corporate functions here under a Virginia charter—to deny that it is a Virginia corporation for all the purposes of Virginia jurisdiction."

The Virginia Court of Appeals specifically decided that where a railroad company incorporated in another State was lessee of a railroad in Virginia, the company lessee could be sued in the State Court, and had no right of removal to the Federal Court.

BRIEF.

It being admitted that the Baltimore and Ohio Railroad Company was a corporation incorporated by the State of Maryland, when sued in the Circuit Court of Shenandoah County, by a citizen of Virginia, has it lost its right of removal to the United States Court because it was the lessee and operator of a railroad incorporated by and located in the State of Virginia?

I.

A corporation for the purpose of suing and being sued, is a citizen of the State which created it. It owes its existence to that State. It has no legal existence beyond its bounds. By a conclusive presumption of law as settled by this Court, a suit by it is regarded as the joint suit of the individual persons which compose the corporation. Further, the legal presumption is that its members and all of them are citizens of the State in which alone the corporate body has existence. When it sues or is sued by its corporate name, it must be presumed to be a suit by or against the citizens of that State which created such corporation, and no averment or evidence to the contrary is admissible for the purpose of withdrawing jurisdiction from a Court of the United States. A suit, therefore, by or against the Baltimore and Ohio Railroad Company for jurisdictional purposes, must be considered a suit by or against citizens of the State of Maryland. This doctrine has been fully established by this Court in the following cases:

The Louisville C. & C. R. R. Co. vs. Letson, 2 How., 497.
Marshall vs. B. & O. R. R. Co., 16 How., 314.
R. R. Co. vs. Wheeler, 1 Black, 286.
R. R. Co. vs. Harris, 12 Wall., 65.
R. R. Co. vs. Whitton, 13 Wall., 270.

In the case of R. R. Co. vs. Harris, 12 Wall., 65, this Court decided, having before it the Act of Incorporation of the plaintiff in error and the Virginia Statutes relied upon by the Virginia Court of Appeals in its decision in these cases, that the B. & O. R. R. Co. was for jurisdictional purposes, a citizen of the State of Maryland. The Court held (page 81) that the act of Virginia permitting the Railroad to be constructed in that State did not create a new corporation of that State.

"The Company was chartered to construct a road in Virginia as well as in Maryland. The latter could not be done without the

consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to this question before us, they were the same as to powers, privileges, obligations, restrictions and liabilities as those contained in the original charter.

"The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. In its name, locality, capital-stock, the election and power of its officers, in the mode of declaring dividends and doing all its business, its unity was unchanged, only the sphere of its operations was enlarged. * * * * For the purposes of Federal jurisdiction it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members will be permitted."

The Act of Virginia which gave the Baltimore and Ohio Railroad Company the license to construct its road within the territory of Virginia, was not in evidence in the first case. It was offered in evidence in the second and third cases and is to be found on the Record in the second case, on page 24. By that act the Railroad Company was granted the same privileges within the territory of Virginia as it had within the territory of Maryland, except that it could not make any lateral roads within Virginia without the consent of the Legislature. After the passage of this Act, the State of Virginia was divided, and the entire line of the Baltimore and Ohio Railroad is within the limits of the State of West Virginia; and no part of its road is within the State of Virginia. So that this Act has no bearing upon the questions involved in these cases. The Baltimore and Ohio Railroad Company does not operate any part of its line in that State. The Court of Appeals of Virginia did not base its decision upon the terms of this Act, but solely upon the ground that as lessee of a Virginia railroad company it occupied the position of the company it leased, and should be

treated as a Virginia corporation as to the railroad under its control, so far as its liability to citizens of Virginia is concerned.

The Baltimore and Ohio Railroad Company being a Maryland corporation, and a citizen of that State, when sued by a citizen of Virginia in a Court of that State was entitled to have the case transferred to the Federal Court.

Its corporate existence was not dependent upon any Act of the State of Virginia. By leasing or operating a railroad incorporated by and situated within that State, it no more became a citizen of that State than would a natural person, a citizen of another State, who should purchase a farm in Virginia. The jurisdiction of the Federal Courts is such as they have under the Constitution of the United States and the Acts of Congress passed in conformity therewith. This jurisdiction can neither be taken away or impaired by the State legislation or by the act of any party. If under the wording of the statutes, that party can have his suit transferred to a Federal Court, this is a right which he cannot waive nor can any legislature divest him of it. The implied assent spoken of by the Court of Appeals of Virginia in connection with the license to the plaintiff in error to act as a lessee of a Virginia railroad company, cannot be construed on the one hand as a requirement by the State of Virginia that the plaintiff in error should not exercise the right of removal, or on the other hand as a surrender of that right by the plaintiff in error.

This Court in the case of Insurance Company vs. Morse, 20 Wall., 445, 450, &c., has held that a statute of a State requiring an insurance company, before transacting any business in that State, to sign an agreement that it would not remove any suit into the Federal Courts is unconstitutional and void.

"Every citizen is entitled to resort to all the Courts of the country, and to invoke the protection which all the laws of all these Courts may afford him. A man may not barter away his life or his freedom, or his substantial rights."

A citizen by going to another State and there engaging in business, does not lose thereby his citizenship. This is a right of which he can be divested only in one manner. When sued in a State Court he may not assert his right of removal, but he none the less has it. While he remains a citizen of another State he may always assert it.

Railroad Co. vs. Harris, 12 Wall., 65, 81, 82, 83, 84.
Doyle vs. Continental Ins. Co., 94 U. S., 535.
Ex parte Schollenberger, 96 U. S., 369.
Cowles vs. Mercer County, 7 Wall., 118.

The Court of Appeals of Virginia in these cases held, that the Maryland corporation, operating under an implied license, the Manassas Gap Railroad in the State of Virginia as lessee thereof, is to be deemed for all jurisdictional purposes to be identical with said Manassas Gap Railroad, and as the latter company could not move to transfer a suit to the Federal Court, neither can the Baltimore and Ohio Company, its lessee, do so.

The error arises from confounding the idea that as lessee it may be sued in Virginia, with the very different idea that when sued, although conceded to be a citizen of Maryland, it cannot make a motion to remove.

The sounder view of this question is taken by the Supreme Court of Ohio in the case of B. & O. R. R. Co. vs. Cary, 28 Ohio St. 208.

That Court held that a foreign railroad corporation by merely leasing, possessing and operating the property of a railroad company of that State, did not thereby become a citizen of that State, nor lose its right of removal to the Federal Court. Also, that a statute providing that such leasing and operating should be regarded as a waiver of the right of removal, was unconstitutional.

If therefore the right of removal is such a right as cannot be specifically waived, or contracted away, or cannot be divested by a State statute, how can there be an implied waiver of this right by

the transaction of its business by the plaintiff in error in Virginia as lessee of a Virginia corporation.

The reasons which have led the Courts to raise the implication of assent to the institution of suits against a foreign corporation within the State in which it undertakes to do business, are ~~already~~ given by this Court in the case of the Railroad Company vs. Harris, 12 Wallace, 81. The Court says, that "a corporation cannot migrate; but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to *be sued* there. If it do business there it will be presumed to have assented and will be bound accordingly." The Court however adds: "For the purposes of Federal jurisdiction, it is regarded as if it were a citizen of the State where it was created, etc.,"—and the Court approves the case of the B. & O. R. R. Co. vs. Gullahue's, Adm., 12 Grat., upon the same grounds: and not upon the grounds that the B. & O. Company was a citizen or corporation of Virginia for jurisdictional purposes, but that acting under a license to do business in Virginia, it was, on the principles referred to, suable in that State. And that citizens of Virginia, dealing with it, should not be compelled to go to Maryland to institute their actions. That is all that either case decides. Neither of them suggests the idea that when sued, the Company could not move to transfer the case to the Federal Court.

It is submitted that the case of Knapp vs. Railroad Company, 20 Wall., 117, is in point, in respect to the effect of a lease of a railroad to a non-resident corporation. It decides that such lease does not affect the citizenship of the corporation lessee.

The facts in the case were these: The Western Vermont Railroad Company, a corporation of Vermont, mortgaged the road to Knapp & Briggs, citizens of New York, to secure the payment of its bonds. The mortgage was regularly foreclosed, and Knapp & Briggs purchased it as trustees for the bondholders. They leased the railroad to the Troy and Boston Railroad Company, a corpor-

ation of New York. Suit was brought in the State Court of Vermont by Knapp, surviving trustee, against the Troy and Boston Railroad Company upon the covenants of the lease. The defendants applied to have the case removed, under the Act of March 2, 1867, on the ground of local prejudice, alleging that a certain corporation by the name of the Bennington and Rutland Railroad Company had been organized under Vermont law by a majority of the bondholders represented by Knapp & Briggs as trustees, and that this new corporation, Knapp, the surviving trustee being a nominal party, had become the real party in the suit. That therefore the subject matter of the controversy was between the Bennington and Rutland Railroad Company, (the Vermont corporation,) and the Troy and Boston Railroad Company, as lessee of the Vermont road. The case was removed to the Federal Court, a motion to remand was denied, and the Circuit Court proceeded to hear and adjudge the case, deciding it against Knapp, surviving trustee, who took the writ of error.

This Court held: that although the Troy and Boston Railroad Company was the lessee of the Vermont road, and held and operated it for a term of years, it did not thereby become a citizen of Vermont within the meaning of the Act of Congress, but was and continued to be a citizen of the State of New York, and that Knapp and Briggs being substantial and not merely formal parties, and likewise citizens of New York, the suit could therefore not be maintained in the Federal Court.

This case was followed in Brownell vs. Troy & Boston R. R., 3 Fed. Rep., 761.

II.

The record in each case shows that the petitions for removal were filed in due time, and the bonds tendered with them were unquestioned. When this was done, on the 2d September, 1876, the jurisdiction of the State Court was divested. By the 3d sec-

tion of the Act of March 3, 1875, it is provided that "it shall then be the duty of the State Court to accept said petition and bond, and proceed no further in said suit."

But the Virginia Court asserted its jurisdiction and decided that the plaintiff in error was for the purposes of these suits a citizen of that State. The plaintiff in error at no time acquiesced in this decision. On the contrary, by its motion to remove, by the exceptions reserved by it, by its assignment of error on this ground in the Court of Appeals of Virginia, it has persisted in its claim of right to have these cases tried in the only Court having jurisdiction. At all times and in all places, it has insisted upon its rights.

In the brief of counsel for defendant in error, they allege that the plaintiff in error, by reason of not filing copies of the record in the United States Court, has lost its right of removal, if at any time it had such right.

It is a sufficient answer to this, merely to say, that what may or may not have been done by the plaintiff in error in this respect, does not appear in the records. This Court will not consider any such matters.

Whether the plaintiff in error filed copies of the records in each case in time or not, is a question of fact. Whether by so doing, the defendants were prejudiced by such action, is also a question of fact. Questions of fact which may be different in each case. Hence this Court cannot pass upon all these matters which do not appear in the records. They might be cognizable in the Circuit Court of the United States on motions to remand.

We may be permitted, however, to observe that the defendant in error in each case now complains of *laches* resulting from a judgment of a State Court, procured by himself upon an issue tendered in his own answer to the statements contained in the petitions for removal. He obstinatety, persistently, and so far as the judgment of the State Court was concerned, successfully resisted and defeated the acceptance by the State Court

of the petitions filed, and a removal of the cases to the proper forum. He incited and encouraged the State Court to usurp authority over the cases, against the Act of Congress, and to continue that usurpation, and held the plaintiff in error under the dominion of that power, down to the date of the final judgment in the Court of Appeals of Virginia. His complaint now seems to be, that the plaintiff in error did not arrest his illegal purposes in the Court below, and did not at the risk of a conflict of jurisdiction prevent him from dragging the plaintiff in error through all this litigation. To say the least of it, the complaint of *laches* coming from the defendant in error, is inconsistent with his own contention, and should perhaps be supplemented by expressions of regret at the violation of law procured by himself, and by reason of which he now seeks to defeat the just rights of the plaintiff in error. There is no reason for such claim and it is wholly unsustained by the authorities.

Where a party entitled to removal is, notwithstanding his protests and exceptions, held for the trial of his case in the State Court, he loses none of his rights by defending against that action. He is not bound to desert the case and take the risk of such judgment as the State Court may pronounce against him by default, when by its solemn judgment it has determined that the case shall not be removed from its jurisdiction, but shall be proceeded in to final judgment.

Gordon vs. Longest, 16 Peters, 97.
Kanouse vs. Martin, 15 How., 198.
Ins. Co. vs. Dunn, 19 Wall., 214.
Removal Cases, 100 U. S., 457, 475.
Railroad Co. vs. Mississippi, 102 U. S., 135.
Kern vs. Huidekoper, 103 U. S., 485.

In the case of Railroad Co. vs. Mississippi, The party whose motion for removal was denied, remained in the State Court and contested the case. He did not file the record in the Federal

Court, as was done in Kern vs. Huidekoper, and in The Removal Cases. But as in the cases of Gordon vs. Longest and Kanouse vs. Martin he defended his rights in the State Court. The waiver of the right of removal must affirmatively appear, it cannot be inferred from the fact of contesting the case in the State Court.

The contention of the defendant in error has a double aspect.

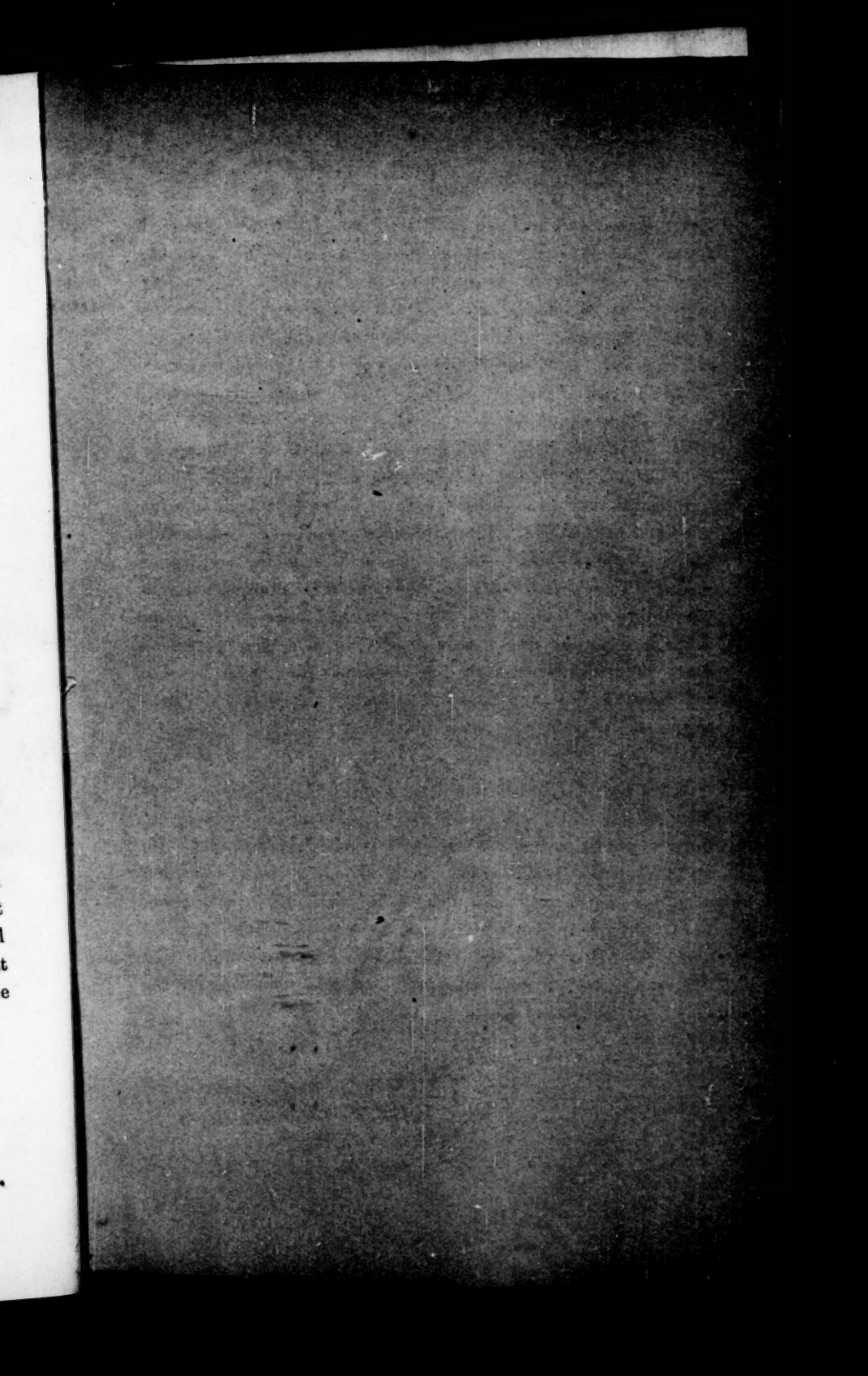
(a.) He insists that the judgment of the State Court is right, and therefore should not be reversed.

(b.) That even if that judgment be erroneous, the plaintiff in error has no right to have that error corrected in this Court.

In addition to the authorities referred to, to show such an error must be corrected by this Court in conformity with the twenty-fifth section of the Judiciary Act, we remark that in the decision of neither of these cases did the Supreme Court of Appeals of Virginia take the ground that the plaintiff in error had been guilty of any *laches*, and in the recent cases decided by that Court, such as Beery vs. Irick, Newton vs. Bushong, and Continental Ins. Co. vs. Casey, 27 Grattan, 316, and other cases, has any such idea been suggested.

When such distinguished tribunals as the Appellate Courts of Virginia and Ohio, both recognizing the same mode of proceeding, differ so widely on the identical question here involved, that is to say, whether the Baltimore and Ohio Railroad Company, by reason of leasing the railroad of a domestic corporation does or does not lose its citizenship in Maryland, and thereby its right of removal under the Act of Congress, it is eminently right and proper that this very grave and important question should be settled by the only Court which can decide it.

HUGH W. SHEFFEY,
JOHN K. COWEN,
E. J. D. CROSS,
of Counsel for Plaintiff in Error.



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H Miller

Field

April 5. 1881

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 448. ~~174~~ 20

DAVID C. SHANKS, EXECUTOR OF JOSEPH H. JOHNSTON, DECEASED, APPELLANT,

vs.

JOHN A. KLEIN ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPPI.

FILED JULY 18, 1878.

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1 Pleas and proceedings had and done in the circuit court of the United States for the southern district of Mississippi at a regular term thereof begun and held at the court-room, in the city of Jackson, on the 1st Monday, being the 7th day of May, A. D. 1877, before the Hon. R. A. Holl, district judge, present and presiding, sitting in equity.

JOHN A. KLINE ET ALS.
vs.
DAVID C. SHANKS, EX'R. } N. S. 241.

Be it remembered that heretofore, to wit, on the 1st day of May, 1876, John A. Kline and others, by their attorney, filed in the clerk's office of said court their certain bill of complaint against David C. Shanks, ex'r, which, with the exhibits thereto, and the fiat of the judge, are in words & figures following, to wit:

To May term, A. D. 1876. In equity.

UNITED STATES OF AMERICA,
Southern District of Mississippi, ss:

To the judges of the circuit court of the United States for the southern district of Mississippi:

John A. Klein and Elizabeth B. Klein, his wife; Mary Genella; J. A. Kellogg, and his wife Fredrika Kellogg, as executrix of the last
2 will and testament of Fritz Ackerman, deceased; Virginia Thomas, and Nathaniel W. Thomas, Rosa C. Thomas, Lillie H. Thomas, and Annie F. Thomas, the last four of whom are minors, and sue by Virginia Thomas, their next friend and guardian; Alexander Kuhn, J. C. Blum, Isadore Brown, the mayor and aldermen of the city of Vicksburg; James Botto, and Catherine Botto, a minor, who sues by her next friend James Batto; Antonie Steike, and Rachael Steike, his wife; and Kate Smith, John Smith, Susan Smith, and George Smith, minors, who sue by their next friend and guardian Henry B. Bruser, all residents of the city of Vicksburg, and citizens of the State of Mississippi, bring this their bill against David Shanks, as executor of the last will and testament of Joseph H. Johnston, deceased, of , and a citizen of Virginia.

And thereupon your orators complain and say:

1st. That in the year 1837 Joseph H. Johnston and Shepperd Brown, citizens of Vicksburg, Mississippi, formed and entered into an agreement of copartnership for the purpose of carrying on business in
3 the said city of Vicksburg under the firm-name and style of Brown & Johnston. No formal articles of copartnership were executed between said partners, as your orators are advised, but it was specifically understood and agreed between them as follows: 1st. That the style of the firm should be "Brown & Johnston." 2nd. That said Shepperd Brown & Joseph H. Johnston should constitute the members of the said firm. 3rd. That their interests should be those of general partners. 4th. That the funds and capital of said firm should be devoted to the business of a bank of discount and deposit, the purchase and sale of commercial paper, and the purchase and sale of real estate. Upon the basis of this agreement said copartnership was organized and commenced business in the city of Vicksburg, about the date last aforesaid, and from that time until its dissolution, as heretofore stated,

4 it continued in Vicksburg the business of a bank of discount and deposit, the purchase and sale of commercial paper, and the buying and selling of real estate. As your orators are advised, the only variation in the business of said firm as originally agreed upon, that occurred in its progress, was when the cultivation of cotton become greatly profitable between the years 1845 and 1855, said firm employed a part of its funds in the purchase of slaves, utilizing the investment in the cultivation and improvement of certain real estate of the firm, and such was the extent of the investment in this species of property, that at the time the slaves of the country were emancipated, said firm owned, as your orators are advised and charge, some five hundred slaves, the loss whereof contributed very materially to the insolvency of the firm, brought about by the results of the civil war, as will be hereinafter shown.

2nd. That the transactions of said firm, during the period of its
5 organization in all departments of its business, were of quite an extensive character, particularly in the matter of dealing in real estate. In this latter branch of the business of the firm, as your orators are advised and charge, no fixed rule was adopted or pursued as to the name in which partnership real property was acquired and sold in pursuance of its agreed business. The deeds to such property were sometimes taken in the name of one partner and again in the name of the other, as might be deemed necessary to facilitate a transfer when sold. Sometimes the title was taken in the names of both partners, but it was not deemed necessary or required in any case that their deeds of purchase or sale should show upon their face the partnership character of the transaction. But as your orators are advised and charge, every purchase and sale of real estate made in the State of Mississippi by said partners or either of them, after the organization of the copart-
6 nership as aforesaid, was a purchase with the funds and on account of said partnership, in pursuance of the original terms of agreement, and the books of said firm exhibited said transactions by way of debit and credit regularly in the course of the business, said partners sharing equally in the profits or loss of the venture.

3rd. In the year 18 the said Shepperd Brown & Joseph H. Johnston became interested in a copartnership formed in New Orleans, La., under the firm-name of Brown, Johnston & Co., organized for the purpose of conducting in said city the business of banking, and whereof one Buck was the third partner, but, as your orators are informed and charge, there was no connection whatever in the way of partnership interests or obligations between said firm of Brown, Johnston & Co., & the firm of Brown & Johnston at Vicksburg. But said partnerships, in their respective interests and obligations, were entirely separate
7 and distinct. Likewise said Brown & Johnston, in the year 18 , became interested as copartners in a firm founded in New Orleans, La., under the firm-name of Ratchferd, Brown & Co., organized for the purpose of conducting in said city the business of cotton factors and commission merchants, but, as in the other case, as your orators are advised and charge, the copartnership of Ratchferd, Brown & Co. had no connection whatever in point of partnership interests or liabilities with the firm of Brown & Johnston at Vicksburg, but the two firms in all their business affairs were wholly separate and distinct, and so continued during their respective organizations.

4th. That the said firm of Brown & Johnston continued business in Vicksburg as originally organized until May, 1862. At that date one A. H. Arthur became associated with the firm as partner, and the name

was changed to that of Brown, Johnston & Arthur. Upon information your orators charge that this change in nowise affected
8 the business relations and interests of the partners of the firm of Brown & Johnston; the new arrangement only admitted said Arthur to a participation in the profits of the banking business of the firm from and after the date of his connection therewith; the partnership property of the firm of Brown & Johnson, both real and personal, continued and remained vested in them unaffected by the new association with Arthur. Indeed, as your orators are advised, but little more than a nominal business was transacted by the firm after the association of Arthur with it, the whole business being confined to a few deposits with the bank, and payment to deposit creditors; for the war in its active grogress had so closed in around Vicksburg, that within ninety days after the new association was formed the business of the firm, in common with every other species of business in the city, was forced to suspend, and never resumed again.

9 5th. The several firms hereinbefore named, in New Orleans and Vicksburg, were forced to suspend business by the results of the war in the year 1862; following this, their final dissolution occurred in the month of 1863, by the death of Joseph Johnston, who departed this life in the State of Virginia, where he was then residing. Said Johnston left an olographic will, wherein he specifically charged upon his estate the payment of his just obligations; and subject to said charge he willed his entire estate to one David C. Shanks, named and appointed therein as sole executor, in trust for distribution to certain legatees designated and named in said will, the said Shanks being devised a fourth interest in said estate; said will vested said Shanks as executor with plenary power in the administration of the estate, generally, empowering him, as executor, to buy, sell, or exchange; do any thing which he may think wisest to the interest of the estate,
10 formally relieving said executor from all obligations to consult any of the beneficiaries of his trust in his management of it, and declaring forfeited the claim of any legatee under the will who should complain of the action of said executor with reference to the estate, whatever it might be. Said executor was also relieved from any obligation to give bond as executor. Said will bears date June 29th, 1863, and a copy of the same is herewith filed, marked Exhibit A.

6th. By the death of said Johnston, Shepperd Brown was left the sole surviving partner of the firm of Brown & Johnston, and representative of its assetts and liabilities; and while your orators have not the means of accurately declaring the conditions of the two New Orleans firms at the time they were dissolved by the death of Johnson, they are informed, and so charge, that the results of the war had rendered them wholly insolvent, their respective liabilities being
11 largely in excess of available assetts with which to liquidate and discharge them. By loss of slaves, depreciation of real estate, disruption of the business of the country, and the consequent general insolvency of the debtor class following the war, the firms of Brown & Johnston and Brown, Johnston & Arthur were also found irremediably insolvent when the war closed. To the depositors alone of the banking business these firms owed about $70,000, as will appear by schedule accompanying the deed in trust hereinafter exhibited with this bill. And as your orators are advised, and upon information charge, the following real estate situate in Mississippi, the property of said firm of Brown & J., acquired with partnership funds on partnership account in the ordinary course of business, constituted the

sole available means left said Brown, as surviving partner, to be employed in discharge of partnership debts for which it was liable: All those certain tracts or parcels of land, all being the property of the said firm of Brown & Johnston, described as
12 follows, to wit: The south half of section eleven, all of section ten, east half and east half of the west half of section nine; east half and east half of the west half of section four, in township seventeen, range six west; and the north half of section three, north half of section four, southwest quarter of section four, southeast quarter of section nine, southwest quarter and west half of the southeast quarter of section ten, west half and the west half of the southeast quarter of section twenty-nine and north half of section thirty-one, all in township fourteen, range four west; and the north half of the southeast quarter of section thirty-four and west half of section thirty-five, in township seventeen, range seven west; and the east half of the east half of section 28 in township sixteen, range six west, and the southwest quarter and the southwest quarter of the northwest quarter of section fifteen in township sixteen, range six west, all lying in the county of Washington, and State of Mississippi, except a portion of sections twenty-nine and
13 thirty-one, in township fourteen, range four west, which are in Yazoo County. And also lots three, four, five, six, and twelve & thirteen in section two, east half of the southwest quarter of section three, southeast quarter of section four, east half of section nine, & northwest quarter of section ten, all in township thirteen, range four west; and the northwest quarter of section thirty-two, township fourteen, range four west, all lying and being in Yazoo County, Mississippi; also all of section nine and the north and the west half of the southwest quarter of section two in township twenty-six, range two west, in Tallahatchie County, Mississippi; also the southeast quarter of section nineteen, and the northeast quarter of section thirty in township nineteen, range four west; and the north half and the southeast quarter of section twenty-nine, township fourteen, range four west, in Sunflower County, Mississippi; and also the east half of the southwest quarter of the southeast quarter, and southeast quarter of
14 the southwest quarter of section five, and the *and the* west half of the northwest quarter of section eight, and lot in section one, all in township seventeen, range five east, in Warren County, Mississippi. And also the following described lots or parcels of land lying and being in the city of Vicksburg, and State of Mississippi, to wit: That part of lot number two hundred and eighty-six in square sixty, fronting twenty-four feet and seven inches on Washington street, and one hundred and fifty-seven feet and six inches on Clay street, being the same lot on which the banking house of Brown & Johnston stood, and runs back the whole depth of the lot the same width it fronts on Washington street, as designated on the original plat of Vicksburg, & also lot No. 3, as designated on a plat of lots recorded in the probate court clerk's office with a deed from the said Brown & Johnston to William H. Stevens, bounded on the west by Washington street, on the east by Walnut street, on the north by the lot of
15 Wm. H. Stevens, and on the south by the lands of the estate of S. B. Newman, deceased, being part of the square on which the Verandah building stood; also part of lot number two hundred and eighty-seven in square No. sixty, fronting feet on Clay street, and running back that width the full depth of the lot, bounded on the east by the said lot number two hundred and eighty-six, and on the west by the lot sold by Brown & Johnston to A. Novra; also part of lot

number two hundred and eighty-four in square fifty-nine, fronting on Clay street, upon which there is a livery stable now occupied by the United States, bounded on the east by the lands of Hooper P. Hunt, on the west by the lot formerly owned by John C. Bull, on the south by Clay street, and running back the whole depth of the lot; also part of lot two hundred and ninety in square sixty-one, fronting twenty-four feet and nine inches, and running back west that width to an alley fifteen feet reserved on the western side of the lot for the common use of the owners of the block, bounded on the north
16 by the lot sold by Brown & Johnston to W. S. Wheeler, and on the south by *by* the lot sold by them to S. B. Brown; also that part of Gordon square fronting on Washington street, and on the west by Gordon street, and adjoining on the south the lot sold by Brown & Johnston Patrick Hogan or his wife, and on the north the lot sold by them to Mrs. Elliott, formerly Mrs. McGuire, being the same lot on which the building known as the Martin House now stands, and all the land now owned by said Brown & Johnston in said square, and the steam engine and machinery connected with or in the upper saw mill in the said city of Vicksburg, now occupied by the government of the United States; and also an undivided half interest in about twenty acres of land in West Jackson, Hinds County, Mississippi, near the depot of the New Orleans and Jackson Railroad, being the only property owned by Brown & Johnston in or near that place, and the whole
17 tract owned by Mrs. B. H. Roach and Brown & Johnston. And your orators are advised and so charge that any other assets which said firm may have owned at the date of its dissolution before stated were substantially lost to the said survivor Brown by the results of the war, and could not be made available by him thereafter in the duty devolved upon him of adjusting and satisfying as far as practicable the partnership liabilities.

7th. As your orators are informed and charge, upon close of hostilities in 1865, Shepperd Brown returned to New Orleans, where he was residing when the war began, having, just before the occupation of the city by the Federal Army in 1862, taken up his residence in Georgia. He immediately entered upon the duty of providing for a settlement of the affairs of the several firms of which he was a partner hereinbefore designated and described, by gathering up such available assetts
18 of the several firms as could be found, and applying them to the claims of their creditors that were esteemed of the highest moral and legal obligation. As early as practicable after his return to New Orleans said Brown visited Vicksburg with the view of looking into the affairs of the firms of Brown & Johnston, and Brown, Johnston & Arthur, and determining upon the adoption of some practicable means of securing to the creditors of these firms the equal appropriation of their assetts, particularly the real estate of Brown & Johnston hereinbefore set forth and described. To this end he sought the aid of legal advice as to his power, as surviving partner of the copartnership to which the property belonged, to convey it in trust for the benefit of creditors who had the highest claim upon it, and was advised that he had the legal power to do so, said property being but assetts
19 of the partnership that the creditors had the right through his agency to have applied in satisfaction of their debts.

As your orators are advised and charge, this proposition of said survivor Brown of securing to the creditors of the Vicksburg firms the equal appropriation of what the war had left of their assets was not only just, but eminently expedient, as the members constituting the

firm owning the property were likewise bound for the vast volume of debt of the insolvent firms of Brown, Johnston & Co., & Ratchferd, Brown & Co., and suits were threatened him for the absorption of said property, to the satisfaction of claims that said Brown and Johnston were only liable for by reason of their connection with the New Orleans firms, and the exclusion of creditors who were justly entitled to it, and said Brown, as survivor, was sued by attachment, and
20 threatened with suits of like character by creditors of the Vicksburg firms, who in this way sought to secure the inequitable advantage of full payment over other creditors of said firms, whose claims were of equal obligation with theirs.

8th. As your orators are advised and upon information charge, David C. Shanks named executor in the last will and testament of Joseph Johnston, deceased, with the view of ascertaining the condition of the estate of his testator, and the necessity of taking out letters executory upon said will in the States of Louisiana and Mississippi, in the fall of 1865 visited New Orleans, and was several weeks in that place. That upon said visit said Shanks had frequent interviews with Shepperd Brown, who gave him in detail all information of which he was possessed concerning the conditions in which the war had left the several firms of New Orleans & Vicksburg, in which his testator was
21 interested as a partner, placing at his disposal for examination such books of said firms as had escaped destruction by the war to facilitate a satisfactory investigation of the subject of his visit. Further pursuing this investigation, as your orators are advised and charge, said Shanks visited Vicksburg in company with said Brown, and looked into the affairs of the firms of Brown & Johnston and Brown, Johnston & Arthur, and both in Vicksburg and New Orleans took competent legal advice upon the relative rights of *of* himself as executor, and of the surviving partners to the control and direction of the interest of the deceased partner, Johnston, in the assets of the several firms with which he was connected at his death, and the necessity or propriety of his taking out letters executory under Johnston's will, either in Mississippi or Louisiana, the result of all which was, as your orators are
22 advised and charge, said Shanks declared to said Brown that he was perfectly satisfied that the several firms in New Orleans and the firms of Brown & Johnston and Brown, Johnston & Arthur, of Vicksburg, were hopelessly insolvent, their liabilities greatly exceeding their assets of any value, and as the surviving partners of these had the legal right, and were in every way better qualified to direct the appropriation of the assetts, among the creditors to whom they of right belonged, he would offer no hinderance to their doing so; as there was no occasion for it he would decline to administer under the will either in Mississippi or Louisiana.

9th. Your orators are advised and upon information charge that while said Shanks was in Vicksburg as aforesaid, Shepperd Brown informed said Shanks and advised with him of the purpose that he then
23 entertained of conveying, as surviving partner, the real estate of Brown & Johnston in Mississippi hereinbefore described in trust to have the same sold, and the proceeds thereof applied specifically and rateably to the payment of the claims of creditors of the Vicksburg firms, and especially to the deposit creditors of these firms, whose claims he considered of the highest obligation, partaking of the character of trust obligations, explaining to said Shanks the necessity of the measure to insure equal justice to the largest class of creditors. To this proposition, as your orators charge, the said Shanks not only gave his unquali-

fied approval, but advised it as a measure of expediency and justice, and as being the speediest and most efficient method of securing an equitable distribution of the assets of the partnership that had survived the war upon the claims of their creditors, to whom in justice and of
24 right they belonged, and said Shanks expressed his perfect willingness to co-operate with said Brown in any way to carry the proposition into effect. And your orators, upon information, further charge that since the institution of the suits by ejectment hereafter more particularly referred to, said Shanks has again in unqualified terms expressed his approval of that conveyance as act of common right and justice and demanded by the circumstances of the case.

10th. Your orators further charge that in pursuance of the legal advice he had received upon the subject of his power as surviving partner to make the trust conveyance hereinbefore referred to, and influenced thereto by the approval and advice of said David C. Shanks, and the demands of justice and expediency to do so, the said Shepperd Brown
25 as surviving partner of Brown & Johnston, secured the consent of your orator, John A. Klein, to act as trustee, making known to said Klein the fact of said Shanks' concurrence and approval of the proceedings as aforesaid, and having prepared a schedule of the deposit creditors of the firms of Brown & Johnston, and Brown, Johnston, and Arthur, whose aggregate claims amounted to some $70,000, on the 15th day of September, 1865, executed and delivered to said Klein a deed in trust, conveying to him all the property hereinbefore set forth and described, in trust, to be sold by said Klein, and the proceeds applied rateably to the claims of the deposit creditors of the firms of Brown & Johnston, and Brown & Johnston & Arthur, embraced and set forth in the aforesaid schedule accompanying and referred to in said trust deed, a copy of which said deed and schedule is herewith filed as Exhibit B and prayed to be considered in connection with this bill. And
26 your orators aver and charge that each and every lot and parcel of ground embraced in said deed in trust was the property of the partnership firm of Brown & Johnston, purchased with the funds of the partnership account, and in the ordinary course of the partnership business, and in this hon. court will be held and maintained to have been assetts of said firm, subject to the lien and control of the surviving partner, Brown, to be first applied in satisfaction and discharge of the liabilities of said partnership.

11th. Upon information, your orators further charge that said David C. Shanks was fully advised of the execution and delivery of said deed in trust as aforesaid, and of the purpose of the trustee, Klein, in pursuance of the powers delegated him thereby and the provisions thereof, to execute the trust by a public sale of the trust property in Vicksburg at or about the time it was subsequently made. That said Shanks
27 never indicated to said trustee, by word or act, that his views of confirmation and approval of the trust conveyance had undergone any change whatever, and as far as there appeared from him any objection indicating the contrary, the making & delivering of said deed and the execution of its trusts, still met his approval and concurrence. Pursuant of the powers and provisions of said trust deed, the trustee, John A. Klein, having given the required notice of the time, place, and terms of sale by publication in the Vicksburg newspapers & posting notices through said city on the day of , 1866, proceed' to sell at public outcry, in said city, that portion of the trust property located in the city of Vicksburg, at which sale the following of said

property was purchased by the persons (under whom your orators hold) and at the prices for each parcel, as follows, to wit:

28 Benjamin R. Thomas became the purchaser, at the price of eleven thousand five hundred dollars, of that certain lot, to wit: That part of lot numbered 280, in square 64, fronting 24 feet and 7 inches on Washington street and one hundred and fifty-seven and six inches on Clay street, being the same lot on which the banking & business house of Brown & Johnston had stood, & the house having been destroyed by fire during the war, & the lot then vacant, and runs back the whole depth of the lot the same width that it fronts on Washington street, as designated on the original plat of Vicksburg.

Fritz Ackerman became the purchaser, at the price of $4,350, that certain lot, to wit, part of lot No. 287, in square No. 60, fronting feet on Clay street, and running back that width the full depth of the lot, bounded on the east by the lot 286 and on the west by the lot

29 sold by Brown & Johnston to A. Navra.

Fritz Ackerman became the purchaser also, at the price of $7,100, of that certain lot, to wit: Part of lot 284, in square No. 59, fronting on Clay street, upon which there is a livery stable, now occupied by the United States, bounded on the east by the lands of Hooper P. Hunt, on the west by the land formerly owned by John C. Bull, on the south by Clay street, and running back the whole depth of the lot.

Joseph Botto became the purchaser, at the price of $11,800, of that certain lot, to wit: That part of Gordon square fronting on Washington street and on the west by Gordon street, and adjoining on the south the lot sold by Brown & Johnston to Patrick Hogan or his wife, and on the north the lot sold by them to Mrs. Elliott, formerly Mrs. Maguire,

30 being the same lot on which the building known as the Martin House now stands.

Antonio Genella became the purchaser, at the price of $14,200, of that certain lot, to wit: Part of lot No. 290, in square No. 61, fronting 24 feet 9 inches on Washington street and running back that width west to an alley 15 feet wide, reserved on the western side of said lot for the common use of the owners of the block, bounded on north by the lot sold by Brown & Johnston to W. B. Wheeler, and on the south by the lot sold by them to S. B. Brown.

J. C. Blum and Isadore Brown, Alexander Kuhn became the purchasers, at the price of $5,925, of that certain lot, to wit: Lot No. 3, in a plat of lots, land, and recorded in the probate clerk's office, with a deed from said Brown & Johnston to W. H. Stevens, bounded on

31 west by Washington street, on the east by Walnut street, on the north by the lot of W. H. Stevens, and on south by lands of estate of S. B. Newman, deceased, being part of the lots on which the Verandah building stood.

Your orators are advised and so charge that the sale of said property was conducted by the trustee in strict accordance with the requirements of the trust deed with unqualified fairness, and in the interest of the beneficiaries of the trust. That the prices paid for said property at said sale were its full value at the time and as they believe, and charge exceeding what the same property would sell for at this time at public sale. And they further charge that the proceeds of sale, less the expenses thereof, were rateably distributed and paid by the trustee upon the claims of the partnership creditors embraced and set forth in the schedule aforesaid as required by said trust deed.

32 12th. Your orators further show and charge that the purchas-

ers of the property at the trust sale as aforesaid, im'ediately paid to said trustee the purchase money in cash and receiving from him deeds therefor, went into possession of the lots respectively purchased by them, and said purchasers and your orators holding under them have enjoyed quiet and uninterrupted possession of the same from the time of said trust sale until the institution of the ejectment suits of said David C. Shanks, executor, &c., as hereinafter set forth. And your orators further say and charge by way of recapitulation that the co-partnership of Brown & Johnston to which said real estate belonged, and Brown & Johnston & Arthur were rendered insolvent by the results of the late civil war. That the assets of said firms real & personal
33 belonged to the creditors of said firms, both at law and equity, to the exclusion of the individual claims of the partners, their creditors, legal representatives or heirs at-law, and the aforesaid will of Joseph Johnston expressly recognized this to be so by charging the payment of his debts upon his estate and subordinating all gifts, legacies, and bequests under said will to said charge. That Shepperd Brown, as sole surviving partner of said firm of Brown & Johnston, had by virtue of said survivorship the equitable right and power, and it was likewise his duty to give effect to the just claims of said creditors upon the assetts of said firms, and for this purpose the perfect equitable title to the interest of the deceased partner, Johnston, in and to said real estate lodged and vested in the said survivor Brown, which
34 title passed and was transferred to Klein by force of said trust deed, and by the deed of said Klein, as trustee, passed & became vested in your orators; that the said David C. Shanks acting upon a full and fair understanding of the insolvent conditions of said partnership firms of Brown & Johnston, and Brown, Johnston & Arthur, the character and obligation of the aforesaid schedule claims of the creditors of said firms, appeared, encouraged and advised the making of said trust deed by said survivor Brown, for the purposes therein specified. That said trustee, John A. Klein, accepted said trust upon the faith that it vested him with the authority of transmitting a perfect title to said real estate to the purchaser under him, said faith being supported by
35 the fact known to said trustee that said Shanks as the executor of said Johnston, with the knowledge of the making of said trust deed, not only offered no objection to it as an adverse claimant, but approved and advised it. That at a public sale of said real estate by the trustee named in said deed, over which no shadow of unfairness rests, those under whom your orators claim became purchasers at prices that experience has shown were a high valuation upon it, which prices were paid in cash, that was honestly and fairly disbursed and appropriated among the creditors to whom the proceeds rightfully belonged. That investing their money in the purchase of said real estate the purchasers at said trust sale took the then uncertain chances presented by
36 the condition of the southern country after the war of the venture resulting in one of profit or loss, and said purchasers and your orators under them, have held said property for over nine years upon the faith of the title acquired as aforesaid, investing money in the payment onerous taxes and improvements thereon, without a word respecting an adverse claim from the said Shanks, who has resided at Salem in the State of Virginia during the whole period, until it came in the form of process from the law side of this hon. court at his suit demanding possession of your orators, in right of said deceased partner, Joseph Johnston, and as executor of his will, one-half of the real estate, with a

demand for rents and profits running through said period of nine years.

37 And your oratrices the said Bettie B. Willis, and Virginia Thomas for herself and as guardian of her minor children, Nathaniel W. Thomas, Rosa C. Thomas, Lillie H. Thomas and Annie F. Thomas, aver and charge that by purchase in the case of said Bettie B. Willis, and inheritance in the case of said Virginia Thomas and her said children, they are now the owners of the perfect equitable title and in possession of that portion of the real estate hereinbefore described as acquired by purchase at said trust sale by Benjamin R. Thomas. That at the date of the purchase at said trust sale said lot was unimproved and incumbered only with a common frame tenement. That since said sale there has been expended upon it by the original purchaser, Thomas, and those holding from and under him, fully fifty-five thousand dollars, in the way of substantial improvements, taxes, & insurance. And your orators the said John A. Klein and Mary Genella aver and

38 charge that they are the owners of the perfect equitable title and in possession, the said Klein by purchase and the said Mary Genella by de'cent from and under Antonio Genella, of the lot hereinbefore described as having been sold to said Antonio Genella at said trust sale. That since the purchase of said lot at said trust sale the said Antonio Genella, in his lifetime, and your orators have expended upon said lot about the sum of thirty thousand dollars, in the way of substantial improvements and taxes thereon. And your orators the said James Botto and Catherine Botto, as sole surviving heirs at law of Joseph Botto, deceased, aver and charge that they are the owners in right of their said ancestor, of the perfect equitable title and in possession of the lot hereinbefore described as having been purchased by their said ancestor, Joseph Botto, at said trust sale, and that there has been

39 expended upon said lot since it was purchased by their said ancestor, as aforesaid, fully ten thousand dollars, in substantial improvements and taxes thereon. And your orators Alexander Kuhn, J. C. Blum, Isadore Brown, and the mayor and aldermen of the city of Vicksburg aver and charge that the latter by purchase from and under said Kuhn, Blum, and Brown by purchase at said trust sale, as aforesaid, they are now the owners of the perfect equitable title and in possession of that portion of the real estate hereinbefore described as acquired by purchase by said Kuhn, Blum, and Brown at the trust sale aforesaid. That there has been expended upon said lot since it was purchased by said Kuhn, Blum & Brown, at said trust sale, the sum of one thousand eight hundred dollars, in substantial improvements and taxes thereon. And your oratrix Frederika Kellogg, late Acker-

40 man, as executrix of the last will and testament of Fritz Ackerman, deceased, avers and charges that she is the owner of the perfect equitable title, by devise from said Fritz Ackerman, and in possession of the following described lot, purchased by said Ackerman at said trust sale, to wit: Part of lot number two hundred and eighty-four, in square fifty-nine of the original plat of the city of Vicksburg, fronting on Clay street, upon which there is a livery stable, bounded on the east by the lands of Horper P. Hunt, on the west by the lot f rmerly owned by John C. Bull, on the south by Clay street, and running back the whole depth of the lot, and that said Ackerman, in his life time, and your oratrix, since his death, have expended upon said lot, since it was purchased by said Ackerman as aforesaid, about the sum of three thousand dollars, in substantial improvements and taxes

41 thereon. And your orators Antonie and Rachael Steine aver and

charge that, by purchase from said Frederika Kellogg, as executrix of the last will and testament of Fritz Ackerman, deceased, (the power to make said sale being given to said executrix in said will,) they are the owners of the perfect equitable title and in possession of the following described lot, purchased by said Ackerman at said trust sale as aforesaid, to wit, the west half of that certain lot or part of lot No. two hundred and eighty-seven, in square No. sixty, as designated on the original plat of the city of Vicksburg, fronting on Clay street twenty-three feet and nine inches, adjoining the property of A. Navra, and running south in parallel lines the whole depth of said lot, and being the west half of the same property conveyed by John A. Klein, trustee,
to F. Ackerman, on the 13th day of January, 1866, in the county
42 of Warren and State of Mississippi. That at the date of the purchase at said trust sale said lot was wholly unimproved; that since said sale your orators have expended upon it about the sum of four thousand dollars, in the way of substantial and valuable improvements and taxes thereon. And your orators Kate, John, Susan, and George Smith, minors, by their next friend and guardian, H. B. Bruser, aver and charge that by inheritance from and under their ancestor, George Smith, deceased, who purchased the lot next below described from said Frederika Kellogg, as executrix of the last will and testament of Fritz Ackerman, deceased, (the power to make said sale being given to said executrix in said will,) they are the owners of the perfect equitable title and in possession of the following lot, purchased by said Ackerman
at said trust sale as aforesaid, to wit, part of lot No. two hundred
43 and eighty-seven in square No. sixty, as known on the original plat of the city of Vicksburg, and bounded as follows: Fronting on Clay street twenty-three feet and nine inches, and running south in parallel lines the whole depth of said lot, being the east half of that part of said lot sold by John A. Klein, trustee, to F. Ackerman, on the 13th day of January, 1866, and being in the county of Warren and State of Mississippi; that on the date of the purchase of said lot at said trust sale said lot was wholly unimproved; that since said trust sale your orator's said ancestor, George Smith, has expended upon said lot about the sum of ten thousand dollars in the way of substantial and valuable improvements and taxes thereon. And your oratrix, Elizabeth B. Klein, avers and charges that, by purchase from and under Margaret Wheeler,
she is now the owner of the perfect, equitable title and in posses-
44 sion of that portion of the real estate hereinbefore described as acquired by purchase by said Margaret Wheeler at the trust sale aforesaid; that there has been expended upon said lot since it was purchased by said Margaret Wheeler at said trust sale about the sum of thirty thousand dollars in way of valuable and substantial improvements and taxes thereon.

13. Your orators further show and charge that said David C. Shanks, as executor of the last will and testament of Joseph H. Johnston, deceased, on the day of , 1875, brought his several actions of ejectment in the circuit court of the United States for the southern district of Mississippi, for the recovery of your orators the one-half interest undivided of the several lots and parcels of land hereinbefore shown to be respect-
ively owned and in the possession of your orators, together with
45 a large sum from your orators as rents and profits of said property accruing since the date of the trust sale aforesaid, and said suits are now depending in said court. While said suits stand in the name of said Shanks as plaintiff, yet, upon information, your orators charge that said Shanks did not advise or voluntarily suffer them to be

brought in his name; and if the institution of said actions had been left solely to the judgment and sense of right of said Shanks, as your orators charge should have been the case, by the express terms of the will under which he was acting, said suits would not have been brought; but, as your orators are informed, and so charge, certain beneficiaries of the will of said Johnston, whose names your orators are unable to give, claiming that the legal title to the interest of said Johnston in and to the real estate aforesaid never passed by the trust deed executed
46 and delivered by the survivor, Brown, but that said legal title therein survived and remained in said Shanks as executor of his will, to the use of the legatees named in said will, not only demanded that said Shanks should institute suits to recover the interest of said Johnston in said property, but by the agency of employed council threatened said Shanks with actions for damages should he fail or refuse to institute said suits, for the execution of which they claimed was the trust devolved upon him by the will of Johnston in their behalf. In this effect to force the judgment of said Shanks in relation to this matter by said legatees, your orators charge that they brought themselves within that provision of said will ordering forfeited the claim under the will of any of its beneficiaries who should complain "or interfere with
47 the exercise of the judgment of said testator in what he should or should not do as executor." As before stated, your orators do not know the names of said beneficiaries, but will pray discovery of said Shanks of their several names and interests claimed by them under the will. Upon information your orators further charge that when said Shanks was first applied to to allow his name and office as executor to be used for the institution of said suits, he refused, declaring that such action would not only be inequitable, but a gross injustice upon your orators; that the property had been sold in good faith to pay honest debts, for which it was bound, and knowing the purpose of it, he had approved and advised the sale; that the same disposition had been made of it as his uncle, the deceased Johnston, would have made of it,
48 had he been alive, and precisely the disposition he had required in his will should be made of it, & whatever questions of law the case might be susceptible of, the title and possession of said property was in the purchasers under the trust sale, where they justly belonged, and he would not interfere to disturb them. Your orators charge, upon being frequently importuned by said legatees, and threatened with the harrassment of an action for damages, he finally consented to allow his name to be used in said suits, but upon the express condition that said legatees should make or cause to be made to him a bond and security in a sum sufficient to indemnify him against all costs and expenses that might arise by reason of said actions, which bond, as your orators
49 are advised and charge, was made and is now in the possession of said Shanks, discovery whereof will be demanded of said Shanks.

14. Your orators further aver and charge upon information that about the time of the making and delivery of the trust-deed to John A. Klein by Shepperd Brown as aforesaid, or some time thereafter, the said David C. Shanks, as executor of Joseph Johnston, deceased, or in his individual capacity, or both, by some form of writing that your orators are not able now to clearly define and make known, as no one of them has seen it, assigned and transferred to said Shepperd Brown, or to some other person not now known to your orators, all the right, title, and interest of Joseph Johnston, deceased, in and to the assets real and personal of the aforesaid several New Orleans and Vicksburg copartnerships of which

at the time of his death he was a member. And while your
50 orators are unable to declare the purpose of said assignment and transfer, they have understood and believe it to have been to give more direct and express effect to the approval before given by the said Shanks to the aforesaid conveyance in trust of Brown to Klein. But be the purpose thereof what it may, your orators are advised and charge that if such an assignment and transfer was given by said Shanks, it operated to vest in said Brown, or other person, all title whatsoever of the said deceased partner in and to the entire assets of said firms, and the same enured to the benefit of your orators respecting the real estate aforesaid, will be so held by this hon. court in this proceeding, or at least to divest the said Shanks, as executor or otherwise, of all right, title, or interest in or to the same. The matter of such an assignment
51 or transfer, its character and purpose being peculiarly within the knowledge of said Shanks, your orators will ask full discovery thereof of him. Your orators are advised that inasmuch as their respective claims upon the real estate involved in the aforesaid actions of ejectment are derived from the same common source, to wit, the deed of trust exhibited with this bill, and their several matters of equitable defence to said suits are the same and common to all, your orators, for the purpose of avoiding a multiplicity of suits and having their several rights in the premises adjudicated and determined in one proceeding, they are entitled to come before this hon. court making common cause to that end. That the said David C. Shanks, executor of the last will and testament of Joseph H. Johnston, dec'd, and one of the leg-
52 atees named therein, being vested by the provisions of said will with all such legal title to the aforesaid real estate as stood in said testator, the said Johnston, at his death, by reason of his action in advising and approving the execution and delivery of the trust deed of the surviving partner Brown to John A. Klein, bearing date September ,1865, and standing by and permitting said property sold under said deed to purchasers for a full value and the proceeds distributed to creditors of his testator without dissent, and permitting the purchasers of said property to go into possession under their said purchase and occupy for a period of over nine years, without objection or interruption, and expend thereon large sums of money in the payment of taxes and substantial improvements upon the faith of their title acquired as aforesaid, without a word from said Shanks or any
53 one of the other legatees under said will intimating a purpose of asserting an adverse claim at some late day, when it was confidently supposed that all debts and liabilities of said testator, Johnston, would be barred by lapse of time, and by the further action of said Shanks in executing and delivering to said Brown a tra'sfer of all interest of his said testator in and to the assets of the several firms of which he was a member, as hereinbefore charged and set forth, stands in equity estopped from asserting in any court any claim whatever to said property, or as having waived all claim thereto in the interest of your orators, as by the will of said Johnston he had the power to do. That it is essential to the perfect equitable defence of your orators to said actions of ejectment that they should have full and complete
54 discovery of said Shanks of every matter and thing within his knowledge touching the several charges, allegations, and suggestions contained in this their bill. That if there is any title in said real estate to such interest as Johnston had therein at the time of his death outstanding in the said David C. Shanks by virtue of the will aforesaid, your orators possessing and showing a perfect equitable title thereto,

are entitled to have the decree of this court compelling said Shanks to convey to them his naked legal title, or perpetually enjoining and restraining him from the assertion of his said legal title in any court whatsoever; or, if mistaken in this, that your orator' are entitled to have an account taken under the direction of this hon. court of the money expended by your orators and the original purchas-
55 ers at the trust sale in the purchase of said property, and expenditures under them in improvements, taxes, and insurance, together with interest on the whole, and the decree of the court requiring said Shanks to pay the sums so ascertained to be severally due your orators, or that he be restrained and enjoined in default thereof from further disturbing your orators in their possession of said property. Your orators further state that they are advised & believe that the said will of said Joseph H. Johnson, deceased, was never proven nor admitted to probate in the State of Mississippi, nor was said David C. Shanks ever sworn or qualified as executor thereof in said State, nor were any letters executory or of administration ever granted upon the estate of said testator in Mississippi, nor any administration thereof of any kind had therein, except by said Brown, as surviving partner
56 as aforesaid, with the full consent and approval of said Shanks, as hereinbefore mentioned. Your orators further state that they w*as* informed and believe a large proportion of the claims mentioned in the schedule A, made part of said deed of trust, amounting in the aggregate, including interest, to at least thirty or forty thousand dollars, and s'ill unpaid, & are now legal and valid debts and claims against the estate of *of* said Joseph H. Johnston, and by the express provisions of said will are required to be fully paid by said Shanks, as executor and trustee therein named, before he or any other devisee or legatee under said will can lawfully claim or receive any portion of the estate; that it is only the balance of the estate after the debts are paid that is devised to him for himself and in trust for others. Your oratrix, Bettie B. Willis, states that the said Joel H. Willis mentioned in said deed of trust as a creditor of said firm of Brown & Johnston, and
57 whose claim, to the amount of ten thousand dollars, was intended to be secured thereby, was at the time of his death her lawful husband; that prior to his death he made his last will and testament, which was duly proven and admitted to probate, after his death, by the probate court of Warren County, Mississippi; that the executor named therein declined to qualify, and she was duly appointed administratrix of his estate, with the will annexed, and gave bond and qualified as such. She further states that by said will she is the sole devisee and legatee of the entire estate, real and personal, of her said deceased husband. So she states she is now the sole owner of the balance of said judgment and of the sum secured to said J. H. Willis, and that the balance of said ten thousand dollars mentioned in said deed of trust now remaining unpaid, including interest, is about eight thousand dollars;
58 which sum is a subsisting legal and valid claim against the estate of said Joseph H. Johnston, deceased; for the payment of which she is informed and bel*e*ives the interest of said testator, Joseph H. Johnston, deceased, in all the lots, lands, and property, and said Shanks in said several actions of ejectment if said estate, or said Shanks as executor of said will has any, is bound in equity, and she has the right in this court to compel him, as executor and trustee, to sell such interest for the payment of the amount due her as above stated. And your orators further state they are advised and believe if they are not now the legal or equitable owners of the whole of said land or real estate claimed or

held by them respectively, as aforesaid, and this court should be of opinion that the estate of said Johnston, or said Shanks, as ex-
59 ecutor of his will, yet has any interest, legal or equitable, in said real estate sued for, as above mentioned, they are entitled to be subrogated in equity to the rights of said purchaser at said trust sale, whose money was applied, as aforesaid, to the just debts of said Brown & Johnston, and to have such interest of said estate, whatever it may be decreed to be, sold for the payment of the amount of the debts of said testator discharged by said payments. In tender consideration of the premises, and inasmuch as your orators can only obtain full and adequate relief in a court of equity, they pray the said David C. Shanks may be made defendant to this bill, and compelled on oath to make full and true answer to all and singular the allegations, statements, and charges herein contained; that he be required to discover and say whether he has not, as executor of the
60 will of said Joseph H. Johnston, or in some other character or capacity, sold, transferred, assigned or conveyed all the interest which the said Joseph H. Johnston had or owned at the time of his death in or to the assets and property of the said firms of Brown, Johnston & Co., and Rotchford, Brown & Co., in New Orleans, and Brown & Johnston, and Brown, Johnston & Arthur, in Vicksburg, including all the property held and claimed by your orators as above stated; and that he be required to file with his answer hereto the original or a copy of such assignment, transfer, or conveyance, and that he be further required to answer and say whether he was not consulted by said Brown touching the execution of said deed of trust to said Klein, and whether he did not approve it and advise it to be done, and whether he did not know of the said sales by said Klein, as trustee,
61 thereunder, and did not assent to it, advise or approve the same, and did not always, heretofore, and still think it just and proper that said deed of trust should be executed and said sales made, and that the proceeds of said sales were applied and used in strict accordance with the spirit and intent of the will of said Johnston, and as he, said Johnston, would have required them to be used had he been living; and that he be compelled to further answer and say specially whether he did not, when first spoken or written to on the subject, decline and positively refuse to bring said action of ejectment, or any other suit or suits against your orators for the recovery of said property, or to permit his name to be used for any such purpose, and did not repeatedly refuse to do so because he believed it would be unjust and contrary to equity and good conscience; and whether he was not
62 importuned and urged to bring said suits or permit his name to be used for the purpose, and whether he was not threatened with suit or suits for damages and for removal from his office of executor of said will if he did not sue for said property; and whether some bond or written agreement was not executed or made to indemnify him and save him from all costs, loss or damage by reason or on account of said suits for the recovery of said lands, before he finally consented to bring them or permit them to be brought in his name; and that he be required to set forth and state the names of the parties who so importuned, urged and threatened him and who gave him such bond or agreement to indemnify and hold him harmless; and that he be required to file said bond or agreement, or a copy thereof, with his answer to this
63 bill. Your orator's further pray that upon a final hearing it may be decreed that their title to said property held and claimed by them respectively is complete and perfect, and that said Brown had the

legal and equitable right to execute said deed of trust and apply the property therein named as personalty to the payment of the debts mentioned in said schedule A as was done by him. And also that said defendant Shanks having advised and approved the execution of said deed of trust and the sales thereunder for the purposes therein mentioned, and having quietly acquiesced in said sales for so many years, and permitted your orators to expend such large sums of money in erecting and constructing valuable and permanent improvements thereon, is now estopped. And this court is prayed to decree that he shall not be permitted to set up, assist, or prosecute against your orators any
64 right or claim whatever at law or in equity to or for the recovery of any part of said land or property. Or if your orators are mistaken in the decree they believe they are entitled to have rendered herein and prayed for above, and this court shall be of opinion that said defendant, Shanks, as executor or otherwise, has now any interest in or right to all or any portion of said property under and by virtue of said will of Joseph H. Johnston, deceased, then your orators pray that such interest be decreed to be held by him in trust and liable to them for all the money paid by them respectively, or by those thro' or under whom they claim for taxes and insurance on said property, and for the value of all permanent improvements made or erected thereon, and for the said several sums for which it was sold by said Klein as trustee and applied to the payment of the debts of said Johnston,
65 either individually or as a member of either said firms or copartnerships, and for such debts or claims as they still hold and unpaid against him, said Joseph H. Johnston, or his estate, no matter how accruing or originating, together with interest on each of said sums, and they be decreed to have a lien on said property as against said defendant and all others claiming under said will for the payment of the whole. And your orators pray that an account may be taken of the several sums due them as aforesaid, and said defendant be decreed to pay within some short time the amount found to be due them, and in the event of his failure to do so that all of said property or so much thereof as may be necessary be decreed to be sold for the payment thereof, or if the interest of said Shanks in the property respectively claimed
66 herein by your orators should be found to be but naked legal titles with a complete equitable title in your orators, they pray that said legal titles be decreed conveyed to your orator, in manner to be fixed and determined by the court. In the mean time your orators pray that said defendant, Shanks, his agent, attorneys, & solicitors, be enjoined and restrained from the further prosecution of said actions of ejectment or either for the recovery of said property or any part thereof, and from asserting, setting up, or attempting to enforce against your orators any right or claim to any part or all of said property until the matter and things herein set forth shall be heard and determined by this court, and that such injunction upon final hearing may be
67 decreed to be perpetual; or your orators pray for such other and further relief as their case requires, and may be equitable in the premises. Your orators pray for the issuance of writs of subpœna or summons and injunction, directed, &c., commanding, &c. And, as in duty bound, &c.

J. A. KLEIN.

T. A. MARSHALL,
BIRCHETT & GILLAND,
BUCK & CLARK,
Sol's for Compl'ts.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Personally came before the undersigned commissioner in and for said district, John A. Klein, one of the complainants to the foregoing bill, who says, on oath, that the matters and things set forth as of his knowledge are true, and such as are stated and set forth upon information
68 derived from others he believes to be true.

J. A. KLEIN.

Sworn to and subscribed before me this 31st day of March, A. D. 1876.

LAY LINDSAY,
U. S. Commissioner.

(Endorsed:) Filed May 1st, 1876, with Exhibits A & B. Geo. T. Swann, clerk.

Said bill bears the following fiat for injunction endorsed thereon in words and figures following, to wit:

To the clerk of said court:

You will issue the injunction as prayed in the within bill upon complainants entering into bond with good and sufficient security in the sum of one thousand dollars, payable to defendant, and conditioned for the payment of the costs of said cause.

This May 1st, 1876.

R. A. HILL, *Judge.*

69 *Exhibit A to bill.*

I, Joseph H. Johnston, of the city of Vicksburg, State of Mississippi, being aware of the uncertainty of life and being now of sound disposing mind, do make this my last will and testament, renouncing all others heretofore made:

1st. I will all of my just debts be first paid.

2d. I will all of the balance of my estate, both real and personal, to my nephew, David C. Shanks, of the county of Roanoke, State of Virginia, with the following directions: That he take charge of the same without administration; that he will carry on or wind up the present business in New Orleans & Vicksburg as he may think best. He is authorized to buy, sell, or exchange, do anything which he may think most to the interest of the estate, as I have the most implicit confidence in him and do not wish him restricted, and, when wound up, to make the following distribution of the same:

1st. I will David C. Shanks, my nephew, the same above mentioned, one-fourth of the entire estate.

2d. I will to each of my sisters, Susan Shanks, Elizabeth Lea, Ann Earnest, Lucy Johnston, widow of my brother William, & Margaret Johnston, widow of my brother Jno. Johnston, the sum of five thousand dollars each.

3d. I will the balance of my estate be divided between my nephews and neices that may be living at the time, share and share alike, but
70 should any of them be placed in such a situation that they cannot control the same for their support, then I wish the am't may be so placed as to go to their support.

As the business is a very large one and will take time to wind it up,

I do not wish D. C. Shanks to be restricted in any way. Any one or more of the heirs complaining, he shall not receive any portion of the estate; nor shall any heir be allowed to sell his interest in the estate, but shall wait the distribution. Owing to the immensity of the business that will devolve upon D. C. Shanks, he shall receive a compensation for the same, that to be left to commercial men, as they are acquainted with such matters. But should anything occur that it would be necessary for to administer upon my estate, in that event I hereby appoint D. C. Shanks, and clothe him with as full power to do so as possible without giving security in the bond. I wish the remains of my beloved brother George W. Johnston, to whom I was greatly attached, be removed to the family burying gound in Virginia and a suitable monument erected to his memory regardless of expense.

As witness my hand and seal, this the 29th June, 1863.

JOS. H. JOHNSTON. [SEAL.]

A copy. Test:

WM. M. CAULEY,
Clerk of the County Court of Roanoke County.

71 (Endorsed:) Filed May 1, 1876. George T. Swan, clerk.

Exhibit B to bill.

This indenture, made out and entered into this 15th day of September, 1865, by and between Shepherd Brown, survivor of Joseph H. Johnston, lately doing business in the city of Vicksburg and State of Mississippi, as copartners under the firm name and style of Brown & Johnston, of the one part, and John A. Klein, of the county of Warren and State of Mississippi, of the other part, witnesseth:

That whereas the said firm of Brown & Johnston was for many years engaged largely in the purchase of notes, bills, checks, money and securities of various kinds, and town lots, lands, houses, &c., and selling the same and dealing generally in banking, exchange and real estate, buying and selling lands in Mississippi and other States, and the lands always considered and used by them as part of the capital firm, just as money, notes, bills of exchange and other personalty were; and whereas the said firm of Brown & Johnston, in the course of their business and in the lifetime of said Johnston, received on deposit large sums of money, and issued certificates of deposit therefor; and also received on deposit money for which no certificates were issued; and

72 whereas the firm of Brown, Johnston & Arthur, composed of the said Brown & Johnston and Alexander H. Arthur, succeeded Brown & Johnston and continued at Vicksburg; and whereas the said firms of Brown & Johnston and Brown, Johnston & Arthur are still justly indebted to various persons holding certificates of deposit and depositors who have no certificates; and whereas the said Brown & Johnston are also indebted to Joel H. Willis, who has a judgment founded on monied securities against them, recorded in one of the courts of New Orleans, Louisiana, a full and complete schedule and list of all of which debts, including the names of depositors, dates and amount of deposit, rate of interest when they bear interest, and number of certificate when certificates were issued, and the amount of the judgment is filed herewith as a part hereof marked; and whereas the said Brown is desirous of securing the full payment of all of said creditors:

Now, therefore, for and in consideration of the premises, and of the sum of ten dollars to him in hand paid, the receipt whereof is hereby acknowledged, hath granted and sold, and as surviving partner as afore-

said doth hereby grant, bargain, and sell unto the said Klein, his heirs and assigns, all those certain tracts or parcels of land, all being the property of the said firm of Brown and Johnston, described as follows, to wit: The south half of section eleven; all of section ten; east half and east half of east half and the west half of section nine; east
73 half of the west half of section four, in township seventeen, range six west; and the north half of section three; north half of section four; southwest quarter of section four; southeast quarter of section nine; southwest quarter and west half of southeast quarter of section ten; west half and the west half of the southeast quarter of section twenty-nine, and the north half of section thirty-one, all in township fourteen, range four west; and the north half of the southeast quarter of section thirty-four, and west half of section thirty five, in township seventeen, range seven west; and the east half of the east half of section 28, in township sixteen, range six west; and the southwest quarter and the southwest quarter of the northwest quarter of section fifteen, in township sixteen, range six west, all lying in the county of Washington and State of Mississippi, except a portion of sections twenty-nine and thirty-one, in township fourteen, range four west, which are in Yazoo County. And also lots three, four, five, six, twelve, & thirteen, in section two; east half of the southwest quarter of section three; southeast quarter of section four; east half of section nine & northwest quarter of section ten, all in township thirteen, range four west; and the north-
west quarter of section thirty-two, township fourteen, range four
74 west, all lying and being in Yazoo County, Mississippi. Also all of section nine and the north half and the west half of the southwest quarter of section ten, in township twenty-six, range two west, in Tallahatchie County, Mississippi. Also the southeast quarter of section nineteen and the northeast quarter of section thirty, in township nineteen, range four west; and the north half and the southeast quarter of section twenty-nine, township fourteen, range four west, in Sunflower County, Mississippi. And also the east half of the southwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter of section five, and the west half of the northwest quarter of section eight, and lot , in section one, all in township seventeen, range five east, in Warren County, Mississippi. And also the following described lots or parcels of land, lying and being in the city of Vicksburg, and State of Mississippi, to wit: That part of lot number two hundred and eighty-six, in square sixty, fronting twenty-four feet and seven inches on Washington street and one hundred and forty-seven feet and six inches on Clay street, being the same lot on which the banking-house of Brown & Johnston stood, and runs back the whole depth of the lot the same width it fronts on Washington street, as designated on the original plat of Vicksburg; also lot number three, as designated on a plat of
lots recorded in the probate court, clerk's office, with a deed from
75 the said Brown & Johnston to William H. Stevens, bounded on the west by Washington street, on the east by Walnut street, on the north by the lot of W. H. Stevens, and on the south by the lands of the estate of S. B. Newman, dec'd, being part of the square on which the Verandah building stood; also part of number two hundred and eighty-seven, in square number sixty, fronting feet on Clay street and running back that width the full depth of the lot, bounded on the east by the said lot number two hundred and sixty-six, and on the west side by the lot sold by Brown & Johnston to A. Navra; also part of lot number two hundred and eighty-four, in square fifty-nine, fronting on Clay street, upon which there is a livery stable now occupied by the United States,

bounded on the east by the lands of Harper P. Hunt, on the west by the lot formerly owned by John C. Bull, on the south by Clay street, and running back the whole depth of the lot; also part of lot two hundred and ninety, in square sixty-one, fronting twenty-four feet and nine inches, and running back west that width to an alley fifteen feet, reserved on the western side of the lot for the common use of the owners of the block; bounded on the north by the lot sold by Brown & Johnston to W. S. Wheeler, and on the south by the lot sold by them to S. B. Brown; also that part of Gordon square fronting on Washington st., and on the west by Gordon street, and adjoining on the south the lot
76 sold by Brown & Johnston, Patrick Hogan or his wife, and on the north by the lot sold by them to Mrs. Elliot, formerly Mrs. McGuire, being the same lot on which the building known as the Martin House now stands; and all the land now owned by said Brown & Johnston in said square; and the steam engine and machinery connected with or in the upper sawmill in the said city of Vicksburg, now occupied by the Government of the United States. And also an undivided half interest in about twenty acres of land in West Jackson, Hinds County, Mississippi, near the depot of the New Orleans & Jackson Railroad, being the only property owned by Brown & Johnston in or near that place; and the whole tract owned by Mrs. M. B. H. Roach and Brown & Johnston; to have and to hold the several lots, tracts, and parcels of land, together with all and singular the appurtenances, privileges, and improvements thereunto belonging or in anywise appertaining, unto him, the said John A. Klein, his heirs and assigns, in fee simple. The foregoing conveyance is, however, upon the following special trusts and conditions, to wit: It shall be the duty of said Klein, and he is hereby fully empowered to do so, to sell any part or all of said lands or lots or property, and make and execute deeds and titles to the purchaser thereof, at either private or public sale, whenever and as often as he may be able to make sales which in his judgment it will be to the interest of
77 said creditors and of all concerned to do so, and out of the proceeds of such sales, after paying all the expenses of making and executing the same, pay said several creditors, as far as the proceeds of such sales made from time to time will enable him to pay them. And as fast as he pays said debts and fully discharges them, he shall take up said certificates of deposit when certificates have been issued and mark the debts paid on said schedule A. And he shall also, whenever he is satisfied from evidence adduced to him that any of said debts have been paid by said Brown or others, either before the execution of this deed, for some of them may have been paid and the evidence of the payment lost when a portion of the books and papers of said Brown & Johnston were burned, or may have been lost or mislaid, or may be paid hereafter, to mark them paid on said schedule A, and if the whole of said debts shall not be fully paid before the expiration of twelve months from this date, it shall be the duty of said Klein to sell all of the lots, lands, and property then remaining unsold, or so many or such parts thereof as may be necessary, at public auction, for cash, after first giving notice by advertisement in some newspaper published in the said city of Vicksburg of the time and place of sale, and out of the proceeds of such sale pay and satisfy all of said debts then remaining unpaid, after
78 first paying all the expenses of making such sale and of executing this trust, and he shall make to all purchasers at such sales good and sufficient deeds conveying the whole interest of both Brown & Johnston in the property purchased by them respectively. And whatever may remain after paying all expenses of executing this trust

and all of said debts, he, said Klein, shall reconvey and deliver up and pay over to said Brown, his representatives, heirs, or assigns, whether the same be in lands, lots, or money.

In testimony whereof the said Shepherd Brown has hereunto set his hand and seal the day and year first above written.

SHEPHERD BROWN, [SEAL.]
Surviving Partner of Brown & Johnston.

THE STATE OF MISSISSIPPI,
Warren County:

Personally appeared before me, J. C. Chappell, clerk of the probate court of said county, Shepherd Brown, who acknowledged that he signed, sealed, and delivered the foregoing instrument of writing for himself and surviving partner of Brown & Johnston as his act and deed for the purposes and considerations therein set forth.

Given under my hand and seal of office this 16th day of September, A. D. 1865.

J. C. CHAPPELL, *Clerk.*

79 THE STATE OF MISSISSIPPI,
Warren County:

I, James Chappell, clerk of the probate court of said county, do hereby certify that the foregoing instrument of writing and certificate were filed for record in my office on the 16th day of September, 1865, at 20 minutes to 6 o'clock p. m., which I have duly recorded in Deed Book C C, pages 662, 663, 664, & 665, and further certify that said instrument was properly stamped with the proper sum in revenue stamps, as required by U. S. revenue law.

Given under my hand and seal of office this 16th day of September, A. D. 1865.

J. C. CHAPPELL, *Clk,*
By T. C. RICHARDSON, *D. C.*

STATE OF MISSISSIPPI,
Washington County:

I, William A. Haycraft, clerk of the probate court of said county, do hereby certify that the foregoing instrument of writing and the certificate hereto attached, having the proper number of revenue stamps thereon, was filed for record in my office and recorded in Book S, pages 418, 419, 420, 421, & 422, this 20th day of September, A. D. 1865.

W. A. HAYCRAFT, *Clerk,*
Pr. F. A. METCALF,
Deputy Clerk.

THE STATE OF MISSISSIPPI,
Yazoo County:

80 I, M. A. Jenkins, clerk of the probate court of said county, certify that the instrument of writing to which this certificate is attached, from Shepherd Brown, surv., &c., to John A. Klein, trustee, was filed in my said office for record on the 19th day of October, 1868, and that the same day has this been duly made of record therein in Book Y of the record of deeds, etc., of said county, on page 5.

Given under my hand and the seal of said court, at Yazoo City, this 19th day of October, 1868.

M. A. JENKINS, *Clerk,*
By M. W. SMITH, *D. C.*

THE STATE OF MISSISSIPPI,
Sunflower County:

I, L. L. Casey, clerk of the probate court of said county, certify that the instrument of writing to which this certificate is attached, from Shepherd Brown, surv., &c., to John A. Klein, trustee, was filed in my said office for record on the 26th day of October, A. D. 1868, at 15 minutes to 2 o'clock, and that the same has this day been duly made of record therein in Book E of the record of deeds, etc., of said county on page' 524, '5, '6, '7, '8, '9-30, 31, & 32.

Given under my hand and the seal of said court, at McNutt, this 26th day of October, 1868.

L. L. CASEY, *Clerk.*

81 THE STATE OF MISSISSIPPI,
Hinds County:

I, William T. Ratliff, clerk of the probate court of said county, do hereby certify that the foregoing instrument of writing & certificate of acknowledgment was filed for record in my office on the 5th day of February, 1866, and that the same, with said certificate, was duly recorded therein in Deed Book No. 29, pages 52, 53, 54, 55, 56, & 57, and further certify that said instrument was properly stamped with U. S. revenue stamps.

Witness my hand and official seal, at the court-house of said county, in Raymond, this 23d March, 1866.

W. T. RATLIFF, *Clk.*

Certificates of deposit issued by Brown & Johnston.

No. 646.	Mrs. Sarah C. Arthur,	dated 31st Oct., 1857,	@ 10%	$2,500
647.	Ditto A. H. Arthur,	do.	@ 10%	2,500
648.	Ditto	do.	10%	2,500
702.	John Horn	4th March, 1858		30
877.	D. Knott	5th March, 1859		1,673 12
839.	William Newman (col'd)	22 January, 1859, 8%		1,000
850.	Mrs. Jane Webb	4 Feb., 1859		35
894.	N. Williams	24 March, 1859, 8%		1,945
1041.	Wm. Newman (col'd)	8 Octo., 1859, 8%		750
1066.	Mary J. Horsby	5 Nov., 1859		110
1166.	Theodosia J. Rogers	18 Jan'y, 1860, 8%		650
1260.	Patrick J. Crall	18 Feb'y, 1860		60
1368.	Mrs. D. E. Clark	20 April, 1860		600
82 1464.	Wm. Newman (col'd)	9 July, 1860		500
1492.	Wm. Lamon	4 August, 1860		106
1539.	Miss Jane Wood	19 Sept., 1860, 8%		1,400
1548.	John Whitby	4 Octo., 1860, 8%		800
1573.	Mrs. Jane Woods	25 Octo., 1860, 8%		770
1583.	Roger Sheohay	6 Nov., 1860, 8%		495
1596.	Michael Maher	19 Nov., 1860, 8%		700
1607.	John Whitby	8 Jan., 1861, 8%		400
1646.	Mary J. Estes	25 March, 1861; 8% from 9 Jan'y, 1861		1,700
1647.	F. M. Lakeman	1 April, 1862, 8%		1,160
1664.	Ditto	2 April, 1862, 8%		664
1676.	Wm. G. Bender	due 31 Dec., 1862, 10%		5,000
1677.	Ditto	due 31 Dec., 1862, 10%		5,000

1679.	Mrs. E. H. Lewis	1 June, 1861, 8%	600	
1694.	B. F. Barge	29 Dec., 1861, 10%	500	
1695.	Ditto	do do 10%	500	
1696.	Ditto	do do 10%	500	
1697.	A. J. Matthews	1 July, 1861	450	
1698.	F. F. Smith	1 Jan., 1862, 8%	671	
1699.	Jno. Stack	2 " 1862, 8%	50	
1704.	Elizabeth Boreman	10 July, 1861, 12 mo., 8%	1,500	
1716.	A. Walters	2 Sept., 1861	200	
1719.	America Braxton	10%	320	60
1717.	M. B. H. Roach	3 Sept., 1861, 10%	100	
1721.	J. C. Cowper	5 Octo., 1861, 10%	4,000	
1725.	Mrs. Nancy Stevens	19 Nov., 1861, 8%	7,000	
1726.	James Mitchell	22 Nov., 1861, 10%	6,236	
1728.	A. Warner	1 Ap'l, 1862	175	
1731.	Mrs. T. J. Finney	bal. due 1 Sept., 1865	1,323	74
1734.	Bennett Taylor	14 Jan., 1863, 8%	300	
1736.	Ditto	18 Jan'y, 1863, 8% (paid)	50	
1737.	Jas. W. Parks	25 Feb., 1862. 8%	181	
1739.	Patience Gamble	due Jan'y, 1863, 8%	800	

Certificates deposit issued by Brown, Johnston & Arthur.

No. 13.	Samuel Edwards	15th May, 1862 (balance due)	$1,409	30
4.	James Burk	28 Ap'l, 1862	100	
5.	Honoria Lewis	30 Ap'l, 1862	100	
11.	Merchants' Ins. Co., Richmond, Va	12 May, 1862	78	30

Deposition of Brown & Johnston.

Mrs. M. H. Bonney	$5,382	57
F. W. Boyd	602	50
John C. Lum	2,596	53
Jacob Barker	781	31

(Endorsed:) Filed May 1, 1876. Geo. T. Swann, clerk.

And on the day and date of the filing of said bill an agreement of counsel was filed in the clerk's office of said court, which, with the endorsement thereon, is in words and figures following, to wit:

In U. S. circuit court for southern district of Mississippi. In equity.

JOHN A. KLEIN
vs.
DAVID C. SHANKS, EX'R.

84 The undersigned, representing the defendant as his solicitors in the above entitled cause, hereby agree to waive notice of application for the injunction as prayed in the bill, and upon the bill being filed to the ensuing May term of the U. S. circuit court, that said court may grant the preliminary injunction usual to the class of cases in which said cause is embraced. We further agreeing to enter the appearance of said defendant to said cause at said term of court, waiving issuance & service of subpœna, &c.

Vicksburg, April 13, 1876.

PITTMAN & PITTMAN,
Solicitors for Def'ts.

(Endorsed:) Filed May 1, 1876. Geo. T. Swann, clerk.

And afterwards, to wit, on the 20th day of May, A. D. 1876, an injunction bond was filed in the clerk's office of said court, which, with the endorsement thereon, is in words and figures following, to wit:

Know all men by these presents that we, John A. Klein, Mary Genella, A. A. Kellogg, Frederica Kellogg, executrix, &c., Virginia Thomas, Bettie B. Willis, A. Kuhn, I. Brown, J. C. Blum, R. O'Leary, mayor of the city of Vicksburg, James Bolto, A. Steike, Rachael Steike, H. B. Brusor, guardian, &c., principals, and E. S. Butts and L. C. Moore, sureties, are held and firmly bound unto David C. Shanks,
85 executor of the last will and testament of Joseph H. Johnston, dec'd, in the sum of one thousand dollars, to be paid the said David C. Shanks, executor, his heirs, &c., for which payment, well and truly to be made, we bind ourselves, our heirs, &c., firmly by these presents, sealed with our seals and dated this the 1st day of May, 1876.

The condition of the above obligation is such, that whereas the above bound principal obligors have this day obtained from the hon. the circuit court of the United States, sitting in equity, for the southern district of the State of Mississippi, Hon. R. A. Hill, presiding judge, a fiat for a writ of injunction, enjoining and restraining the said David C. Shanks, executor, &c., from the further prosecution of seven several actions of ejectment by him, before the date hereof, instituted in the said circuit court for the district aforesaid against the said principal obligors herein for the recovery from them of certain lands situate in said district, and now pending therein until this bill of complaint, upon which said fiat was made, can be heard and determined by the hon. the said circuit court sitting in equity for the district aforesaid:

Now, if the said principal obligors herein, in case said injunc-
86 tion shall be dissolved, shall well and truly pay and satisfy all costs and damages as shall result from the wrongfully suing out of said injunction, and abide and perform the decree of the court aforesaid, then this obligation shall be void; otherwise the same shall remain in full force and effect.

J. A. KLEIN. [SEAL.]
BETTIE B. WILLIS. [SEAL.]
VIRGINIA THOMAS. [SEAL.]
ALEXANDER KUHN. [SEAL.]
JAMES BROWN. [SEAL.]
J. C. BLUM. [SEAL.]
MARY E. GENELLA. [SEAL.]
H. B. BRUSOR, [SEAL.]
Guardian.
A. STEIKE. [SEAL.]
RACHAEL STEIKE. [SEAL.]
JAMES BOLTO. [SEAL.]
FREDERICA KELLOGG, [SEAL]
By R. S. BUCK, *Att'y, &c.* [SEAL.]
E. S. BUTTS. [SEAL.]
L. C. MOORE. [SEAL.]

Bond approved.

A. A. HOLT, *Judge.*

(Endorsed:) Filed May 20, 1876. Geo. T. Swann, clerk.

And afterwards, to wit, on the 9th day of October, A. D. 1876, a demurrer was filed in the clerk's office of said court, which is in the
87 words and figures following, to wit:

Bill.

In the United States circuit court for the southern district of Mississippi.
In chancery.

JOHN A. KLEIN ET AL.
vs.
DAVID C. SHANKS, EX'R, &C.

The demurrer of David C. Shanks, defendant, to the above bill of complaint.

The defendant, David C. Shanks, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur in law to said bill, and for cause of demurrer says that it appears by said complainants' own showing by their said bill of complaint that the said complainants are not entitled to the discovery or relief prayed for by them in said bill, or to any relief or discovery from said defendant, touching the matters in said bill contained.

And for further cause of demurrer to so much of said bill of complaint contained in the alternate prayer for relief as seeks to have complainants abrogated to the rights of creditors, and to have an account
88 of the moneys expended by them in the purchase and improvement of said property, defendant says complainants are not entitled to said relief, because they do not, in said bill, offer to do equity and to account for the rents and profits by them received from said property.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

PITTMAN & PITTMAN,
Sol's for Defendant.

Affidavit of defendant, David C. Shanks, to demurrer waived.

T. A. MARSHALL &
BUCK & CLARK,
For Compl'ts.

I certify that in my opinion the above demurrer is well founded in point of law.

W. B. PITTMAN,
Of Counsel for Def't.

(Endorsed:) Filed Octo. 9, 1876. Geo. T. Swann, clerk.

And afterwards, to wit, on the 20th day of November, A. D. 1876, being a day in the November term, A. D. 1876, of said court, the
89 following proceedings were had in said cause, in words and figures following, to wit:

Circuit court of the United States for the southern district of Mississippi.
Before the Hon. R. A. Hill, district judge, present and presiding.
November term, A. D. 1876.

NOVEMBER 20TH, A. D. 1876.

JOHN A. KLINE ET AL.
vs.
DAVID C. SHANKS, EX'R, &C. } N. S. 241. In equity.

This cause was argued by counsel on defendant's demurrer to complainants' bill, and submitted for consideration.

And afterwards, to wit, on the 24th day of November, A. D. 1876, being a day in said last above mentioned of said court, an order was made in said cause, in words and figures following, to wit:

JOHN A. KLINE ET AL.
vs.
D. C. SHANKS, EX'R, &C. } N. S. 241. In equity.

This cause having heretofore, at this term, been submitted on the demurrer of defendant to complainants' bill, and the court being now thereof sufficiently advised, because it appears to the court that said demurrer is not well taken, it is therefore ordered, adjudged, and decreed that the same be and is hereby overruled.

And it is further ordered that defendant answer said complainants' bill within ten days.

90 And afterwards, to wit, on the 22d day of December, A. D. 1876, the answer of David C. Shanks was filed in the clerk's office of said court, which is in the words and figures following, to wit:

In the circuit court of the United States, southern district of Mississippi.
In equity.

JOHN A. KLEIN AND ELIZABETH B. KLEIN, HIS wife, Mary Genella, A. A. Kellogg and his wife, Frederika Kellogg, as executor of the last will and testament of Fritz Ackerman, deceased; Virginia Thomas and Nathaniel W. Thomas, Rosa C. Thomas, Sallie H. Thomas, and Annie F. Thomas, the last four of whom are minors and sue by their next friend, Virginia Thomas; Alexander Kuhn, J. C. Blum, Isadore Brown, The Mayor and Aldermen of the city of Vicksburg; James Bolto, and Catharine Bolto, a minor, who sues by her next friend, James Bolto; Antoine Steike and Rachael Steike, his wife, and Kate Smith, John Smith, Susan Smith and George Smith, minors, who sue by their next friend and guardian, Henry B. Bruser, all residents of the city of Vicksburg, and citizens of the State of Mississippi, complainants,

versus

DAVID C. SHANKS, AS EXECUTOR OF THE LAST will and testament of Joseph H. Johnston, deceased, of , and a citizen of the State of Virginia.

91 **The answer of David C. Shanks to the bill of complaint filed against him by the complainants in the above-entitled cause.**

The defendant, David C. Shanks, reserving unto himself all advantage and benefit of exception on account of the many errors and imperfections in said bill of complaint, for answer thereunto says:

1. This defendant admits that Joseph H. Johnston, deceased, and Shepherd Brown entered into copartnership about the time stated in the bill, but whether their agreement was in writing or not he is unable to state, either upon his own knowledge or upon information. He admits that said copartnership was formed for the purpose of carrying on the business of banking under the firm name and style of Brown & Johnston, in the city of Vicksburg, in the State of Mississippi, but he denies that said partnership was formed for the purpose of purchasing and selling real estate. He is informed, and admits that it is true, that they did purchase largely of real estate for the purpose of making safe and profitable investments, and for the purpose also of engaging in the business of planting to a very large extent, but he denies that such purchases and the cultivation of these lands were in the contemplation of said partners when they entered into partnership, and denies that such purchase and sale of real estate and planting operations

92 were included in the terms of their agreement of partnership, and denies that they were within the scope of the copartnership of Brown & Johnston as bankers, who did business as such in the city of Vicksburg, but avers that they withdrew moneys from the profits of the copartnership and invested the same from time to time as tenants in common in real estate in Vicksburg and elsewhere, and that whether they bought other lands for partnership purposes or not they did not so purchase the lands in controversy in this suit.

Respondent admits that Joseph H. Johnston and Shepherd Brown, whilst they were copartners as bankers, did in 1845 and 1855, and during the intermediate time, make large purchases of slaves and plantations, and that some of these plantations and the slaves thereon were purchased by them as tenants in common, and that they enjoyed the profits thereof as such, but respondent denies that said slaves and plantations were assets of the banking copartnership of Brown and Johnston.

Your respondent, on information and belief, denies that the banking copartnership of Brown and Johnston had extensive dealings in real estate, and that deeds were sometimes taken in the name of one and sometimes in the name of the other; and

Respondent avers that the deeds to all of the numerous pieces of property included in this litigation were made to Joseph H. Johnston and Shepherd Brown as tenants in common.

93 Respondent avers that at the time these purchases were made the banking copartnership of Brown and Johnston had large accumulations of profits arising from their banking business, undivided, which they had a right to withdraw from said partnership and divide between themselves, and that they did in fact do this very thing by investing the sums of money paid for these lands as tenants in common, that there was no agreement between said partners by which one could compel the other to sell his interest in these lands for partnership purposes, and that either had the right to a partition of these lands.

Respondent denies that the books of the banking copartnership of Brown and Johnston showed that the real estate herein involved was purchased on partnership account, though, for convenience, the real estate transactions of Shepherd Brown and Joseph H. Johnston may have

been kept in a book or books by the bookkeeper of the bank, as he was their servant in common.

Respondent admits that in 18 Joseph H. Johnston and Shepherd Brown became interested in a copartnership formed in New Orleans under the firm name of Brown, Johnston & Co., for the purpose of conducting a banking business there, and admits that the firms were carried on separately, and that copartnership of each, that is, the
94 Vicksburg firm and the New Orleans firm, were primarily liable for its own debts. Respondent also admits that Brown and Johnston afterwards became members of the firm of Rotchford, Brown & Co., of New Orleans, cotton factors and commission merchants, and that this last firm was entirely distinct from the other two. But respondent avers that the capital with which Shepherd Brown and Joseph H. Johnston became partners in these two firms was a part of the profits of the banking firm of Brown & Johnston at Vicksburg, and was withdrawn by them without a partition thereof and invested in their respective names in the new firms exactly as were the funds with which the lands in controversy were purchased.

Respondent admits that the said firm of Brown & Johnston, bankers, continued business in Vicksburg until May, A. D. 1862, but avers that at that time said firm of Brown and Johnston was dissolved and a new firm formed, to wit, the firm of Brown, Johnston & Arthur.

Respondent denies, however, that the firm of Brown and Johnston or their assets were or could, in the nature of things, be liable as such to debts contracted by the new firm of Brown, Johnston & Arthur, and denies that the partnership property of Brown and Johnston, as such, remained vested in them, but on the contrary avers that all of the partner-
95 ship assets were transferred and became the property of the new firm, and all of the debts of the old firm were assumed by the new firm of Brown, Johnston & Arthur, and all sums of money on deposit with the firm of Brown & Johnston were delivered to the new firm and entered upon the books of the new firm of Brown, Johnston & Arthur to the credit of the depositors, the depositors being notified of this change and accepting the same, and checking against their deposits with the new firm until its suspension.

Respondent avers that the real estate in controversy being held by Shepherd Brown & Joseph Johnston as tenants in common, was not transferred to the new firm and did not become its property.

Respondent further avers that at the time of the dissolution of the firm of Brown and Johnston in May, A. D. 1862, said firm was entirely solvent and had largely more assets than liabilities.

5th. Respondent admits that Joseph Johnston died in the month of August, A. D. 1863, in the State of Virginia, and that he made the will marked Exhibit A to complainants' bill, and that respondent was named therein as executor.

6th. Respondent admits that Shepherd Brown survived Joseph Johnston, but denies that the firm of Brown & Johnston existed at the
96 time of the death of Johnston except for the purposes of liquidation, the same having been dissolved in May, A. D. 1862, when the new firm of Brown, Johnston and Arthur was formed.

7th. Respondent does not know what was the condition of the firm of Brown, Johnston and Arthur at the close of the war, whether solvent or insolvent, and prays that if the insolvency of this firm is in any way to effect respondent's rights, strict proof thereof may be required.

8th. Respondent denies that the lands in the State of Mississippi described in the bill were purchased on partnership account as mere

assets of the firm of Brown and Johnston, and denies that there were not other available assets of the firm.

Respondent denies that said Shepperd Brown, in 1865, proceeded to gather up the assets of the several firms of which he was the survivor, for the purpose of settling the liabilities of said firms and paying the creditors thereof as far as possible, but is informed and so charges upon information and belief that said Brown proceeded to gather up said assets and by various and sundry devices to acquire them for himself in the names of several of his nephews, who, prior to that time, had been totally without means. Respondent is informed and believes that

97 nearly all of the lands which were owned by Joseph Johnston and Shepperd Brown and which complainant's bill charge were assets of the firm of Brown & Johnston except those contained in the deed of assignment exhibited with complainant's bill, are now in fact owned by said Shepperd Brown and held under one or the other of the following well-known aliases of Shepperd Brown, the names being those of his nephews who had no means of their own with which to purchase these lands. Those names are as follows: James Barclay, Jos. Andrews, Joseph E. Aiken, Andrew J. Aiken, William Aiken, and John H. Anderson. Your respondent is advised that all of the lands owned by Joseph H. Johnston and Shepperd Brown and claimed by complainants to be assets of Brown & Johnston located in Louisiana, Arkansas, Missouri, and Minnesota, are now owned by said Shepperd Brown in one of the three names above mentioned, and that said Sheppard Brown owns, controls and receives the rents and profits thereof to his own use, though he pretends to hold and use them as agent for the several parties above mentioned. These lands he has, by cunningly devised schemes, had sold to pay pretended debts of the various firms in which he and Johnston were partners (having previously purchased such debts for nominal sums) and bought them in the names of his aforesaid nephews.

98 Respondent further charges upon information that said Shepperd Brown had no money of his own after the war, and that he in fact used the money of Brown & Johnston in purchasing the debts of the firm to be used as above set forth in acquiring the property of the firm for himself, and that at the very time that he made the pretended sale of the lands for which respondent has sued, he was largely indebted to the estate of Joseph Johnston on partnership account.

Respondent further says that he, Shepperd Brown, assigned the lands in question to John A. Klein for the benefit of the creditors, not from the lofty notions attributed to him by complainants, but because the Vicksburg creditors were about to proceed by attachment to subject his, Brown's, interests to their claims; seeing that he could not save this property for himself, he transferred not only his own interest in these lands, but also made a pretended conveyance of Johnston's interests to appease the creditors and lull them into inactivity in order that whilst the creditors were eagaged in picking up these crumbs he had thrown, he might himself get away with the loaf.

Respondent admits that in 1865 he went to New Orleans for the purpose of looking into the affairs of his testator, and also admits

99 that Shepperd Brown convinced him that all of the firms of which Joseph Johnston had been a partner were insolvent, and that on that account he did not further investigate or interfere with the administration of the partnership assets. He fears now that he did wrong and that he should have looked more closely after his own inter-

ests and that of his cest'i qui trusts, as he is now informed that said Brown has saved a considerable fortune out of the assets of these firms.

Respondent admits that he also visited Vicksburg and took legal advice upon the relative rights of himself as executor and the surviving partner, but respondent avers that the counsel with whom he advised at Vicksburg was the lawyer of the surviving partner, and that said counsel advised him that the real estate in Vicksburg was assets of the firm of Brown & Johnston, and that the surviving partner had the legal and equitable title thereto, and respondent relying upon this advice did not see the propriety at that time of interfering with a matter over which he was advised he had no control.

Respondent further says that being thus advised that he had as executor no interest, legal or equitable, he did not deem his assent or dissent of any importance and did not commit himself to any pro-
100 posed course of action. Had he been advised that he had any interest in these lands (adverse to the surviving partner) he would then have taken legal advice from some competent lawyer not retained by the surviving partner, as to what course his duty as an executor and trustee, and his own interest, required him to take. He has since learned that said advice was erroneous, and that the title to the lands in question vested in him by the will, and that it was and is his duty as a trustee and executor to control and administer said lands himself as executor.

Your respondent denies that any propositions were submitted to him for his acceptance or rejection, to assign the lands in question to John A. Klein for the benefit of certain named creditors, and he therefore never had the opportunity and could not either accept or reject such a proposition, since a proposition could only have been made to him upon the supposition that as executor he had some interest in these lands, and he was in fact advised by Brown and by his lawyer that he had none. As to what advice respondent gave upon abstract propositions of law or business as to the best and speediest mode in which the surviving partner could administer the assets in his hands, respondent
101 respectfully submits that he is not a lawyer, and as the surviving partner had retained eminent counsel, it is not likely that he was misled by his views of the law, and it is equally improbable that so astute and able a business man as the surviving partner is, should have followed or been controlled by the advice one like respondent, who is a farmer and totally unacquainted with the intricacies of banking and commercial affairs.

Respondent therefore denies that said Shepperd Brown made said assignment, influenced thereto by the approval and advise of respondent, or that John A. Klein, one of the complainants, accepted said assignment because respondent had approved or advised such an assignment, but avers that said assignment was made by said Shepperd Brown and accepted by said Klein because the Hon. T. A. Marshall, an eminent lawyer, advised Brown that he could make such assignment, and advised Klein that the title to said lands was in said Brown.

Respondent admits that the assignment was made to Klein, and that (B) is a copy thereof.

Respondent denies that any of the lands contained in said agreement were purchased upon partnership account or were assets of the firm of Brown and Johnston, of Brown, Johnston and Arthur.

102 Respondent denies that he was present at the time said agreement was made, or was informed thereof, until several months thereafter, but admits that when informed thereof he did not make any

objection thereto, because he had been deceived into the belief by said Brown and his counsel that said lands legally and equitably belonged to said Brown as surviving partner, and did not therefore see the use of making any objections.

Respondent admits that John A. Klein did on day of , A. D. 1866, at public outcry, sell the several pieces of lands involved in this suit to the several parties mentioned, but does not know the manner and mode of said sale, whether fair or unfair, nor the price received for said several pieces of lands, and prays if it can in any effect respondent's rights, that all the allegations of said bill touching these sales may be required to be strictly proved.

Respondent further denies that the proceeds of said sales were appropriated equitably to the payment of the debts of Brown and Johnston, but avers and charges that they were used to pay certain arbitrarily preferred creditors of Brown and Johnston, and of Brown, Johnston and Arthur, which would have been a misapplication of said proceeds divided by the deed of assignment, even if these lands had belonged to the firm of Brown and Johnston, and would,
103 as respondent is advised, have rendered said assignment void.

Respondent denies again that said lands ever belonged to the copartnership of Brown & Johnston, and denies that the will recognized them as belonging to said partnership, and avers that on the contrary these lands are mentioned in the will of said testator as his real estate.

Respondent further denies that said will, by word or hint, directs these lands to be sold to pay partnership debts or any other debts. Respondent denies that said surviving partner had any legal or equitable title to the lands in question, and denies that any interest in said lands, equitable or legal, passed to said John A. Klein by said deed. Respondent avers that at the time of the death of Johnston, Shepperd Brown and Joseph H. Johnston, as tenants in common, owned in addition to the lands in Arkansas:

Phillips County	$805\frac{15}{100}$	acres.
Monroe County	12,708	" "
Chicot County	160	"
Chicot County	14,257	"
Mississippi County	2,450^{08}	"
Pulaski County	560	"
Marion County	117,969	"
Independence	120	"
Total	20,802.88	

104 In Louisiana:

In Carroll Par	118,987	acres.
In Claiborne	1,600	"
" Livingston	307,780	"
" St. Helena	60,740	"
" St. Tammany	1,365,950	"
" Madison	362,224	"
" Ditro	60,990	"
Total	2,556,672	

In the State of Missouri:

Harrison and Nodaway Counties ..... 360 acres.

In the State of Mississippi:

In Washington County		4,940.36
" Yazoo	"	1,456.57
" Tallahatchie	"	1,048.10
" Sunflower	"	798.88
" Warren	"	64
Total		25,566

In Saint Paul, Minnesota, one lot and house valued at $5,000 in 1859, and in Memphis, Tennessee, real estate valued before the war at $40,000.

Respondent avers that if the lands in controversy were assets of the firm of Brown and Johnston, then the above mentioned lands must have also been assets, and if so, the firm of Brown and Johnston was perfectly solvent, outside of large personal assets.

105 Respondent says that he is informed that all the above mentioned property, worth perhaps $200,000, is now owned and controlled by said Shepperd Brown, in the names of the various nephews mentioned before.

Respondent avers that some time in the year of 1867 or '68, said Brown advertised the personal assets of the New Orleans firms for sale, and respondent, with Joseph Willis, now deceased, and several other creditors of the New Orleans firms, went to New Orleans for the purpose of seeing that said assets were not sacrificed, but as soon as said Shepperd Brown heard of their arrival he deferred the sale of said assets, and several months afterwards, without notice to respondent or those creditors who desired to purchase the assets, he had these assets sold and bought them in for a nominal sum in the name of his nephew, Andrew J. Aiken. And that it was with assets so purchased that he proceeded to acquire for himself all of the lands formerly owned by Brown and Johnston, except these now in controversy. Respondent says that the knowledge of such acts as these, upon the part of said Brown, has destroyed his confidence in him and forced him unwillingly to the conclusion that he has been deceived and overreached by said Brown's deceitful and cunning statements to him.

106 Respondent admits that complainants, Bettie B. Willis and Virginia Thomas, and the children of B. R. Thomas, who sue by their guardian, Virginia Thomas, have acquired and are possessed of whatever interest, claim or title said B. R. Thomas acquired at the trust sale to the property claimed by them, but denies that they or those under and through whom they have acquired title, have expended fifty-five thousand dollars in improvements, taxes or insurance, and if the allegation in said bill can in any way effect respondent's interest, prays that strict proof thereof may be required.

Respondent avers that said Bettie Willis, Virginia Thomas, and the heirs of B. R. Thomas, deceased, and those from whom acquired title, have received rents and profits to the amount of about seventy thousand dollars since the pretended sale by John A. Klein, assignee, to B. R. Thomas.

Respondent admits that James and Catherine Botto have inherited whatever interest their father, Joseph Botto, acquired in the property described and claimed by them, but denies that they have expended ten thousand dollars in improvements, and asks that, if pertinent, strict proof thereof may be required. Respondent avers that they and their

father, from whom they have inherited, have collected a large
107 amount of rents from said property, to wit, at least $15,000.00.

And respondent admits that Alexander Kuhn, J. C. Blum, Isodore Brown, and the mayor and board of aldermen of Vicksburg, own whatever right, title, and interest was acquired in the lands by them claimed by the purchase of these lands by Kuhn, Blum, and Brown at the trust sale aforesaid, but denies that said parties have expended the sum of $1,800 in substantial improvements or that they have expended any money in improvements, but aver that they have enjoyed large rents and profits from said property.

Respondent admits that Frederika Kellogg, as executor, is the owner of whatever title Fritz Ackerman acquired at said trust sale, to the property described and claimed by her in the bill, but denies that she has expended the sum of three thousand dollars or any other sum therein in substantial improvements, but aver that she and her testator have collected rents to the amount of at least $10,000 from said property since his, Fritz Ackerman's, pretended purchase thereof.

Respondent admits that complainants Antoine and Rachael Strike own whatever interest was acquired by Ackerman at said trust sale to the property claimed by them in the bill, and admit that they
have made improvements thereon, the value whereof is unknown
108 to respondent, and therefore prays that strict proof may be required of the amount and value of said improvements, if the same be pertinent to the issue in this cause.

Respondent avers that they have received a large amount of rents from said property, to wit, about $4,000.00.

Respondent admits that complainants Kate, John, Susan, and George Smith, by inheriting from George Smith, own and are possessed of whatever title or interest Fritz Ackerman acquired at the aforesaid trust sale to the lands by them claimed in the bill, and admits that George Smith made improvements, but denies that said improvements amount to ten thousand dollars, and prays strict proof of the amount and value thereof if pertinent. Respondent charges that said complainants and their ancestor have received large sums of money as rents for said property, to wit, about $5,000.

Respondent admits that Elizabeth Klein owns all of the right, title, and interest acquired by Margaret Wheeler in and to the lands claimed by her in the bill, but denies that improvements to the value of thirty thousand dollars have been put upon said lot, and prays that strict
proof may be required upon the value of said improvements if re-
109 spondent is to be effected thereby. Respondent charges that said complainant has received large sums for rents of said premises, to wit, about twenty thousand dollars.

Respondent admits that John A. Klein and Mary Genella own whatever interest Antoine Genella acquired at aforesaid trust sale to the property by them claimed in the bill, but denies that they have expended $30,000 in improvements upon said property, and ask that, if respondent is to be effected thereby, strict proof of the value and character of said improvements may be required. Respondent charges that said complainants have received a large amount in rents of said property since their pretended purchase, to wit, about twenty thousand dollars. Respondent denies that any of the complainants acquired any title, equitable or legal, to the undivided interest in these lands owned at the time of his death by Joseph H. Johnston. Respondent admits the bringing of the ejectment suits charged in the bill, and farther admits that he

was urged by certain legatees to bring these suits, and was fully indemnified from loss or expense by said legatees, and admits that one of the legatees threatened suit if he did not bring these suits. Respondent denies, however, that said legatee brought himself within the provisions of said will declaring his interest forfeited by said threats,
110 or that if he did, any one could claim advantage thereof except respondent, who is not inclined to make any such claim.

Respondent now believes that it was his duty to bring these suits, and, as he is advised that that portion of the bill seeking to discover the name of the legatee who insisted upon his bringing these suits is totally impertinent, he declines to give the name.

Respondent admits that he once thought that he ought not to bring these suits, but avers that many things have come to his knowledge since which have changed his mind.

Respondent admits that he has a bond from one of the parties in interest indemnifying him against costs and expenses, but declines to discover or produce said bond, because he is advised that such evidence is not pertinent or relative to any issue of fact or law involved in this cause, and that it was only demanded in the hope that it might in some way prejudice the mind of the court against respondent's cause.

Respondent denies that at or about the time that Brown made assignment to Klein respondent made or executed an assignment transfer to Brown or to any one else, all his right, title, and interest of Joseph H. Johnston in and to the assets of the several firms of which
111 Johnston was a member, real and personal, and respondent denies that he ever executed any writing which could or was intended to confirm the sale made of the property herein involved or divest respondent of any interest he may have acquired therein under the will of Joseph H. Johnston.

Respondent denies that he advised or approved the making of said trust-deed, except as set forth before in his answer, and denies that he knowingly permitted innocent purchasers to make improvements thereon, but avers that he did not take steps sooner to assert his title because he was deceived as to the true state facts by Shepperd Brown, and as to the law by said Brown's retained counsel, and that it is only recently that he has become fully informed as to his duties and rights in the premises.

Respondent is also advised that he has not and could not lose his right to sue by any delay short of the time prescribed in the statute of limitations.

Respondent has already denied explicitly making any assignment or transfer of his interest to Shepperd Brown or any one else. And he now denies having ever waived his own interest or that of the legatees in favor of complainants.

Respondent was not aware, until informed by complainants in
112 their bill, that he had the right, legally or morally, to waive or surrender the rights of his cest qui trust.

Respondent says that he has heretofore always conscientiously performed his duty as trustee, and that if he has failed to do his whole duty it has been through ignorance of what it was rather than a wilful intention to neglect it.

Respondent avers that since the commencement of this suit complainants have, through one of their counsel, urged respondent to desert his colors, prove traitor to his trust, and make them a deed to the lands in controversy. So persistent did these efforts become that respondent declined to meet said counsel who had telegraphed that he would be at

the depot near respondent's house on a certain day, and desired to see him, and has since refused to answer his letters upon this subject.

Respondent denies that there are any outstanding debts against the estate of Joseph H. Johnston due and unpaid.

Respondent denies that Bettie B. Willis, one of the complainants, owns or holds a debt against the estate of Joseph H. Johnston or against the copartnership of Brown & Johnston, but says that if she ever owned any such claim it is long since barred by the statute of limitations.

Respondent says, in answer to the first interrogatory propounded in complainants' bill, that he has not, as executor or otherwise,
113 transferred, sold, assigned, conveyed, or otherwise parted with whatever interest vested in him by the will of Joseph H. Johnston in the several firms of which Joseph H. Johnston was a partner nor in either of them. In 1868 respondent executed a power of attorney to A. J. Aiken for the purpose of facilitating the settlement of the estate so far as the banking and commercial firms are concerned, and at that same time assigned to him his respondent's commissions on the estate of Jos. H. Johnston so far as the same might arise out of assets of firms of which Johnston was a member. This transfer is in possession of Aiken, and respondent has no copy of it.

In answer to the second interrogatory respondent says that he was not consulted by the said Brown as one having any interest or right to control in the assignment to John A. Klein, but that both Brown and Brown's lawyer, before conversing with respondent about this matter, informed him that the legal and equitable title to this property was in Brown.

Respondent does not recollect exactly what passed between them, but knows that if he gave any approval of the matter it was with the understanding that respondent had no legal or equitable title to the property and upon representations of Brown as to facts, which rep-
114 resentations respondent is now informed were not correct and true.

Respondent says that he did know that said assignment had been made to Klein for some months after it had been made, and admits that he did not take any legal steps to avoid and made no objections to it, because he thought and had been told he had no interest in these lands or right to control them.

Respondent respectfully suggests that as to what he thought about the justice of the assignment is a matter impertinent and irrelevant and the justice thereof is a subject for the determination of the court under all of the circumstances that may be brought to light by the evidence in this cause. As to what was the spirit of the will, and whether the proceeds of these sales were applied in accord therewith, that likewise is a question for the court to determine. There is the usual clause in the will directing the payment of all just debts. Whether the proceeds of those sales were applied to the payment of just debts or unjust debts, respondent does not know.

Respondent is advised, however, that these proceeds if partnership assets should have been applied pro rata to the payment of the debts of the firm to which they belonged and not to arbitrarily preferred debts of the firm to which they were claimed to belong, and to those
115 of a co-partnership which could have no claim upon them.

Respondent is also advised that if the lands were not partnership assets, and such he charges to have been the case, then they could not be applied to the payment of any partnership debt except after the creditors had exhausted the partnership assets and probated the claims

against the estate of Joseph H. Johnston, and not then, until all individual liabilities had been paid.

To the third interrogatory respondent admits that he did first refuse to bring these suits because he still believed that these lands belonged to the surviving partner, having been led into the error by the learned counsel who represented the surviving partner and because at that time he still confided in the statements made to him by said Brown. As to what agreement or influence induced him to change his mind, respondent is advised that a statement thereof would be impertinent and irrelevant to the issues tendered in complainant's bill and declines to answer farther, as it is a matter for the court to determine whether he ought or ought not to have brought these suits.

Respondent also declines to give the names of the legatee or legatees who pressed the bringing of these suits and to exhibit the indem-
116 nifying bond tendered to him because he is advised that the question is irrelevant and impertinent, and could only have been asked to gratify an unjustifiable curiosity or from the still less praiseworthy motive of trying to influence the decision of the court by matters not pertinent to the inquiry before it.

Respondent shows that the following are the legatees and heirs of deceased.

Legatees under the will of Joseph H. Johnston as far as he now can ascertain:

Lucy A. Johnston,	aged	67	Roanoke	Co., Va.
Agnes Davis,	"	46	Mon'gomery	" "
John W. Johnston,	"	42	Roanoke	" "
Sallie Johnston,	"	45	"	" "
G. W. Zirkle,	"	38	"	" "
Emma Zirkle,	"	35	"	" "
Fannie Johnston,	"	33	"	" "
O. V. Chapman,	"	27	"	" "
Hadassah Chapman,	"	27	"	" "
Thomas Johnston,	"	25	"	" "
E. B. Shields,	"	48	Baltimore, Md.	
E. B. Lea,	age unknown,		Tennessee.	
John H. Lea,	"	"	"	
James P. Lea,	"	"	"	
George J. Lea,	"	"	"	
Lizzie Lea,	"	"	"	

And respondent having fully answered all of the matters set
117 forth in said bill, prays that the same be dismissed with costs, and for such other and further relief as to justice and equity may pertain and this honorable court may see fit to grant him.

D. C. SHANKS,
Extr. of Jos. H. Johnston, dec'd.

STATE OF VIRGINIA,
Roanoke County, to wit:

I, William McCauley, clerk of the county court of Roanoke County, in the State of Virginia, do hereby certify that David C. Shanks personally came before me in the clerk's office of said county court this 10th day of August, 1876, and made oath before me that the statements contained in the foregoing answer, so far as made of his own personal knowledge, he knows to be true, and so far as made on the information of others he believes to be true.

Witness the following signature and the seal of said county court affixed hereto this 10th day of August, in the year 1876.

[SEAL.] WM. McCAULEY,
Clerk of Roanoke County Court.

(Endorsed:) Filed Dec. 22d, 1876. Geo. T. Swann, clerk.

118 And afterwards, to wit, on the 11th day of April, A. D. 1877, the deposition of S. Brown was filed in the clerk's office of said court, which with the exhibits thereto are in words and figures following, to wit:

It is agreed between the solicitors for the complainants and those for the defendant that these depositions or inter'ogatories shall be taken in the following manner: the inter'ogatories and cross-inter'ogatories shall be sent to some notary public or commissioner, who shall propound the questions one at a time, categorically, and take down the witness' answer thereto. He shall not allow the witness to read any inter'ogtory until it is propounded to him. It is further agreed that after the witness has completed his answers to the questions propounded and his deposition has been forwarded, the defendant's solicitors may propound further cross-interrogatories to him, the answers to which shall be
119 read as a part of this deposition as if they had been given at the taking of the original testimony or deposition, and complainant may in such case re-examine witness. All exceptions as to relevancy and competency of testimony are reserved to be made upon the offering the deposition as evidence. It is further agreed that when the deposition is taken, the officer taking the same shall forward it to the solicitors for the complainant to be opened by them and the solicitors for def't.

BUCK & CLARK,
For Compl't.
PITTMAN & PITTMAN,
Sol's for Def't.

120 Inter'ogatories to be propounded to Shepperd Brown, a citizen of Louisiana, residing at New Orleans, in said State, whose answers thereto, when taken under oath before any officer in the State qualified to administer the same, are to be read in evidence in a suit now pending in equity in the circuit court of the United States for the southern district of Mississippi, wherein John A. Klein et al. are complainants, and David C. Shanks, ex'r, &c., is defendant, upon the suit of said complainant.

Int'y 1. What is your name, age, and place of residence?

Int'y 2. Who composed the co-partnership firm of Brown & Johnston doing business at Vicksburg, Miss., at the beginning of the late war between the States? If you say that you were a member of said firm, please state when it was organized and when it was dissolved and how.

121 Int'y 3. Did any change occur in the organization of said firm from the date it commenced business in Vicksburg until its dissolution by the death of Joseph Johnston; if so, when? Did the association of A. H. Arthur with the firm in any way effect the affairs of the firm of Brown & Johnston as it related to their assetts and liabilities? What was the date of the death of Joseph H. Johnston?

Int'y 4. State fully what character of business did Brown & John-

ston carry on from the time the firm organized until its business was finally suspended by the war and the death of Johnston.

Int'r'og. 5. If you say that in addition to the business of a bank of discount and deposit said firm was also engaged in buying and selling real estate, was the purchase and sale of real estate by said firm always carried on by means of the copartnership funds and on account of the copartnership interests?

122

Inter'og. 6. When real estate was purchased by said firm in the course of the business, how were the deeds to the land for the firm made? Did you or Johnston after you organized the firm of "Brown & Johnston" deal at all in real estate in Mississippi save on account of the copartnership as before stated?

Int'rog. 7. Please look at the annexed deed in trust made by you as surviving partner of Brown & Johnston and state if the lands therein described and conveyed were owned by the copartnership of Brown & Johnston at the date of the dissolution of the firm as copartnership property, and whether the same had been acquired by said firm with the partnership funds, for partnership purposes.

Int'rog. 8. What other, if any, real estate in Mississippi did Brown & Johnston own at the time Johnston died than that conveyed in said trust deed?

123

Int'rog. 9. What was the financial condition of the firm of Brown & Johnston represented by you as surviving partner at the close of the war? State, if you can, approximately, the amount of the debts of the firm, and what was left you to pay them with.

Inte'rog. 10. Look at the schedule of claims annexed to the deed in trust before referred to, and state if at the time said deed was made they were not valid and subsisting debts due from the late firm of Brown & Johnston. How were these debts incurred by said firm?

Int'rog. 11. What property other than that described in said trust deed remained to you as surviving partner to pay the claims embraced in said schedule?

Int'rog. 12. Please state fully what influenced you to make said trust conveyance.

124

Int'rog. 13. Were the individual members of the firm of Brown & Johnston at the time of Johnston's death interested as copartnership any other business partnership? If so, what were the style of said partnerships, and where were they engaged in business?

Inter'og. 14. Who composed the firms of Rotchferd, Brown & Co., & Brown, Johnston & Co., at New Orleans? What were the financial condition of these firms at the close of the war?

Inter'og. 15. Was the firm of Brown & Johnston at Vicksburg, as a copartnership, in any way connected with the business of the New Orleans firms of Rotchferd, Brown & Co., and Brown, Johnston & Co., or obligated for the debts of said New Orleans firms?

Inter'og. 16. What partners of the firms of Rotchferd, Brown & Co., & Brown, Johnston & Co., survived the war? What time did you return to New Orleans after the war, and who of the survivors of said New Orleans firms were there upon your return or were there after your return?

125

Inter'og. 17. Do you know the defendant David C. Shanks? When did you first become acquainted with him? What relation did he bear to Joseph Johnston, deceased? Did Shanks visit you at New Orleans after the war; if so, how often? How much time did he spend there on each visit, and what was his object as expressed to you of his visit

to New Orleans? What relation did he claim to hold to the estate of Joseph Johnston, dec'd?

Inter'og. 18. If you say he expressed his purpose to be to learn the financial condition in which the war had left the several firms of which his uncle was a member and what would possibly be left of their
126 assetts to said estate after payment of their respective indebtedness, state what aid and facilities you afforded him in succeeding in his said object.

Inter'og. 19. After looking into the condition of financial affairs of the late firms in New Orleans, did Shanks express to you any conclusion at which he had arrived respecting the condition of said firms? If so, please state fully what it was.

Inter'og. 20. Did Shanks visit Vicksburg with you to look into the affairs of the late firm of Brown & Johnston, with the same object that he visited New Orleans? What aid did you afford him in the investigation in the affairs of that firm? Did you consult with Shanks as to the expediency and justice of you making the trust deed before referred to? If you did, what did he say and advise with reference to it?

127 Inter'og. 21. Was not Shanks fully advised that you intended to execute the trust deed to secure the creditors of Brown & Johnston; and did he ever in any way object to it or dissent from the justice or propriety of the act, before a sale of the property by the trustee as in that instrument provided?

Inter'og. 22. When did you first learn that Shanks set up any claim as executor of Johnston to the property embraced in said trust deed?

BUCK & CLARK,
T. A. MARSHALL,
Sol's for Compl'ts.

128 Cross-interrogatories to be propounded to Shepperd Brown by the defendant.

Int. 1st. When the firm of Brown, Johnston & Arther was formed, were there any written articles of copartnership?

Int. 2nd. If yea, attach a copy thereof to your answer to this question.

Int. 3rd. When the new firm of Brown, Johnston & Arthur was formed, were the depositors of the banking firm of Brown & Johnston notified of the change?

Int. 4th. If yea, how? By publication in the newspapers or by circular letters?

Int. 5th. If they were notified in either of these ways, attach copies of the notices to your answer, or, if you cannot get copies, give the substance of what said notices contained.

6th. What was the condition of the firm of Brown & Johnston when the new firm was formed?

7th. State in detail its assetts and liabilities.

8th. Where are the books of said Brown & Johnston? If you
129 have them, produce and make them an exhibit to your answer to this question.

9th. Were there ever any written articles of agreement of partnership between yourself and Joseph H. Johnston?

10th. If yea, produce them and attach them as exhibits to your answer.

11th. With what capital did the firm of Brown & Johnston commence business?

12th. How much had this capital been increased August 1st, 1859?

13th. What was done with accumulations? Were they drawn out of the business as dividends by the individual parties, or did they remain as a surplus in the banking business?

14th. What real estate did you and Joseph H. Johnston own in common at the time the new firm of Brown, Johnston & Arther was formed?

15. Give a list of all the real estate owned and conveyed by deeds to you and Joseph H. Johnston at the time in the following States:
130 Mississippi, Louisiana, Arkansas, Missouri, Tennessee, & Minnesota.

16th. How were these lands purchased? That is, where did you and Johnston get the money with which to purchase the said lands, and to what persons in the deeds were these lands conveyed?

17. Does the list furnished by you contain all the lands which upon the records stood in the names of Shepperd Brown and Joseph H. Johnston at time of the formation of the firm of Brown, Johnston & Arthur?

18th. Take the list of lands furnished by you and check off each piece of property and state what disposition has been made thereof; that is to say, when, where, and by whom, and to whom each piece of land in the list (other than that conveyed by deed to John Aklein) was sold?

19th. Also state the name of the present owner of each piece of land where known to you.

131 20th. If you answer to direct inter'ogatory No. 7 that the lands therein designated were purchased for partnership purposes, sta for what purposes.

21st. Were not said lands purchased because they were at the time considered by you and Johnston a good investment of your surplus capital.

22nd. How were this real estate owned by you and Johnston?

23rd. Was it not productive in the way of rents?

24th. Did not you and Johnston build houses on some of these lots for the purpose of renting the same?

25th. Did not you and Johnston purchase large numbers of slaves between the years of 1850 and 1860?

26th. With what view and for what purpose did you purchase them?

27th. Were they purchased the better to enable you to conduct your banking copartnership?

132 28th. How was the money invested in these slaves drawn out of the banking firm? I mean did you give a check for your half, and Johnson for his half, or were the sums withdrawn and charged to account of a joint purchase?

29th. Were the entries made upon your books of the same character when you purchased slaves as when you purchased lands?

30th. How long after you first became bankers was it before you commenced b'ying large quantities of real estate?

31st. If in answer to int. 9 you attempt to state the condition of the firm of Brown & Johnston after the war, state from whence you derive your information, whether from the books of the concern or from mere heresay?

32nd. If you have the books produce them, and if you have not and have any balance sheet made from said books, attach that as an exhibit to your testimony.

33rd. If you answer int. 10th in the affirmative, state whether
133 your knowledge is derived from the books of the firm or whether

you are attempting to state from memory the liabilities of the firm?

34th. Have you the books of Ratchferd, Brown & Co.? If not, in whose possession are they?

35th. Have you a balance sheet made from the books showing the assetts and liabilities of said firm at the close of the war? If so, attach to your evidence as an exhibit.

36th. What became of the assetts of said firm of Ratchferd, Brown & Co. and of Brown, Johnston & Co.?

37th. Who settled their affairs and in whose possession are the books of said firms?

38th. Were not most all of the notes and bills receivable and other credits of said firms sold to A. J. Aiken?

39th. Give a list of the assetts of Ratchferd, Brown & Co. purchased bysaid Aiken, together with the time he made the purchase and
134 the amounts that he paid therefor.

40th. Give the names of any other parties who became purchasers of assetts of Ratchferd, Brown & Co., & of Brown, Johnston & Co., a list of what they purchased, and the time and the price paid by them for each purchase.

41st. From what source did you and Johnston draw money which you put into the firms of Rotchferd, Brown & Co. and Brown, Johnston & Co.?

42nd. If you say from the surplus acquired by you in the firm of Brown & Johnston, do or did the books of Brown & Johnston show the transaction and how it was paid out?

43rd. Was the money transferred by a check on the bank of Brown & Johnston, given by the firm, or did you individually give a check for your part of the fund upon private funds of your own, and Johnston in the same way contribute his part of the capital of the firms of
135 Rotchferd, Brown & Co. and Brown, Johnston & Co. out of individual funds to his individual credit?

44th. How much did you and Johnston each put into the firm of Rotchferd, Brown & Co. and Brown, Johnson & Co., and where did you get the money? Give full particulars of the transaction.

45th. Were there any written articles of copartnership between the members of the firm of Brown, Johnston & Co. or Rotchferd, Brown & Co.? If so, attach the originals or copies thereof to your answer.

46th. Did not Shanks take your settlement and the exhibit made by you of the condition of the firms as correct?

47th. If you say he examined the books of said firms, state the character of such examination, and the time consumed by him in making such examination.

48th. Was Mr. Shanks a competent bookkeeper?

136 49th. How long would it have taken a competent bookkeeper to have made and verified a balance sheet from the books of each of the firms of Brown, Johnston & Co. and Rotchferd, Brown & Co., so that he could come to an intelligent conclusion of what the assetts and liabilities of said firms were?

50. How much longer would it have taken the same person, supposing him to have been a stranger in the community as Mr. Shanks was, to ascertain the real value of the notes, bills and accounts, and properly shown as assetts of said firm?

51. Did not Shanks take your statement and that of Arthur as to the condition of the firm of Brown & Johnston?

52. Did Shanks ever examine the books of Brown & Johnston or per-

sonally undertake to verify the statement made to him by you of the affairs of Brown & Johnston?

137 53. Were the books of Brown & Johnston all preserved?

54. Was not Shanks told by your lawyer that you had the legal and equitable title to the lands conveyed in your assignment to John A. Klein and the full right to dispose of the same?

55. Did you not yourself take him to the Hon. T. A. Marshall, from whom he received this advice?

56. Who was at that time your legal adviser at Vicksburg?

57. What lawyer wrote the deed of assignment from you to Klein?

58. Who now owns the house and lot in St. Paul, Minnesota, owned by yourself and Johnston? To whom did you sell it, at what time, and what did you do with the money received therefor?

59. What disposition have you made of about 20,000 acres of land in the State of Arkansas owned by yourself and Johnston?

60. To whom and how and for what consideration were these

138 lands transferred, and what became of the money for which they were sold?

61. What disposition was made of 1,189.87 acres of land owned by you and Johnston in Carroll Parish, Louisiana; how was it sold, and who became the purchaser, for what price, and who owns the land now?

62. Answer the same questions with reference to the lands of Brown & Johnston in Claiborne Parish, Louisiana, Livingston Parish, Louisiana, St. Helena Parish, St. Tammany Parish, and Madison Parish, amounting in the aggregate to about 25,000 acres.

63. To whom were the lands of Brown & Johnston, in Harrison, Nodaway and Gentry Counties, Missouri, sold, what was the price received therefor, and what disposition was made of the money received therefor?

64. In what particular did the purchase of these lands differ from the purchase of the lands bought by yourself and Johnston in Vicksburg?

139 65. Were not they entered upon your real estate book in the same manner that the Mississippi lands were, and paid for in the same manner, and were they not partnership assets of the firm of Brown & Johnston to the same extent that the lands in Mississippi were?

66. If not, can you point out the reason and state any fact that existed with reference to the Miss. lands that did not also have a place in the purchase *in the purchase* in these other lands, and which would, in your opinion, make the lands in Miss. partnership assets, and the want of which would prevent these lands in other States from being partnership assets?

67. Explain fully what you mean when you say the Mississippi lands were purchased with partnership funds on partnership account and for partnership purposes.

140 68. State what notes, bills, accounts, and personal property of any and all accounts came into your hands after the war belonging to any and all of the firms of which you and Joseph H. Johnston were members.

69. State how much money you realized out of such claims, and what you did therewith.

70. From what source, if not from the assets of these firms, did you receive the large amount of money which you had soon after the war, and which you invested in your wife's name?

71. Did you not lend or furnish Andrew J. Aiken, your nephew, money soon after the war to purchase assets of Brown & Johnston?

72. Were you not secretly interested through him and others in the purchase of the assetts of Brown & Johnston & Co. and Botchferd, Brown & Co., or of one of these firms?

73. Have you not continued since Andrew J. Aiken purchased
141 the notes, bills, and other assetts to manage direct the collection of these claims, to employ lawyers for that purpose, to pay taxes on the lands acquired by him through claims purchased by said Aiken of you as surviving partner, and make contracts of sale, collect rents with reference to all the property so acquired by said Aiken?

74. What disposition have you made of the valuable property owned by Johnston and you in Memphis, Tennessee?

75. To whom have you sold it, and for what consideration, and what have you done with the money?

PITTMAN & PITTMAN,
Sol's for Def't.

142 *Trustee deed.*

This indenture, made and entered into this 15th day of September, 1865, by and between Shepperd Brown, survivor of Joseph H. Johnston, lately doing business in the city of Vicksburg, and State of Mississippi, as copartners, under the firm name and style of Brown & Johnston, of the one part, and John A. Kleim, of the county of Warren and State of Mississippi, of the other part, witnesseth:

That whereas the said firm of Brown & Johnston was for many years engaged largely in the purchase of notes, bills, checks, money, and securities of various kinds, and town lots, lands, houses, &c., and selling the same, and dealing generally in a banking exchange, and real estate, buying and selling lands in Mississippi and other States, and the lands always consider'd and used by them as part of the capital of the firm, just as notes, money, bills of exchange, & other personalty; and whereas the said firm of Brown & Johnston, in the course of their business, and in the lifetime of said Johnston, received on deposit large
143 sums of money, and issued certificates of deposit therefor, and also received on deposit money for which no certificates were issued; and whereas the firm of Brown, Johnston & Arthur, composed of said Brown & Johnston and Alexander H. Arthur, succeeded Brown & Johnston, and continued at Vicksburg; and whereas the said firms of Brown & Johnston and Brown, Johnson & Arthur are still justly indebted to various persons holding certificates of deposit and depositors who have no certificates; and whereas the said Brown & Johnston were also indebted to Joel H. Willis, who has a judgment founded on monied securities against them, recorded in the courts of New Orleans, Louisiana, a full and complete schedule and list of all of which debts, including the names of depositors, dates, and amount of deposits, rate of interest when they bear interest, and number of certificates when certificates were issued, and the amount of the judgment is filed herewith as part hereof, marked; and whereas the said Brown is desirous
144 of securing the full payment of all of said creditors:

Now, therefore, for and in consideration of the premises, and of the sum of ten dollars to him in hand paid, the receipt whereof is hereby acknowledged, hath granted and sold, and as surviving partner as aforesaid doth hereby grant, bargain and sell unto the said Klein, his heirs and assigns, all those certain tracts or parcels of land, all being the property of the said firm of Brown & Johnston, described as follows, to wit: The south half of section eleven, all of section ten;

east half and east half of the west half of section nine; east half and east half of the west half of section four, in township seventeen, range six west; and the north half of section three, north half of section four, southwest quarter of section four, southeast quarter of section nine, southwest quarter and west half of the southeast quarter of section ten, west half and west half of the southeast quarter of section twenty-nine, and north half of section thirty-one, all in township fourteen,
145 range four west; and the half of southeast quarter of section thirty-four, and west half of section thirty-five, in township seventeen, range seven west; and the east half of the east half of section 28, in township sixteen, range six west; and the southwest quarter and the southwest quarter of the northwest quarter of section fifteen, in township sixteen, range six west; all lying in the county of Washington, and State of Mississippi, except a portion of sections twenty-nine and thirty-one, in township fourteen, range four west, which are in Yazoo County; and also lots three, four, five, six, twelve & thirteen, in section two; east half of the southwest quarter of section three, southeast quarter of section four, east half of section nine & northwest quarter of section ten, all in township thirteen, range four west; and the northwest quarter of section thirty-two, township fourteen, range four west; all lying and being in Yazoo County, Mississippi; also all of section nine, and the north half and the west half of the southwest quarter of section ten, in township twenty-six, range two west, in Tallahatchie
146 County, Missis'ippi; also the southwest quarter of section nineteen, and the northeast quarter of section thirty, in township nineteen, range four, west; and the north half and southeast quarter of section twenty-nine, township fourteen, range four west, in Sunflower County, Miss'ippi; and also the east half of the south, and the southwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter of section five; and the west half of the northwest quarter of section eight, and lot , in section one, all in township seventeen, range five east, in Warren County, Mississippi; and also the following described lots or parcels of land lying and being in the city of Vicksburg, and State of Mississippi, to wit: That part of lot number two hundred and eighty-six, in square sixty, fronting twenty-four feet and seven inches on Washington street and one hundred and forty-seven feet and six inches on Clay street, being the same lot on which the banking-house of Brown & Johnston stood, and runs
147 back the whole depth of the lot the same width it fronts on Washington street, as designated on the original plat of Vicksburg; also lot number three as designated on a plat of lots recorded in the probate clerk's office, with a deed from the said Brown & Johnston to William H. Stevens; bounded on the west by Washington street, on the east by Walnut street, on the north by the lot of Wm. H. Stevens, and on the south by the lands of the estate of S. B. Newman, deceased, being part of the square on which the verandah building stood; also part of lot number two hundred and eighty-seven, in square number sixty, fronting feet on Clay street, and running back that width the full depth of the lot, bounded on the east by lot, the said lot number two hundred and eighty-six, and on the west by the lot sold by Brown & Johnston to A. Navra; also part of lot number two hundred and eighty-four, in square fifty-nine, fronting on Clay street, upon which there is a livery stable now occupied by the United States, bounded
148 on the east by the lands of Harper P. Hunt, on the west by the lot formerly owned by John C. Bull, on the south by Clay street, and running back the whole depth of the lot; also part of lot two hun-

dred and ninety, in square sixty-one, fronting twenty-four feet and nine inches, and running back west that width to an alley fifteen feet reserved on the western side of the lot for the common use of the owners of the block, bounded on the north by the lot sold by Brown & Johnston to W. S. Wheeler, and on the south by the lot sold by them to S. B. Brown; also that part of Gordon Square fronting on Washington street, and on the west by Gordon street, and adjoining, on the south, the lot sold by Brown & Johnston to Patrick Hogan or his wife, and on the north the lot sold by them to Mrs. Elliott, formerly Mrs. Maguire, being the same lot on which the building known as the Martin House now stands, and all the land now owned by said Brown & Johnston in said square,
149 and the steam engine and machinery connected with or in the upper saw mill in the said city of Vicksburg, now occupied by the Government of the United States; and also an undivided half interest in about twenty acres of land in West Jackson, Hinds County, Mississippi, near the depot of the New Orleans and Jackson Railroad, being the only property owned by Brown & Johnston in or near that place, and the whole tract owned by Mrs. M. B. H. Roach and Brown & Johnston; to have and to hold said several lots, tracts and parcels of land, together with all and singular the appurtenances, privileges and improvements thereunto belonging, or in anywise appertaining, unto him the said John A. Klein, his heirs and assigns, in fee simple.

The foregoing conveyance is, however, upon the following special trusts and conditions, to wit, it shall be the duty of said Klein, and he is hereby fully empowered to do so, to sell any part or all of said lands, or lots
150 or property, and make and execute deeds and titles to the purchasers thereof, at either private or public, whenever and as often as he may be able to make sales which in his judgment it will be to the interest of said creditors and of all concerned to do so, and out of the proceeds of such sales, after paying all the expenses of making and executing the same, pay said several creditors as far as the proceeds of such sales made from time to time will enable him to pay them; and as fast as he pays said debts and fully discharges them he shall take up said certificates of deposit, where certificates have been issued, and mark the debts paid on said Schedule A. And he shall also, whenever he is satisfied from evidence adduced to him that any of said debts have been paid by said Brown or others, either before the execution of this deed, for some of them have been paid, and the evidence of the payment lost when a
151 portion of the books and papers of said Brown & Johnston were burned, or may have been lost or mislaid, or may be paid hereafter, to mark them paid on said Schedule A. And if the whole of said debts shall not be fully paid before the expiration of twelve months from this date, it shall be the duty of said Klein to sell all of the lots, lands, and property then remaining unsold, or so many or such parts thereof as may be necessary, at public auction, for cash, after first giving notice by advertisement in some newspaper published in the city of Vicksburg of the time and place of sale, and out of the proceeds of such sale pay and satisfy all of said debts then remaining unpaid, after first paying all the expenses of making such sale and of executing this trust; and he shall make to all purchasers at such sales good and sufficient deeds conveying the whole interest of both Brown & Johns-
152 ton in the property purchased by them respectively. And whatever may remain after paying expenses of executing this trust and all of said debts, he, said Klein, shall reconvey and deliver up and pay over to said Brown, his representatives, heirs, or assigns, w'ether the same be in lands, lots, or money.

In testimony whereof the said Shepperd Brown has hereunto set his hand and seal the day and date first above written.

SHEPPERD BROWN, [SEAL.]
Surviving Partner of Brown & Johnston.

THE STATE OF MISSISSIPPI,
Warren County:

Personally appeared before me, J. C. Chappell, clerk of the probate court of said county, Shepperd Brown, who acknowledged that he signed, sealed, and delivered the foregoing instrument of writing, for himself and as surviving partner of Brown & Johnston, as his act and deed, for the purposes and considerations therein set forth.

153 Given under my hand and seal of office this 16th day of September, A. D. 1865.

[L. S.]

J. C. CHAPPELL, *Clk*,
By T. C. RICHARDSON, *D. C.*

STATE OF MISSISSIPPI,
Washington County, ss:

I, Wm. A. Haycraft, clerk of the probate court of said county, do hereby certify that the foregoing instrument of writing and the certificate thereto attached, having the proper number of revenue stamps thereon, was filed for record in my office, and recorded in book S, pages 418, 419, 420, 421, & 422, this 20th day of September, A. D. 1865.

Given under my hand and official seal this 20th day of September, A. D., 1865.

[L. S.]

W. A. HAYCRAFT, *Clerk*,
By F. A. METCALFE,
Deputy Clk.

154 THE STATE OF MISSISSIPPI,
Warren County, ss:

I, James C. Chappell, clerk of the probate court of said county, do hereby certify that the foregoing instrument of writing and certificate were filed for record in my office on the 16th day of September, 1865, at 20 minutes to 6 p. m., which I have duly recorded in deed-book 66, pages 662, 663, 664, & 665, and further certify that said instrument was properly stamped with the proper sum in revenue stamps, as required by U. S. revenue law.

Given under my hand and seal of office this 16th day of September, A. D. 1865.

[L. S.]

J. C. CHAPPELL, *Clk*,
By T. C. RICHARDSON, *D. C.*

STATE OF MISSISSIPPI,
Yazoo County:

I, M. A. Jenkins, clerk of the probate court of said county, certify that instrument of writing to which this certificate is attached from Shepperd Brown, surv., &c., to John A. Klein, trustee, was filed
155 in my office for record on the 19th day of October, 1868, and that the same has this day been duly made of record therein, in book Y of the record of deeds, etc., of said county, on pages .

Given under my hand and the seal of said court, at Yazoo City, this 19th day of October, 1868.

[L. S.]

M. A. JENKINS, *Clk*,
By M. W. SMITH, *D. C.*

THE STATE OF MISSISSIPPI,
Sunflower County:

I, L. L. Casey, clerk of the probate court of said county, do hereby certify that the instrument of writing to which this certificate is attached from Shepperd Brown, surv'r, &c., to John A. Klein, trustee, &c., was filed in my office for record on the 26th day of October, 1868, and that the same has this day been duly made of record therein in book E of the record of deeds of said county.

156 Given under my hand and the seal of said court, at McNutt, this 26th day of Oct., 1868.

[L. S.] L. L. CASEY, *Clerk.*

STATE OF MISSISSIPPI,
Hinds County:

I, William T. Ratliff, clerk of the probate court of said county, do hereby certify that the foregoing instrument of writing & certificate was filed for record in my office of the 5th day of February, 1866, and that the same, with the certificate, was duly recorded therein in deed book No. 29, pages 52, 53, 54, 55, 56, & 57. And further certify said instrument was properly stamped with U. S. revenue stamps.

Witness my hand and official seal, at the court-house of said county in Raymond, this 23rd March, 1866.

[L. S.] W. T. RATLIFF,
Clerk.

157 *Certificates of deposit issued by Brown & Johnston.*

No.	646.	Sarah C. Arthur, dated 31 Oct., 1857, 10 % ...	$2,500
"	647.	" " " " 10 %	2,500
"	648.	" " " " 10 %	2,500
"	702.	John Hern, 4th March, 1858	30
"	877.	D. Knott, 5th March, 1859.....	1,673 12
	839.	Wm. Newman, col'd, 22nd Jan'ry, 1859, 8 %	1,000
	850.	Mrs. Jane Webb, 4th Feb'y, 1859.....	35
	894.	N. Williams, 24th March, 1859, 8 %	1,945
	1041.	Wm. Newman, col'd, 8th Oct., 1859, 8 %	750
	1066.	Mary J. Horsley, 5th Nov., 1859.....	110
	1166.	Theo. J. Rogers, 18th Jan'ry, 1860, 8 %	650
	1260.	P. I. Crall, 18th Feb'y, 1860	60
	1368.	Mrs. D. E. Clark, 20th Ap'l, 1860.....	600
	1461.	Wm. Newman, col'd, 9th July, 1860	500
	1492.	Wm. Lanon, 4th Aug'st, 1860.....	1,061
	1539.	Miss Jane Wood, 19th Sept., 1860, 8 %.....	1,400
	1548.	John Whitby, 4th Oct., 1860, 8 %.....	800
	1573.	Miss Jane Woods, 25th Oct., 1860, 8 %	770
	1583.	Roger Sheehay, 6th Nov., 1860, 8 %.....	495
	1596.	Michael Maher, 19th Nov., 1860, 8 %.....	700
	1607.	John Whitby, 8th Jan'y, 1861, 8 %	400
	1646.	Mary J. Estes, 25th March, 1861, 8 %.....	1,700
	1647.	F. M. Lakeman, Ap'l, 1862, 8 %.....	1,160
	1664.	" 2nd Ap'l, 1862, 8 %.....	664
	1676.	W. G. Bender, due 31st Dec'r, 1862, 10 %.....	5,000
	1677.	" " 31st Dec'r, 1862, 10 %.....	5,000
	1679.	Mrs. E. H. Lewis, 1st June, 1861, 8 %.....	600
	1694.	B. F. Barge, 29th Dec'r, 1861, 10 %.....	500
	1695.	" " " " 10 %.....	500

158	No. 1696. B. F. Barge, 29th Dec'r, 1861, 10 %.....	$500	
	1697. A. J. Matthews, 1st July, 1861.....	450	
	1698. F. F. Smith, 1 Jan'y, 1862, 8 %.....	671	
	1699. Jno. Stack, 2nd " " "	50	
	1704. Elizabeth Bowman, 10th July, 1861, @ 12 m. d. 8 %.....	1,500	
	1716. N. Watters, 2nd Sept., 1861.....	200	
	1719. America Broxton, 10 %.....	320	60
	1717. M. B. H. Roach, 3rd Sept., 1861, 10 %.....	100	
	1721. J. C. Cowper, 5th Oct., 1861, 10 %.....	4,000	
	1725. Nancy Stevens, 19th Oct., 1861, 8 %.....	7,000	
	1726. James Mitchell, 22d Nov., 1861, 10 %.....	6,236	
	1728. H. Warner, 1st April, 1862.....	175	
	1731. Mrs. T. I. Finney, bal. due 1st Sept., 1865.....	1,323	74
	1734. Bennett Taylor, 14th Jan'y, 1863, 8 %.....	300	
	1736. " 18th Jan'y, 1863, 8 %.....	50	
	1737. J. N. Parks, 25th Feb'y, 1862, 8 %.....	181	
	1739. Patience Gamble, 28th Jan'ry, 1863, 8 %.....	800	

Certificates deposit issued by Brown, Johnston & Arther.

	No. 13. Sam'l Edwards, 15th May, 1862.....	$1,409	30
	" 4. James Burk, 28th Ap'l, 1862.....	100	
	5. Honora Lewis, 30th Ap'l, 1862.....	100	
	11. Merchants' Ins. Co. Richmond Va., 12 May, 1862..	78	30

Depositors of Brown & Johnston.

	Mrs. M. H. Bonney.....	5,382	57
	F. W. Boyd.....	602	50
	John C. Linn.....	2,596	53
159	Jacob Barker.....	$781	31

UNITED STATES OF AMERICA,

District and State of Louisiana, City of New Orleans, ss:

I certify that on the seventh day of December, A. D. 1876, and the days thereafter, as per adjournments duly noted, before me, John G. Eustis, an United States commissioner in and for the district of Louisiana aforesaid, duly commissioned and qualified, at my office No. 35 Carondalet street, in said city of New Orleans, between the usual hours of business, was produced to and personally came before me Shepperd Brown, witness in behalf of the complainants in a certain cause now pending in the circuit court of the United States for the southern district of Mississippi, wherein John A. Klein et al. are complainants and David C. Shanks, ex't'r, &c., is defendant.

160 And the said SHEPPERD BROWN, being of lawful age and sound mind, and being by me first carefully examined, cautioned, and duly sworn to testify the whole truth, and nothing but the truth, touching the matters in controversy in the suit aforesaid, did depose and say as follows:

1st. To the first int. he saith: My name is Shepperd Brown; am 75 years of age; reside in New Orleans, and have since 1854 or 1855, except while in the Confederacy and on temporary visits out of the city.

2nd. To the 2nd int. he saith: It was composed of myself and Joseph H. Johnston; it was organized in 1838, at Vicksburg, Miss., and con-

tinued up to April, 1862, when we took in Alexander H. Arther as a partner, and the name of the firm thus formed was Brown, Johnston, & Arther.

3rd. To the 3rd int. he saith: In April, 1862, we took in A. H. Arther and formed a new firm, but the taking of him in did not affect the firm of Brown & Johnston as to their assetts and liabilities.

161 Johnston died on the 30th day of July, 1863, at Salem, Virginia.

4th. To the 4th int. he saith: We commenced business in a small way (with a capital together of about $13,000) in buying and selling uncurrent monies, and doing what was called an exchange or brokerage business. We made a great deal of money and did a very large business, dealing in everything pretty much, including the buying and selling of real estate, which was then at very low figures, caused by the commercial and financial convulsions in the southern country; nearly all the banks in Mississippi and Louisiana suspended at that time.

5th. To the 5th he saith: Yes; all purchases of real estate in Mississippi were made with partnership funds for partnership account, and charged up on the books of the firm like any bill, note, or other personal property. I never owned any lands in Mississippi that belonged

162 to me individually, except some lands I entered in Washington County, Miss., previous to going into partnership with Johnston.

6th. To the 6th he saith: Sometimes the deeds were taken in my name, and sometime' in Johnston's, but mostly in the name of Brown & Johnston, but it made no difference in whose name title was taken, as all the real estate was bought and paid for out of the partnership funds and so entered and charged up on the books of the firm. I never dealt in real estate in Mississippi on my own account, and I don't think Johnston did either. He may have purchased a small house and lot in Jackson, Mississippi.

7. To the 7th int. he saith: I have examined said deed in trust, and declare that the real estate therein described was owned as copartnership property by the firm of Brown & Johnston at the date of dissolution of the firm. The property had been acquired by the firm

163 with partnership funds, and for partnership purposes.

8th. To the 8th int. he saith: None that I know of. I intended in that deed to convey every piece of property that the firm of Brown & Johnston owned in Mississippi; if I did not so do, it was because I did not know of any other than as described in said deed.

9th. To the ninth he saith: Their financial condition was very bad. I would suppose their debts was about one hundred & fifty thousand dollars or more, in Mississippi. At the commencement of the war we had plenty of means to pay all the firm's debts and depositors, and I repeatedly urged Mr. Arthur to pay them, but a great many people would not take the money, thinking it safer in our hands. At the close of the war I had on hand in Confederate money & bonds $177,000, the result of the war, but the only available thing left to pay said debts was the real estate in Mississippi.

164 When, for want of time, I adjourn the further taking of testimony herein until to-morrow, then to be continued at the same place and between the same hours mentioned in the caption above.

[SEAL.] J. G. EUSTIS,
U. S. Commissioner.

NEW ORLEANS, *8th December*, 1876.

Pursuant to adjournment, the further taking of testimony herein was resumed, and the said Shepperd Brown, on his oath aforesaid, continuing, deposes and says:

10. To the 10th he saith: They were; these debts were mostly for money deposited with the firm.

11th. To the 11th int. he saith: There were a great deal of wild lands in Louisiana, Arkansas, & Missouri, which were worth hardly anything, and on which we had ceased to pay taxes. What lands Brown
165 & Johnston may have sold at Vicksburg I cannot state, as I did not live at Vicksburg after 1854 or 1855. Mr. Arthur can answer better.

12. To the 12th int. he saith: I was in the Confederacy from early in 1862 to the close of the war, in various States; I knew from the result of the war that the firm of Brown & Johnston and the different firms were largely insolvent. There were judgments against me and the firms before I reached New Orleans of $500,000 and upwards; and knowing that all these firms were insolvent I determined to give to the Mississippi creditors and depositors of Brown & Johnston all that said firm possessed in the State of Miss.; and accordingly upon the advice and under the supervision of my lawyers in New Orleans and Vicksburg I executed the trust deed annexed. At the date of the execution of this trust deed, when the war closed, and ever since, Brown & John-
166 ston was certainly largely insolvent; with no amount of diligence could money enough have been realized out of the assetts of that firm, including all its real estate, to have paid the just debts of the firm; for those reasons I in good faith executed and delivered said trust deed to pay said creditors as far as I could.

13th. To the 13th int. he saith: We were both members of the firm of Brown, Johnston and Arther, but as the war came on when that firm commenced, there was no business done by that firm of consequence. We were also interested in the firm of Brown, Johnston & Co., established here in New Orleans, and whose business was principally that of an exchange and banking business. We afterwards established a cotton house here under the style of Cady, Brown & Co., in which Mr. Wm. Crutcher, now dead, late of Vicksburg, was a partner with Mr.
167 Cady, myself; the business of that firm was settled and wound up long before the war. Then we became interested and formed the firm of Rotchferd, Brown & Co., which did a large cotton commission business in the city. Both Johnston & myself were interested in that firm.

14. To the 14th int. he saith: Rotchferd, Brown & Co. was composed of Phillip Rotchferd, Joseph H. Johnston, & myself. Brown, Johnston & Co. was composed of Joseph H. Johnston, myself, and R. A. Bourke; both of these firms were largely insolvent at the close of the war. They owed over two million of dollars.

15th. To the 15th int. he saith: The firms here had no connection with the Vicksburg firms except that Johnston & myself were interested in the firms in each of those places. As a matter of course, Johnston & myself were obligated for the debts of the New Orleans firms.

168 16. To the 16th int. he saith: That Phillip Rotchferd, R. A. Bourke and myself were the only survivors. I returned to New Orleans about the 15th of June, 1865. Mr. Bourke was the only one here when I returned. Mr. Rotchferd went to Ireland before I returned here and has never come back. Mr. Johnston died in July, 1863.

17th. To the 17th he saith: I knew him. I became acquainted with

him at Vicksburg, perhaps in 1852 or 1853. He was a nephew of Jos. H. Johnston. He did visit me in this city four times, I think. He spent considerable time here on each visit. His object in coming here was to look after the interest in the various firms in which his uncle, Mr. Johnston, was interested in his lifetime. He was executor of his uncle's estate.

18. To the 18th int. he saith: I introduced him to T. S. McCoy, att'y for Sam'l Rainey, the receiver of the assetts, books & accounts of the firms of Rotchferd, Brown & Co. and Brown, Johnston & Co.,
169 and Mr. Shanks consulted with said attorney, who was fully conversant with all the affairs of both concerns. I gave him all the aid and explanations, I could, showed him the amount of the liabilities and assetts, and Mr. Shanks was perfectly satisfied and ascertained that both firms were largely insolvent and that nothing would be left for the heirs of Johnston after the firm debts were paid.

19th. To the 19th he saith: From the large amount of suits and judgments against said firms he was satisfied that there was nothing left for the heirs, and that there would not be enough to pay the debts by a long ways, and he so expressed himself.

20. To the 20th he saith: I did visit Vicksburg with Shanks and met him there twice. I gave him all the aid I could. Shanks was not present when the trust deed was made, but he came shortly afterwards.

170 21st. To the 21st int. he saith: Shanks knew of the trust deed soon after it was made. He ratified and confirmed it verbally and declared that it met his views, and acknowledged the justice and propriety of the act verbally, and did the same thing in several letters. I annex as part of my answer and depositions such letters of Shanks as I consider will throw any light on this case, marked Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, & 8. Mr. Shanks always told me that he would have signed the trust deed as executor if I had asked him to have done it, but I did not ask him to do so because Mr. Marshall, my attorney at Vicksburg, didn't think it necessary, as I was the surviving partner and had in his opinion full power to execute the deed, as the property was purchased with partnership funds for partnership account and the
171 taxes paid thereon always charged to the partnership, and as Brown & Johnston dealt in real estate in their business. His opinion was based on the fact that the heirs could have no interest until all the firm's debts were paid, because the partnership business of Brown & Johnston included the purchase and sale of real estate; because all lands, town lots, and especially all embraced in said trust deed, were bought and paid for out of the partnership funds and charged upon the books of the firm just like any note, bill, or other property, because said property was always considered and treated as partnership property and assessed for taxes as partnership; because when any real estate was sold the proceeds went into the common partnership fund like collections of notes, bills, &c.; because ~~none~~ of these lands were purchased as investments for the separate benefit of the individual
172 members *members* of the firm, or either of them. My great reason for such haste in executing this deed of trust was for the protection of the Mississippi creditors of Brown & Johnston. I wanted to fix it up before the attention of the Louisiana creditors of our other firms was called to the property, as I knew all the firms were largely insolvent beyond redemption.

22nd. To the 22nd int. he saith: I was first made aware of it through the letter of Shanks, already annexed, marked Exhibit No. 4. Shanks

sent me a printed slip cut from some newspaper, which I also annex by pasting it on to said Exhibit No. 4. I annex as part of my answer and deposition a copy of my reply to that letter, marked Exhibit No. 9, taken from my impress letter copying book.

173 Cross-interrogatories:

1st. To the 1st cross-int. he saith: Yes.

2nd. To the 2nd cross-int. he saith: I imagine the agreement was signed in triplicate. I annex one of them, marked Exhibit No. 10, which was sent to me from Vicksburg.

3rd. To the 3rd cross-int. he saith: I was not at Vicksburg and can't say.

4th. To the 4th cross-int. he saith: As I was not at Vicksburg I don't know.

5th. To the 5th cross-int. he saith: I have no copies to annex; don't know how they were notified.

6th. To the 6th cross-int. he saith: Solvent.

7. To the 7th cross-int. he saith: I can't do it, as I have no data to do it by in my possession.

8th. To the 8th cross-int. he saith: I have not got them, and I don't know where they are.

9th. To the 9th cross-int. he saith: No.

10th. To the 10th cross-int. he saith: There were none.

174 11th. To the 11th cross-int. he saith: About thirteen thousand dollars together in all.

12th. To the 12th cross-int. he saith: I can't give figures; but over a million.

13th. To the 13th cross-int. he saith: They always remained in the business—parties only drew enough for their individual wants.

14th. To the 14th cross-int. he saith: We owned a large amount of lands in *in* Mississippi, Louisiana, and Arkansas, and a small amount in Missouri.

15th. To the 15th cross-int. he saith: A description of all the lands owned in Mississippi will be found in said annexed trust deed, except some that we sold to John Townsend, a creditor. I also had some lands in Washington County, which I entered in 1836 and owned individually.

We owned a large amount in Louisiana, and now own a large
175 amount of "wild lands," on which I refused to pay taxes, in Madison, Carroll, & St. Tammany parishes; also some in St. Helena Parish, since sold under execution to pay debts in Louisiana. We owned a large plantation and negroes in St. Charles Parish, which cost us $212,000, and which we had to buy, that is, take for debt from one of the debtors of Rotchferd, Brown & Co., and which has since been sold to pay mortgage. Some of the Madison lands has been sold to pay mortgages & debts. Some of the Madison land was a large plantation with 200 and more negroes on it. It was mortgaged for more than $200,000. In Arkansas we owned a large body of lands. A great deal of it was bought and entered in the name of Boyd & Johnston. From what Boyd told me, we owned about 1,300 acres in that State in Chicot County. There was also 2,400 acres bought in the name
176 of Boyd, Johnston & Hunt in Mississippi County, Ark. I can't tell all the other lands we owned in Arkansas. No have been paid on any of them since the war. I annex as part of my answer and deposition a list of all the lands we owned of which I have any knowledge, and make the exhibit 11[1].

16th. To the 16th cross-int. he saith: The lands were paid for with

the partnership funds. Sometimee the deed was taken in my name; sometime' in the name of Johnston, & sometime' in the name of Brown & Johnston; sometimes in the name of Boyd & Johnston; & sometimes in the name of Boyd, Johnston & Hunt.

17th. To the 17th int. (cross) he saith: So far as I know, it does.

18th. To the 18th cross-int. he saith: All the lands in Louisiana were seized and sold under executions, that is, all the valuable lands. I have given no attention to the lands in this or the other States
177 since the war; have paid no taxes on them generally. It is impossible for me to state what was done with land by any de[illegible] statement such as asked for, as I have not the data.

19th. To the 19th cross-int. he saith: In my previous answers I forgot to state that we owned some property in this city. One piece was sold during my absence in the Confederacy, and on my return I had the sale set aside and the property was sold for $45,000, which went to the benefit of our creditors. This building was used & occupied as a negro school during my absence, and our books and papers were exposed for months in said building while so occupied, and many of them carried off. We also owned a square of ground in the city, fronting on the Mississippi River, which was also sold during my absence for about $11,000. This sale I also had set aside, and resold the property for $45,000 for
178 the benefit of our creditors. My private residence, which cost me about $75,000, was also sold for the benefit of our creditors. We owned four squares of ground fronting on Canal & Common streets, but I can't remember when they were sold. We bought $80,000 or $90,000 worth of property in this city, but it was all sold before the war. A description of all the property Brown & Johnston owned in the city, and who are the present owners of the same, can be had by an investigation of the records of the conveyance office in this city, but I have not got the time to make it. The records of that office will also show what the properties cost and how they were sold. If the money is advanced I will procure such a certificate from the register of that office. I presume that descriptions of all the other real estate Brown & Johnston owned can be had by applying to the proper officer, where
179 *where* the land is located. The counties will appear by reference to Exhibit 11. I have always been ready and willing to assist any person who had any interest in these lands, and would have willingly assigned all my interest in them to pay our creditors.

When, for want of time, I adjourn the further taking of testimony herein until to-morrow, then to be continued at the same place.

[L. S.] J. G. EUSTIS,
U. S. Commissioner.

NEW ORLEANS, *9th December*, 1876.

Pursuant to adjournment, the further taking of testimony herein was resumed, and the said Shepperd Brown, on his oath aforesaid, continuing, deposes and says:

180 20th. To the 20th cross-int. he saith: The same as we would any note, bill of exchange, or other personal property.

21st. To the 21st cross-int. he saith: We always purchased with a view of making money out of them—not to keep, but for speculation.

22nd. To the 22nd cross-int. he saith: In partnership.

23rd. To the 23rd cross-int. he saith: No; the lands were not.

24th. To the 24th cross-int. he saith: Yes; we put up a great many houses at Vicksburg to make the ground more valuable, and make interest on our outlay until we could sell.

25th. To the 25th cross-int. he saith: Yes; we purchased plantations with the negroes thereon and otherwise, perhaps to the number of 400 negroes and upwards.

26th. To the 26th cross-int. he saith: For planting purposes.

27th. To the 27th cross-int. he saith: No; we did not use them in our banking business.

181 28th. To the 28th cross-int. he saith: It was drawn out and charged to the partnership the same as when we purchased real [redacted]e notes, etc.; some we had to take for debts—the firm.

[redacted]th. To the 20th cross he saith: Yes.

30th. To the 30th cross-int. he saith: As soon as we made the money and saw any good opportunities—don't remember the exact time.

31st. To the 31st cross-int. he saith: From my own knowledge and Mr. Arthur's statements.

32. To the 32nd cross he saith: I have not got either.

33rd. To the 33rd cross-int. he saith: I have answered from my knowledge, memory, and the information given me by Mr. Arther at the time the trust deed was executed.

34th. To the 34th cross-int. he saith: Have of few of them; they were exposed for months, as I have already stated, and a great
182 many of them stolen. What few I have are open to the inspection of any one having a right to look at them.

35th. To the 35th cross-int. he saith: I have not.

36th. To the 36th cross-int. he saith: They were taken possession of by order of court, together with all the books, papers, &c., and placed in the hands of Mr. Sam'l Rainey, receiver. We placed assetts in his hands to over one million and a half dollars, by order of court.

37th. To the 37th cross-int. he saith: Sam'l Rainey took possession of everything.

38th. To the 38th cross-int. he saith: No; none of them.

39th. To the 39th cross-int. he saith: He never purchased any of them.

40th. To the 40th cross-int. he saith: The majority of the assetts were purchased by Mr. Mayfeild at different times, the same having
183 been sold by order of court and he being the highest bidder—the remainder I can't answer, but it can be had and ascertained from the records of the court.

41st. To the 41st cross-int. he saith: From our funds and credit.

42nd. To the 42nd cross-int. he saith: The books of Brown & Johnston showed every transaction that occurred as I know.

43rd. To the 43rd cross-int. he saith: There was a general account between the two houses; the money was transferred by drafts and other securities; neither one of us contributed separately out of individual funds; in fact, we had no individual funds.

44. To the 44th cross-int'y he saith: We furnished our credit and means as the business required; no specified amount.

45th. To the 45th cross-int. he saith: There was none between Brown, Johnston & Co., but there was between Rotchferd, Brown & Co.
184 I have not got the original or copy to annex.

46th. To the 46th cross-int. he saith: He appeared to have confidence in all I told him. He saw the vast amount of judgments and suits against me and the firms; he consulted with T. S. McCoy, attorney for the receiver, and was satisfied that it was impossible to realize anything for the heirs of Joseph H. Johnston out of the assets after the debts were paid.

47th. To the 47th cross int. he saith: I don't know, but presume enough to satisfy himself.

48th. To the 48th cross-int. he saith: Not that I know of.

49th. To the 49th cross int. he saith: It wouldn't have taken a competent man (such as Sam'l Rainey, the receiver, who knew the books
185 thoroughly and had kept them for ten years) very long to make the balance, but it would have taken Shanks a long time to do it, if he could do it at all.

50th. To the 50th cross int. he saith: No stranger could tell the value until he had posted himself, which would take some time.

51st. To the 51st cross-int. he saith: He was an intelligent man; he consulted Mr. Arthur, myself, lawyers, and others, explained for himself as well as he could, and learned for himself the condition of the firms.

52nd. To the 52nd cross-int. he saith: Not that I know of, but he endeavored to get all information he could.

53rd. To the 53rd cross-int'y he saith: I understood not.

186 54th. To the 54th cross-int'y he saith: As surviving partner, yes.

55th. To the 55th cross-int'y he saith: I don't recollect.

56th. To the 56th cross-int'y he saith: T. A. Marshall.

57th. To the 57th cross-int'y he saith: T. A. Marshall.

58th. To the 58th cross-int'y he saith: It was sold for taxes, and I quitclaimed all my interest in it for $50, before the war. I can't tell the date nor the name of the person, but the money I received went into the copartnership.

59th. To the 59th cross-int'y he saith: I can't answer the question, because most of the lands were bought since I left Vicksburg, and I exercised no control over them. Mr. Arthur can answer better than
187 I. The records of the counties where the lands are situate will show.

60th. To the 60th cross-int'y he saith: I don't know; the records will show.

61st. To the 61st cross-int'y he saith: There was a great deal sold in small lots before the war—none sold since the war. I don't know the purchasers or present owners; the record of the countys will show. The money went into the partnership.

62nd. To the 62nd cross-int. he saith: The Claiborne lands I don't think have ever been sold; we owned them 30 years. The Livingston lands were sold under execution by our Louisiana creditors. The St. Helena lands were sold under execution. One-half of the land in St. Tammany belonged to A. Kleading, although the title was taken in my name. I made him a deed for his share. The balance have
188 been sold for taxes as well as Reading's share; they are of little value. There are some lands in Madison, which were entered in the name of A. R. Hynes & Brown & Johnston, about 1,200 acres, I think, on which I have not paid taxes, as they are worthless. The plantation was sold under execution to pay mortgage or debts. The records will show how they stand now.

63rd. To the 63rd cross-int'y he saith: I never sold them myself, never heard of their being sold, and if they were, sold by the firm at Vicksburg after I left there.

64th. To the 64th cross int'y he saith: They did not differ at all.

65th. To the 64th cross-int'y he saith: Yes.

189 66th. To the 66th cross-int'y he saith: They were all partnership lands same as in Mississippi.

67th. To the 67th cross he saith: I don't see how I could make any

fuller explanation or express it in any better language. I mean what I say.

68th. To the 68th cross-in. he saith: I have no books or data in my possession that would make it practicable for me to do so.

69th. To the 69th cross-in. he saith: I have no books or data that will enable me to say how much was realized by legal process or otherwise, but all that was realized, so far as I know or believe, has been applied to the payment of the debts of the firm and costs.

190 70th. To the 70th cross-int'y he saith: From cotton speculation I made a large amount of money in the Confederacy towards the close of the war. I got permission from the Confederate agent, Mr. De Bow, to ship large amounts of cotton to New Orleans. In this transaction Benj. Thomas and Wm. Crutcher, both deceased, were interested with me. We engaged the cotton in the neighborhood of Woodville, Miss., and sold to New Orleans men at a good figure without advancing or paying out a cent for it until we had sold it. I also in connection with John Duncan, of Jackson, Miss., contracted with the cotton agent of the Confederate Government, Mr. Clapp, of Holly Springs, for 5,000 bales of cotton, 3,000 of which was under 2 sheds at Gainesville, Ala., and the balance in the surrounding country, and which belonged to the Confederate Government. If honestly & properly

191 managed, I should have made $500,000 out of this cotton. When I married my wife she had about $14,000, which her brother-in-law loaned to W. S. Langbley, of Issaquena, on mortgage on his Albemarle plantation. After the war Mr. T. A. Marshall foreclosed this mortgage, and she (my wife) bought in the plantation. I did not invest any money in my wife's name.

71st. To the 71st cross-int. he saith: No.

72. To the 72nd cross-int'y he saith: I decline to answer, because I think the question irrelevant, impertinent, and not legitimate.

73rd. To the 73rd cross-in. he saith: Aiken did not purchase any of the assetts.

74th. To the 74th cross int'y he saith: It was attached by the great bankers, Rothchilds, and others, for a large amount of debts due them by our firms.

192 75th. To the 75th cross-int'y he saith: I didn't sell it; it was attached as I have stated.

SHEPPERD BROWN.

Sworn to and subscribed before me this 9th day of December, A. D. 1876.

J. G. ESTIS,
U. S. Commissioner Dist. of La.

I further certify that the foregoing deposition of said witness was at the time and place aforesaid reduced to writing by my clerk in my presence and that of said witness, and by said witness subscribed and sworn to after having been reduced to writing. I further certify that the interrogatories and cross-interrogatories were categorically propounded to said witness one at a time, and that the witness was not allowed to read any interrogatory until it was propounded to him. I further certify that the fee for taking said deposition, amounting to

193 has been paid to me by the complainants, and that the same is just and reasonable for the services performed.

Given under my hand and seal at New Orleans this ninth day of December, A. D. 1876.

[SEAL.] J. G. EUSTIS,
U. S. Commissioner Dist. of Louisiana.

(Endorsed:) Filed with exhibits April 11th, A. D. 1877. Geo. T. Swann, clerk.

194 *Exhibit No. 1.*

PRENTISE HOUSE,
Vicksburg, 19*th*, 1867.

Mr. SHEPHERD BROWN:

MY DEAR FRIEND: I arrived here last night, having failed to make connection at Jackson, at which place I left Mr. Rainey. Mr. Hawes was fortunate in meeting with a boat just starting up the river, so I hope he will be able to make the trip in time. To-day has been very unpleasant, as it has rained in torrents. I went up to see Mr. Arthur; he is very kind; seems disposed to render me any assistance in his power. I have an engagement to meet him to-morrow morning at 10 'cl'k, when I trust I will be able to enter more fully into the detail of the business. He expresses the opinion that you as surviving partner could appoint an agent to represent you in closing up this business, or that I, should I administer, could do the same; but I told him that I declined the administration. But, actuated, as I trust I am, by respect for the
195 memories of my deceased relations, I am anxious to see this business or to make an effort to try and close it up on the best terms possible without encumbering myself with any liabilities. In conversation with Mr. Clien and Willis they exposed themselves by saying that the creditors were much dissatisfied from the fact that you nor myself had never taken hold of this business to attempt to close it up. They say the creditors would be entirely satisfied and would enter into an article with me not requiring me to administer, but authorizing me to settle up the business on the best terms I could and divide pro rata; but assets, as I understand from Arthur, are nothing but some old claims that would all require some litigation. I will look more particularly into this to-morrow. In a conversation with your particular friend to-day, who had on board a full cargo of whiskey, he ex-
196 presses himself as having found out where he could make his money out of you on his visit to Virginia last summer; he found out that you had some property in Jonesborough which he would attack. I wish very much that you were here so that I could have your views. If I have been correctly informed as regards this business, I think that the creditors here are willing to make any arrangements so that they are convinced that we make an effort on our part to close and settle what is due the concern; as to this, I think they are certainly entitled. Should anything present itself to your mind on receipt of this, please telegraph at once, or I may possibly leave here before you can write.

Very truly, your friend,

D. C. SHANKS.

197 *Exhibit No. 2.*

VICKSBURG, *January* 21*st*, 1867.

Mr. SHEPHERD BROWN:

MY DEAR FRIEND: You see that I still and have accomplished little or nothing, either satisfactorily or interesting. Mr. Arthur seems much disposed to assist me in any way he can; as usual he has much to talk about and much to say about everything of the smallest import-

ance. From all the information I can get out of the books of B. & J. they show an indebtedness to outside parties, just what I did not expect or want. I suggested sending them to N. Orleans and have straightened up; he has to make some references to them, but I will try and ship them. I have also examined the paper in his hands, and also listened to the history of each individual case, and upon this score I have not found a very favorable opinion. He looks upon the wild lands as being some day valuable; but who will reap the benefits the
198 Lord only knows. He (Arthur) says that Willis has brought what he terms a friendly suit to get possession of the balance of the proceeds in the hands of Mr. Klein from the sale of the real estate. As there are several parties who have not applied for their pro rata, it is a rascally trick; but he can do those things, I believe. He is overanxious for me to take charge of the business, but he cannot catch me with his bait. But I feel satisfied of the importance of you sending out a traveling agent, and I think much might be accomplished both as regards the N. Orleans and Vicksburg business. As I notice many claims that will soon be lost by limitation, I wish very much that I could assist you, and should you deem my presence of any importance you must command me, as I am ever at your service. I will leave here to-morrow for Va., I think. Forward my letters you may receive
199 to Va. Please pay Mr. S. Haws eight dollars and some odd cents I owe him, as I entirely forgot when we parted.

Very truly, your friend,

D. C. SHANKS.

Exhibit No. 3.

SALEM, *Aug. 15th*, 1875.

Mr. SHEPHERD BROWN:

MY DEAR FRIEND: Enclosed you will find a paragraph of news from an Augusta paper which emanated from Mr. Koiner. He has the names misplaced. I have found out that he has employed the Pitts & Pitts, of Vicksburg, as his lawyers. He gives them one-third of what is gained. He (Kornes) receives for his share one-third; the other third to the heirs who have joined in with him in the suit; and they are the children of Uncle Wm. Johnson, some six in number, I think; they have increased in about the proportion as the plantations owned
200 by my uncle. You are well posted as to all facts, and know the chances of success. Our friend says that he wishes they may succeed, as he has a judgment of some nine thousand dollars that he will save. As you will likely know what progress and what he is coming for, you will please let me know, as I feel interested how he will manage this case. I am pleased to notice in your last favour that your health continues so good, and that your spirits are revived at the prospect of the future for the South. I am sure that I wish these things may brighten up with another Presidential election, and a change in our financial affairs, and money made cheaper, as no man can pay the rate of interest and do any legitimate business who is in debt. I am now harder pressed than I ever was in my life, and I do not know what quarter to look to. If I could only raise a few thousand (say five) for two
201 years I would be all right. I wish that you had it in your power to give me a little aid; or, as you have been through hard places, you can doubtless give me advice. What do you think is the prospect of that part as to the cotton claims? How has he succeeded in gather-

ing up evidence, and what are his chances of success, &c.? My regards to Mrs. Brown and A. J. A.

Very truly, your friend,

D. C. SHANKS.

Exhibit No. 4.

SALEM, *June 11th*, 1875.

Mr. SHEP'RD BROWN:

MY DEAR FRIEND: I was to-day approached by a young man, Mr. Coime, who married a second cousin of mine, a grand-daughter of Uncle Wm. Johnson, who informs me that he has been South looking after what had become of Uncle W's estate, and that you were im-
202 mensely wealthy, &c.; and I understand some of the heirs think I own an immensely valuable estate down South; so you may readily know that some of them believe that Uncle Ja's estate is owned by us, and I presume they are trying to get after us. I told him that I had been South on several occasions, and that I was largest legatee, and I had never seen anything that I could get hold on to pay my trouble of administering, as every piece of property was either covered by either mortgage or judgment. He then said that *that* you had conveyed all that property in Vicksburg to trustee to pay certain debts. I told him I knew that you had, and that they were just and honest debts. He says that as I had not joined in as exect. that he had determined to bring suit to recover that property in the U. States court, and that he was satisfied he could succeed, and he has a power of attorney from numerous heirs authorizing him to do so. He has en-
203 gaged attorney at Vicksburg for one-third what can be made. He requires one-third for his service, and gives one-third to the heirs. He was anxious to get me interested in the sc'eme, so as to bring the suit in my name as exect. I have taken time to consider the matter, and would like to know what you think of it. I have just had a talk with friend Jack. He says he has known of certain cases of that kind. But should there be anything in it that looked at all encouraging, I would bring the suit, pay the cost, and have the whole amount for the heirs, as his terms are exhorbitant, and I do not see that he has any claim whatever, as he is not recognized under the bill, except his wife's mother. Now you see that he is after you and myself, and they are making this in that direction. Please write me candidly what you think of the Vicksburg property, and also send a list of the prop-
204 erty conveyed in the deed of trust. In this matter I am the proper party to prosecute the suit, and not Mr. Coime. I know that some of the heirs are in great need of assistance, and I assure you that I dislike to have to resort to these means, for I would as soon bring an imputation on my own character as to do an act that would bring a reflection on my dear uncle's memory, but on the other hand I am much opposed to see a perfect stranger reap the benefits that may accrue to needy heirs. He says the *the* debts are stayed or barred by limitation. If you think favorable, who is the best lawyer for the job? A Yankee radical would, you know, be preferable before the U. States court. Please write me in full soon as convenient. Will have an interview with him on the 14th inst. May write you again.

Yours, truly,

D. C. SHANKS.

205 HEAVY LAWSUIT.

Mr. G. W. Koiner, of Fisherville, has just entered suit in the U. S. court of Jackson, Miss., in behalf of himself and sixteen other heirs of the late Joseph H. Johnson to recover property which is estimated as nearly one million. Many years before, George W. & Joseph H. Johnson, two brothers, living in Roanoke Co., Va., were given by their father $40,000 each, and started out in the world. Joseph located at Vicksburg as a banker, in partnership with Shepherd Brown, and the firm was said to be one of the wealthiest between St. Louis and N. Orleans. George, the other brother, located in Louisiana, and became a large landholder. In Grant's march encircling Vicksburg some of the troops passed Joseph's house, and on his offering resistance to their depredations shot him dead. His property was willed to George. After the death of Joseph this brother came to Virginia, and died while the war was still going on. Among the property is said to be 208 plantations in Mississippi and Louisiana. The heirs, except Mr. Koiner, reside in Roanoke County, Va., and East Tennessee.

206 *Exhibit No. 5.*

SALEM, *Sept. 3rd*, 1875.

Mr. SHEP'D BROWN:

MY DEAR SIR: Mr. Koiner and his lawyer, Mr. Pitman, was to see me yesterday; they say they are determined to prosecute this suit, and tried to urge me to join them, and by my refusing they are forced to sue me for neglecting the trust reposed in me, and also for damages, &c., arising from same. Now, under these circumstances what am I to do? They can possibly succeed in removing me, but as for any other danger I have no fears. Now, my dear friend, I will say to you I am harder pressed that I ever knew what it was before. I have been sued, and am forced to raise some money; can you under my great pressure give me any assistance, as I am in great trouble of mind? If I could only get time I can work through; try if it is possible to let me have two thousand dollars. What progress are they making
207 with the cotton claim, and what are probabilities of success, &c. Let me hear from you at your earliest convenience, and much oblige

Your friend,

D. C. DANKS.

Exhibit No. 6.

SALEM, *Oct. 12th*, 1875.

Mr. SHEP'D BROWN:

MY DEAR FRIEND: Your favor containing correspondence to my friend A. J. A. in regard to purchase of cotton plantation to hand and noticed. In reply I enclose letters as requested, and would say that I am much in hopes that you can effect a sale on good terms, as my necessities are such that I must raise some of the needful at a sacrifice if I cannot negotiate a loan for short time. I notice that you see and appreciate the same as regards Koiner and his party. Mr. Pittman has been here, and has made an impression on the minds of some the heirs and expressed himself as being confident of obtaining some 80 or
208 100 thousand dollars that could be secured by bringing this suit.

The heirs seem to censure me for not being willing to go on with the suit. I have mad' them the proposition, to satisfy them in the last emergency if they persist in a suit, to furnish me, as executor, with the means, and I will bring the suit if they indemnify me from all costs, but as to participating in a suit and setting aside sales that were made by a responsible trustee with my knowledge and consent, and for a just and equitable consideration at the time to innocent purchasers to pay debts justly due by my uncle, I did not believe that my uncle's will, nor if he were alive and could speak for himself, would for one moment con'sul or advise a course so derogitory to the position he occupied in the community he had formerly lived, and that class of people with whom he had associated, and if there is a discretion left with me I trust to be able appreciate the same, and if, as they say, they must sue me for direliction of duty, then they must go ahead. I will try and meet them. It has been told me that I had a large quantity
209 of tobacco belonging to my uncle (from what source they obtained this information I do not know), which I appropriated to my use and benefit. I do not that you are familiar with this operation, but my uncle and myself purchased jointly some tobacco, on joint account. One-half of which was shipped to Mississippi, to Canton or Jackson, I think; the other portion I had in my possession, which after great trouble and expense I saved from the rains, but previous to my uncle's death he told me that he settle with me the tobacco speculation by his taking the proceeds of the sale in Mississippi, and I having as my share the tobacco I had in my possession, which was satisfactory, and think I have mentioned same to you. How comes on the cotton claim, and what are its prospects? I would like my uncle to see and have a few hours' talk with you at present. What become of all the
210 cotton that was purchased by B. & J. in the Confederacy; can't you get up a claim for that? It would amount to considerable. Write me soon.

Yours, truly,

D. C. SHANKS.

Exhibit No. 7.

SALEM, *Nov. 13th*, 1875.

Mr. S. BROWN:

MY DEAR FRIEND: I learned through a letter received by Mr. E. N. Jack, from Mr. Butts, brother to Mrs. Willis, that they had been sued in my name, as exec't. of Jo's. H. Johnston, for one-half of the bank, which I regretted, as I had done all in my power to prevent giving any unnecessary trouble or expense, and have written Mr. Butts explaining my position and trying to exhonerate myself from any censure that might be attached to my conduct. You are well acquainted with all the facts: 1st, that I went South in 1865, and after looking into the
211 condition of my uncle's estate, and finding that his liabilities far exceeded assets that were available, and having consulted Maj. Kai, in N. Orleans, and Mr. Marshall, in Vicksburg, and believing that nothing could be received by me as either legatee or exect., I declined to qualify as exect., and as from Marshall's advice it was not considered necessary that I should, as you as surviving partner were qualified to transfer all the real estate to a trustee, to be sold by him for the discharge of the liabilities of Brown & Johnston. This in brief constitutes the facts as connected with this real estate. Mr. Koiner, who has visited the South, and after looking into the titles and sales, and

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MY DEAR FRIEND: Your favor containing correspondence to my friend A. J. A. in regard to purchase of cotton plantation to hand and noticed. In reply I enclose letters as requested, and would say that I am much in hopes that you can effect a sale on good terms, as my necessities are such that I must raise some of the needful at a sacrifice if I cannot negotiate a loan for short time. I notice that you see and appreciate the same as regards Koiner and his party. Mr. Pittman has been here, and has made an impression on the minds of some the heirs and expressed himself as being confident of obtaining some 80 or
208 100 thousand dollars that could be secured by bringing this suit.

The heirs seem to censure me for not being willing to go on with the suit. I have mad' them the proposition, to satisfy them in the last emergency if they persist in a suit, to furnish me, as executor, with the means, and I will bring the suit if they indemnify me from all costs, but as to participating in a suit and setting aside sales that were made by a responsible trustee with my knowledge and consent, and for a just and equitable consideration at the time to innocent purchasers to pay debts justly due by my uncle, I did not believe that my uncle's will, nor if he were alive and could speak for himself, would for one moment con'sul or advise a course so derogitory to the position he occupied in the community he had formerly lived, and that class of people with whom he had associated, and if there is a discretion left with me I trust to be able appreciate the same, and if, as they say, they must sue me for direliction of duty, then they must go ahead. I will try and meet them. It has been told me that I had a large quantity
209 of tobacco belonging to my uncle (from what source they obtained this information I do not know), which I appropriated to my use and benefit. I do not that you are familiar with this operation, but my uncle and myself purchased jointly some tobacco, on joint account. One-half of which was shipped to Mississippi, to Canton or Jackson, I think; the other portion I had in my possession, which after great trouble and expense I saved from the rains, but previous to my uncle's death he told me that he settle with me the tobacco speculation by his taking the proceeds of the sale in Mississippi, and I having as my share the tobacco I had in my possession, which was satisfactory, and think I have mentioned same to you. How comes on the cotton claim, and what are its prospects? I would like my uncle to see and have a few hours' talk with you at present. What become of all the
210 cotton that was purchased by B. & J. in the Confederacy; can't you get up a claim for that? It would amount to considerable. Write me soon.

Yours, truly,

D. C. SHANKS.

Exhibit No. 7.

SALEM, *Nov. 13th*, 1875.

Mr. S. BROWN:

MY DEAR FRIEND: I learned through a letter received by Mr. E. N. Jack, from Mr. Butts, brother to Mrs. Willis, that they had been sued in my name, as exec't. of Jo's. H. Johnston, for one-half of the bank, which I regretted, as I had done all in my power to prevent giving any unnecessary trouble or expense, and have written Mr. Butts explaining my position and trying to exhonerate myself from any censure that might be attached to my conduct. You are well acquainted with all the facts: 1st, that I went South in 1865, and after looking into the
211 condition of my uncle's estate, and finding that his liabilities far exceeded assets that were available, and having consulted Maj. Kai, in N. Orleans, and Mr. Marshall, in Vicksburg, and believing that nothing could be received by me as either legatee or exect., I declined to qualify as exect., and as from Marshall's advice it was not considered necessary that I should, as you as surviving partner were qualified to transfer all the real estate to a trustee, to be sold by him for the discharge of the liabilities of Brown & Johnston. This in brief constitutes the facts as connected with this real estate. Mr. Koiner, who has visited the South, and after looking into the titles and sales, and

with the advice of attorneys has come to the conclusion that as I did not join in this transfer that it is not legal, and the sales can be set aside; this is the impression made on the minds of the heirs in Va. and Tenn.

Actuated by this belief, I have been requested to bring the suit
212 or resign as exect., or make myself responsible for the damages they would receive from my negligence; and having executed bond in Va. for the faithful performance of these duties, and not believing that anything could be gained by suing, and having no money in my hands as exect., and not being desirous of hazarding any one in such an uncertain suit, I proposed to heirs that if they were so sanguine of success, that they could give me an undenying bond, freeing from all costs and risks that would fall upon me as exect. They sent me bond a few days ago which they have complied with, and promising that it would be satisfactory, have instituted this suit and perhaps others, but I am not apprised of any except the bank property. Now, sir, I have only consented to this course to supply the heirs and indemnify myself, supposing that all that was due you was legal and proper, and
213 anxious to hear from you and learn your views.

Yours, truly,

D. C. SHANKS.

Exhibit No. 8.

SALEM, *January 23rd*, '76.

MR. SHEP'D BROWN:

MY DEAR FRIEND: I have written to you some two letters since I heard from , but have not received any answers to them. Mr. Jack told me that he had received a letter from you, and that you had thought hard of me for allowing Koimer to take out letters of administration on my uncle's estate. This I have not done. When I saw that they would force me to surrender the estate, unless I proposed that he should pay all costs, indemnify me as executor from all risk and damages; he has received a power of attorney to represent their of all the other
214 heirs. I consented as executor, he giving me an indemnifying bond, to permit him to sue in my name as exect., so I can loose nothing, and should there be anything made, I receive my full proportion under the will after he receives his contingent fee for the suits, &c. I never had any idea that this would discommode or give you any trouble. Now, if you and myself erred by the advice of Mr. Marshall in making a trustee and transferring the real estate to him, who is to be the sufferer. Not you or myself, but the purchaser of that property. This is what Komer wishes as understood from him and Mr. Pittman. It is as you see a technical point of law on which depends their success. I cannot see how this will affect you in the least. I would like very much to see you and have a talk with you, as I could explain things better than by writing. What has become of the cotton claim, and what are its prospects of success? Se' Mr. Eustis, the Senator,
215 our attorney. Mr. E. N. Jack will leave in a few days for Mississippi, but will remain there some days, and then come to N. Orleans. Let me hear from you soon.

Yours, truly,

D. C. SHANKS.

Exhibit No. 9.

NEW ORLEANS, *June 15th*, 1875.

Col. DAVIS C. SHANKS,
Salem, Va.:

DEAR SIR: I received your letter of the 11th inst., and notice contents. It is all bosh, and the party you refert to has no idea of what he says or writes about, nor has the party who gave him the information and advice, except to get those who would engage in such a mess into trouble and spend money on a thing of which they are totally ignorant, taking the chances, nothing to loose, may by hook or by crook
216 probably make something. You know as well as anybody can know that the assignment to a trustee of all the real estate & everything else in Vicksburg and Mississippi was made over in trust to Jno. A. Klein, a man of standing, character, & means, to pay the debts due by Brown & Johnston in that city and State. All the property was sold by the trustee, and did not pay all the debts filed against B. & J. I determined that all the property & effects in Miss. should be paid by the trustee out of the property, as far as it went. All this was done with your knowledge and belief that it was right and proper to do so, and not merge the Miss. debts & go in with the debts due from Ratchford, Brown & Co., and Brown, Johnston & Co., of Louisiana, these firms being 20 times worse off in La., and no probable chance of ever paying the large debt the two firms owed. Besides, I tried to urge you to take charge of the whole claims and debts in Miss., and that I would aid assist you all I could by advice, &c. You refused
217 to take on your shoulders the assets, &c., unwisely, as I thought then, and I know to be so now, your urging that you would perhaps involve yourself in difficulty, trouble, and loss, with little prospects of benefit to you or the estate. If your uncle, Jos. H. Johnston, for you had had more interest in the estate than any one else, according to the will and the laws of Miss., you could not take charge of the property of the estate of right, as the will provided all just debts were to be paid; but I, as surviving partner of Joseph H. Johnston, could sell property to pay debts in Miss., and could make a trust to secure the payments of debts, and to sell real estate. Of course the various heirs of J. H. J. think they ought to get something out of such a vast estate as Brown & Johnston, Ratchford, Brown & Co., if the debts owing
218 to the different firms was vast and the real estate held by them was large, with 450 negroes included in the same, the debts that Rotchford, Brown, & Co. and Brown & Johnston & Co. owed was of no small magnitude. After the war the planters and debtors paid nothing. A few hundred thousand dollars of debt could wind up and sell out an estate of millions. You know when I came back from the Confederacy in June, 1865, our creditors had sued me (the firm) and got judgments for upwards of $500,000 (five hundred thousand dollars), and after I returned to N. Orleans in 1865, judgments were obtained and now stand against me (that is, the firm) for more than one million of dollars, besides the judgments obtained before I got home, and chief amongst them one who set the pack on me before I returned was that ungrateful rascal Joseph H. Willis, the particular friend of one Edward W. Jack, your
219 neighbor. I am still full of life and vim, and will continue in business as long as my health and life continues, and I hope I will be able to make meat and bread answer my purpose, if I don't make a million of dollars, which I think very doubtful these hard times. The parties who now hold the Vicksburg property by purchase from the

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219 neighbor. I am still full of life and vim, and will continue in business as long as my health and life continues, and I hope I will be able to make meat and bread answer my purpose, if I don't make a million of dollars, which I think very doubtful these hard times. The parties who now hold the Vicksburg property by purchase from the

trustee to pay the debts were not the creditors of B. & J. and R. B. & Co., but were actual purchasers, who paid the money which was paid over to the trustee in Louisiana. You know the assets of R. B. & Co. was put into the hands of a receiver (Sam'l Rainy) by an order of the 2nd dist. court, and after they were held by the receiver trying to collect the debts due, the balance was put up by order of the court and sold to the highest bidder; everything in regard to the old business of B. & J., of Vicksburg, and the business of Louisiana, you were
220 well acquainted with at one time, but it has been so long you have forgot the particulars. If Mr. Coiner or any one else can make anything out of the balance, or as surviving partner, or J. A. Klein, trustee, they may put it in their eye. Thomas A. Marshall, esqr', drew up the trust papers, and he said I had a perfect right to sell the property as surviving partner, and to make a trustee to pay the debts due from the concern; and he said under the will as it was drawn up you could not of right take possession of the assets of the estate, as the debts of Joseph H. Johnston must first be paid, and you alone could bring suit—none of the heirs could; if they made any trouble any way they were disinherited. Your uncle Joseph was fearful they might embarrass and give you trouble; he therefore put it out of the power of any of them. Your previous letter rec'd with package. Nothing can be done in that matter till next winter.

Yours, truly,
(Signed) SHEP'D BROWN.

221 *Exhibit No.* 10.

Agreement made and entered into between Shepherd Brown, Joseph H. Johnston, & Alexander H. Arthur.

The parties have entered in copartnership to transact a banking and exchange business at Vicksburg, as the successors of Brown and Johnston, under the firm of Brown, Johnston, and Arthur. The said Arthur is to devote 'is personal attention to the new business as well as to settling up the business of the old firm; and the other parties to give such attention as they can spare from their other business. The interests of the parties to be mutual, and to be equally liable the responsibilities of the new business; but, inasmuch as the profits of the new business during the war will scarcely remunerate the said Arthur for his labors and responsibilities, the other parties deem it proper to continue the present salaried arrangement with the said Arthur. This firm to commence on Monday, the 14th day of April, 1862, and to con-
222 tinue for two years from that date, unless one of the parties, or a majority of the parties, deem it proper to dissolve or change it prior to that time.

Given under our hands this 9th day of April, 1862.

SHEPHERD & BROWN.
ALEX. H. ARTHUR.

223 *Exhibit No.* 11.

IN ARKANSAS.

Lands of Brown and Johnston, Vicksburg.

PHILLIPS COUNTY.

	Acres.
All of frac. sec. 24, T. 1 north, of R. 5 E	573. 47
Fraction " 25, " 1, " " " " "	71. 68
SW. qr. " 19, " 1, " " " " 6 "	160. 00

MONROE COUNTY.

E. hf. of sec. 19, T. 1 south, of R. 2 W	320.05
NE. qr. of frac. sec. 36 south, of R. 1 W	153.60
E. hf. SW. qr. of sec. 27, T. 2, R. 1 W	80.00
E. hf. of sec. 27, T. 2, R. 1 W	320.00

PULASKI COUNTY—MINERAL LANDS (LEAD).

NE. qr. of sec. 20, T. 3 north, of R. 12 W	160.00
E. hf. of SE. qr. & SE. qr. of SW. qr. sec. 17, T. 3, R. 12 west	120.00
NW. qr. of NW. qr. sec. 21, T. 3, R. 12 west	40.00
NW. qr. of sec. 20, T. 3 north, R. 11 west	160.00
E. hf. of NE. qr. sec. 19, T. 3 north, R. 11 west	80.00

MARION COUNTY—MINERAL LANDS (LEAD).

S.E. qr. of NE. qr. sec. 27, T. 20, R. 16 west	40.00
NW. qr. of SW. qr. " 26, " " " " "	40.00
SW. qr. of NW. qr. " 26, " " " " "	40.00
N. hf. of NE. qr. " 35, " " " " "	80.00
SW. qr. of NW. qr. " 36, " " " " "	40.00
NW. qr. of SW. qr. " 36, " " " " "	40.00
N. hf. of SW. qr. " 34, " " " " "	80.00
S. E. qr. " 34, " " " " "	160.00
224 W. hf. of NW. qr. sec. 10, T. 19, R. 16 west	80.00
W. hf. of SW. qr. " 10, " " " " "	80.00
W. hf. of N. E. qr. " 10, " " " " "	80.00
E. hf. of NW. qr. " 10, " " " " "	80.00
W. hf. of NE. qr. & W. hf. of SE. qr. sec. 3, T. 19, R. 16 west	169.53
E. hf. of NW. qr. & E. hf. of SW. qr. sec. 3, T. 19, R. 16 west	170.16

INDEPENDENCE COUNTY—MINERAL (MASOLE).

SE. qr. of NE. qr. sec. 21, T. 12, R. 5 west	40.00
N. hf. of SE. qr. " " " " " " "	80.00

CHICOT COUNTY.

NW. qr. of sec. 2, T. 12 south, of R. 2 west	160.00
Entered in name of Boyd & Johnston, as follows:	
NE. qr. & E. hf. SE. qr. sec. 6, T. 13 south, R. 1 W	240.00
NE. frac. qr. & N. hf. of SE. qr. sec. 1, T. 13 south, R. 2 west	243.64

CHICOT COUNTY—(Continued.)

W. hf. of SW. qr. sec. 30, T. 14, R. 1 west	80.00
S. hf. of NW. qr. " 14, " 14, " 2 "	80.00
NW. qr. of SE. qr. & S. hf. of W. hf. sec. 15, T. 14, R. 2 west	200.00
SW. qr. fractional sec. 15, T. 14, R. 2 west	159.00
E. hf. & NW. qr. " 20, " " " " "	480.00
Frac. N. hf. & SW. qr. " 21, " " " " "	384.62
Frac. N. hf. of NW. qr. " 22, " " " " "	23.33
NW. qr. (west of lake) " 28, " " " " "	11.68
SW. qr. of S. E. qr. sec. 33, T. 15, R 1 west	40.00
225 SE. qr. of SW. qr. sec. 33, T. 15, R. 1 west	40.00
NE. qr. of NW. qr. " 4, " 16, " 2 "	61.75
NW. qr. " 12, " " " " "	160.00
SW. qr. " 17, " " " " "	160.00
SE. qr. " 18, " " " " "	160.00
E. hf. " 19, " " " " "	320.00
W. hf. of NW. qr " 20, " " " " "	80.00
W. hf. " 32, " " " " "	320.00
NW. qr. of SE. qr. & SE. qr. of SE. qr. sec. 4, T. 17, R. 2 west	58.51
SW. qr. & S. hf. of NW. qr. & NW. qr. of NW. qr. sec. 4, T. 17, R. 2 west	280.00

All frac. sec. 5, T. 17, R. 2 west 648.90
All frac. " 7, " " " " " 610.62
W. hf. & NE. qr. & W. hf. of SE. qr. sec. 8, T. 17, R. 2 west 560.00
SW. qr. sec. 31, T. 17, R. 1 west 160.00
W. hf. of NW. qr. sec. 31, T. 17, R. 1 west 80.00
N. hf. frac. & SW. qr. sec. 1, T. 17 south, R. 2 W 472.37
E. hf. & N. hf. of NW. qr., sec. 2, T. 17, R. 2 W 400.00
E. hf. of E. hf. sec. 18, " " " " " 160.00
SW. qr. " 11, " " " " " 160.00
NE. qr. " " " " " " 160.00
E. hf. of NE. qr. " 12, " " " " " 53.00
SE. qr. of SE. qr. " 13, " " " " " 40.00
NW. qr. of SE. qr. & N. hf. of SW. qr. sec. 13, T. 17, R. 2 west 120.00
226 NW. qr. frac. sec. 14, T. 17, R. 2 west 148.18
NE. qr. frac. " 15, " " " " " 143.10
E. hf. of SE. qr. " 21, " " " " " 80.00
W. hf. SW. qr. " 22, " " " " " 80.00
NW. qr. of NW. qr. sec. 28, T. 17, R. 2 west 40.00
W. hf. sec. 29, T. 17, R. 2 west 320.00
W. hf. of NW. qr. sec. 32, T. 17, R. 2 west 80.00

LANDS IN ARKANSAS (Continued).

E. hf. sec. 7, T. 17, R. 3 west 320.00
W. hf. " 8, " " " " " 320.00
All of " 22, " " " " " 640.00
All of " 27, " " " " " 640.00
All of " 28, " " " " " 640.00
E. hf. " 29, " " " " " 320.00
E. hf. " 32, " " " " " 320.00
E. hf. " 11, " 18 " " " 331.84
NW. qr. of SE. qr. sec. 6, T. 19, R. 2, west 40.00
S. hf. of SE. qr. " 10, " " " " " 80.00
W. hf. of NW. qr. " 10, " " " " " 80.00
SE. qr. sec. 17, T. 19 south, R. 2 west 160.00
NW. qr. of NE. qr. sec. 20, T. 19, R. 2 west 40.00
SE. qr. sec. 20, T. 19, R. 2 west 160.00
Frac. " 31, " " " " " 56.22
All " 20, " " " 3 " 640.00
W. hf. of W. hf. & SE. qr. of NW. qr. sec. 22, T. 19, R. 3 west 200.00
E. hf. of E. hf. sec. 21, T. 19, R. 3 west 160.00
SW. qr. " 31, " " " " " 74.31
227 Frac. sec. 32, T. 19, R. 3 west 108.76
E hf. of NE. qr. sec. 13, T. 18, R. 5 west 80.00
W. frac. hf. S. hf. SW. qr. of NE. qr., & NW. qr. of SE. qr. sec. 18, T. 18, R. 4 west; SW. frac. qr. of sec. 7, T. 18, R. 4 west 646.46

MISSISSIPPI COUNTY.

Boyd, Johnson, and Hunt.

W. frac. hf. of SW. qr. sec. 6, T. 12, R. 2 west 82.00
SW. frac. qr. east of bayou, sec. 3; SE. qr. sec. 9; W. hf. of SW. qr. & S. frac. hf. of NW. qr. west of bayou on sec. 10; N. frac. hf. of NW. qr. both sides bayou on sec. 15; W. frac. hf. SW. qr., W. frac. hf. NW. qr. sec. 30, west of bayou; SE. qr. of SW. qr. sec. 36; NW. qr. sec. 2, S. hf. of NE. qr. sec. 2, T. 17, R. 2 west 612.12
W. frac. hf. of NE. qr. sec. 15; E. frac. part of SE. qr., east of river, sec. 15; all NE. qr. and W. frac. h'f SE. qr. sec. 22; NW. frac. qr. N. frac. hf. NE. qr.; W. frac. p't NE. qr. west of river; SE. frac. qr. of SE. frac. qr. sec. 23, T. 12, R. 8 east 728.65
S. hf. of N. hf. of sec. 24, section 23, T. 12, R. 7 east 626.70
228 N. hf. of NE. qr., SE. qr. of NE. qr., NW. qr. and W. hf. of SW. qr., and SE. qr. of SW. qr. sec. 20, T. 12, R. 8 east 400.00

Lands in Louisiana.

CARROLL COUNTY.

	All of sec. 35, T. 18 north, of R. 8 east	640.00
	W. hf. " 1, " 17, R. 8 east	269.00
	SW. qr. of SW. qr. sec. 26, T. 19, R. 11 east	40.00
	N. hf. of N. hf. sec. 34, T. 19, R. 11 east	160.00
	SE. qr. of NW. qr. & SW. qr. of NE. qr. sec. 34, T. 19, R. 11 east	80.31

LAKE BISTENEAU LANDS, CLAIBORNE PARISH.

	Undivided 2-3 int. E. hf. of SE. qr. sec. 17, T. 16, R. 7 west	80.00
	Undivided 2-3 int. SE. qr. sec. 19, T. 16, R. 7 west	160.00
	Undivided 2-3 int. N. hf. & SW. qr. sec. 20, T. 16, R. 7 west	480.00
	Undivided 2-3 int. NE. qr. sec. 5, T. 15, R. 9 west	160.00
	Undivided 2-3 int. NE. qr. sec. 6, T. 15, R. 9 west	160.00
	Undivided 2-3 int. SE. qr. & E. hf. of SW. qr. sec. 31, T. 16, R. 9 west	240.00
	Undivided 2-3 int. E. hf. of NE. qr. sec. 31, T. 16, R. 9 west	80.00
	Undivided 2-3 int. SW. qr. sec. 32, T. 16, R. 7 west	160.00
229	Undivided 2-3 int. W. hf. of NW. qr. sec. 32, T. 16, R. 9 west	80.

LIVINGSTON PARISH.

	E. hf. sec. 21, T. 5, R. 7 east	326.28
	All " 22, " " " " "	643.14
	W. hf. " 23, " " " " "	321.10
	W. hf. of NW. qr. sec. 26, T. 5, R. 7 east	79.22
	N. hf. of sec. 27, T. 5, R. 7 east	320.32
	SW. qr. " " " " " " "	160.00
	NE. qr. & E. hf. of SE. qr. sec. 28, T. 5, R. 7 east	238.74
	SE. qr. & S. hf. of NE. qr. & SE. qr. of NW. qr. sec. 34, T. 5, R. 7 east	275.64
	W. hf. of SE. qr. sec. 35, T. 5, R. 7 east	393.26

ST. HELENA PARISH.

	W. hf. sec. 3, T. 1 south, R. 7 east	324.00
	SE. qr. sec. 3, T. 1 south, R. 7 east	162.00
	W. hf. of NE. qr. SE. qr. of NE. qr. sec. 3, T. 1 south, range 7 east	121.40

MADISON PARISH (PAW ISLAND NO. 105.)

	N. hf. lot sec. 34, T. 17, R. 14 east	92.00
	S. hf. sec. 35, T. 17, R. 14 east	83.24
	All " 36, " " " " "	185.68
	All " 39, " " " " "	163.60
	Undivided hf. int. sec. 37, containing	85.38
230	Half interest with A. R. Hynes in following lands, Madison Parish: W. hf. sec. 23, W. hf. sec. 26, E. hf. of E. hf. sec. 27, E. hf. of sec. 34, W. hf. of NW. qr. sec. 35, all in T. 16 north, of R. 10 east	1,200.00

ST. TAMANY PARISH.

	E. hf. sec. 7, T. 7 south, R. 15 east	320.00
	SW. qr. & E. hf. of NW. qr. sec. 7, T. 7, R. 15 east	240.00
	All frac. sec. 8, T. 7, R. 15 east	491.92
	N. hf. " 17, " " " " "	320.00
	S. hf. " 17, " " " " "	320.00
	N. hf & SE. qr. sec. 18, T. 7, R. 15 east	480.00
	NE. qr. & SE. qr. sec. 19, T. 7, R. 15 east	320.00
	All sec. 20, T. 7, R. 15 east	640.00
	All " 21, " " " " "	640.00
	All frac. sec. 15, T. 7, R. 15 east	87.00
	" " " 22, " " " " "	264.04
	" " " 27, " " " " "	195.54
	" " " 28, " " " " "	640.00
	E. hf. & N. hf. of NW. qr. sec. 29, T. 7, R. 15 east	480.00
	S. hf. of SW. qr. E. hf. of NE. qr. of NW. qr. sec. 30, T. 7, R. 15 east	20.00

	E. hf. of SE. qr. of SW. qr. sec. 30, T. 7, R. 15 east	20.00
	S. hf. of SE. qr. sec. 30, T. 7, R. 15 east	80.00
	SE. qr. & E. hf. of SW. qr. and E. hf. of E. hf. of NW. qr. sec. 31, T. 7, R. 15 east	285.32
231	NE. qr. sec. 31, T. 7, R. 15 east	163.00
	All " 32, " "south, R. 15 east	653.40
	All " 33, " " " " " "	652.32
	All frac. sec. 34, T. 7 south, R. 15 east	433.64
	Lots 4 & 5 & NE. qr. sec. 6, T. 8 south, R. 15 east	236.34
	All sec. 5, T. 8 south, range 15 east	639.68
	All " 4, " " " " " "	638.80
	All " 3, " " " " " "	638.80
	All frac. sec. 2, T. 8 south, R. 15 east	197.92
	NE. qr. " 8, " " " " "	160.00
	W. hf. of SE. qr. sec. 8, T. 8 south, R. 15 east	79.80
	W. hf. of (east of Pearl River) sec. 8, T. 8 south, R. 15 east	271.70
	N. hf. of sec. 9, T. 8 south, R. 15 east	319.20
	N. hf. of SE. qr. sec. 10, T. 8 south, R. 15 east	480.30
	All frac. sec. 11, T. 8 south, R. 15 east	480.41
	N. hf. of SE. qr. sec. 14, T. 8 south, R. 15 east	478.87
	Frac. NW. (less lot 2) sec. 13, T. 8 south, R. 15 east	62.80
	SW. qr. sec. 13, T. 8 south, R. 15 east	160.00
	Frac. SE. qr. sec. 13, T. 8 south, R. 15 east	107.20
	NE. qr. frac. lot 6 & 8, sec. 17, T. 8 south, R. 15 east	180.61
	N. hf. of SE. qr. sec. 24, T. 8, south, range 15 east	479.07
232	All frac. sec. 18, T. 8 south, R. 16 east	20.80
	All frac. (north of Pearl River) sec. 19, T. 8, R. 16 east	258.56
	Frac. N. hf. sec. 30, T. 8 south, R. 16 east	133.09
	NW. qr. of S.W. qr., sect. 30, T. 8 south, R. 16 east	51.61

LANDS IN MISSISSIPPI.

WASHINGTON COUNTY.

	S. hf. of sec. 11, T. 17, R. 6 east	320.00
	All of " 10, " " " " "	639.64
	E. hf. & E. hf. of W. hf., sec. 9, T. 17, R. 6 west	477.93
	E. hf. and E. hf. of W. hf., sec. 4, T. 17, R. 6 west	478.23
	N. hf. of sec. 3, T. 14, R. 4 west	296.91
	N. hf. & SW qr. of sec. 4, T. 14, R. 4 west	445.23
	SE. qr. sec. 9, T. 14, R. 4 west	160.86
	SW. qr. & W. hf. of SE. qr. sec. 10, T. 14, R. 4 west	240.06
	W. hf. & the W. hf. of SE. qr. sec. 29, T. 14, R. 4 west	401.50
	N. hf. of sec. 31, T. 14, R. 4 west	320.00

Parts of 29 and 31 are in Yazoo Co., the county line running through them.

	N. hf. of SE. qr. sec. 34, T. 17, R. 7 west	480.00
	W. hf. sec. 35, T. 17, R. 7 west	320.00
233	E. hf. of E. hf., sec. 28, T. 16, R. 6 west	160.00
	SW. qr. & SW. qr. of NW. qr. sec. 15, T. 16, R. 6 west	200.00
	SW. qr. & W. hf. of SE. qr. sec. 3, T. 14, R. 4 west	222.69
	SE. qr. sec. 4, T. 14, R. 4 west	148.41
	NE. qr. & E. hf. & NW. qr. sec 9, T. 14, R. 4 west	241.29

YAZOO COUNTY.

	Lots 3, 4, 5, 6, 12 & 13, sec. 2, T. 13, R. 4 west	208.64
	E. hf. of SW. qr. sec. 3, T. 13, R. 4 west	446.80
	SE. qr. of sec. 4, T. 13, R. 4 west	160.00
	E. hf., " 9, " " " " "	320.32
	NW. qr. " 10, " " " " "	160.65
	NW. qr. " 32, " 14 " " "	160.16

Lands adjoining 32, sec. 29 & 31, partly in Washington County.

SUNFLOWER COUNTY.

	N. hf. & SE. qr. sec. 29, T. 14, R. 4 west	480.00

TALLAHATCHIE COUNTY.

All of sec. 9, T. 26, R. 2 west	644.92
N. hf. & W. hf. of SW. qr. sec. 10, T. 26, R. 2 west	403.18

WARREN COUNTY.

E. hf. of SE. qr., SW. qr. of SE. qr. sec. 5, T. 17, R. 5 east	122.76
SE. qr. of SW. qr. " " " " " " "	81.90
W. hf. of NW. qr. " 8 " " " " "	79.75

HARRISON COUNTY.

S.W. qr. of sec. 25, T. 65, R. 28	160.00

NODAWAY COUNTY.

W. hf. of NE. qr. and NW. qr. of SE. qr. sec. 14, T. 65, R. 35	120.00

DE KALB COUNTY.

Lot in section 4, T. 58, R. 31	80.00

235 And afterwards, to wit, on the 11th day of April, A. D. 1877, the depositions of John A. Klein and A. H. Arthur were filed in the clerk's office of said court, which, with the endorsement, thereon is in words and figures following, to wit:

In the case of Jno. A. Klein et als. vs. D. C. Shanks, exr., now pending on the equity side of the circuit court of the U. S. for the southern district of Mississippi, it is hereby agreed that the depositions of A. H. Arthur & Jno. A. Klein may be taken before Lay Lindsay, U. S. comm'r, upon the following interrogatories in chief and such x-interrogatories as solicitors for def't in said cause may file upon answer being made to said interrogatories in chief. That commissioner's notice in the taking of said depositions be waived. The same to be read upon the trial of said cause in behalf of complainants, subject only to all proper exceptions on account of competency and relevancy of the testimony.

November 3d, 1876.

BUCK & CLARK,
Sol's for Compl'ts.
PITTMAN & PITTMAN,
Sol's for Respond'ts.

U. S. OF AMERICA,
State of Mississippi:

Southern district.

COUNTY OF WARREN,
City of Vicksburg, ss:

236 I, Lay Lindsay, a commissioner of the United States circuit court for said district & State, hereby certify that in accordance with the agreement of counsel in the within-named cause, I caused to come before me at my office in said city John A. Klein and A. H. Arthur, the witnesses therein named, who, being by me first duly sworn, deposes and says as herein certified by me in answer to the interrogatories and cross-interrogatories hereto annexed:

LAY LINDSAY,
U. S. Comm'r.

Interrogatories to John A. Klein, whose answers thereto will be read
evidence in the case pending in the circuit court of the United Sta
for the southern district of Mississippi, on the chancery side of
docket, wherein et al. are complainants, and David
Shanks is defendant, on behalf of complainants.

Int'y 1. Where do you reside, and how long have you lived there
Int'y 2. Were you acquainted with the firm of Brown & Johnston,
merly doing business at Vicksburg, Mississippi? If you say you we
state who composed that firm, and how long you knew them respe
ively, and in what business the firm was engaged.

237 Int'y 3. Look on a deed of trust made exhibit to the bill
complainants herein, and state whether you are the John A. Kl
made trustee therein.

Int'y 4. Have you sold the property and particularly the lots in
city of Vicksburg mentioned in said deed of trust? If you have, st
when and how you sold it, whether at public or private sale, for cash
on credit, and upon what notice, if any, of the time and place of sa
and how the property, and especially the Vicksburg property, sold, a
whether or not it brought its reasonable and fair value.

Int'y 5. State whether you have bought and sold much real estate
Vicksburg, and how cognizant of or known of many sa'es made
others; to what extent in the aggregate have you personally and
trustee or agent, at various times, dealt in such property, and genera
what have been your means of knowing the value of real estate in th
place?

Int'y 6. File with your answer to this interrogatory a full schedule
list of all the property in Vicksburg sold by you as trustee, and in
cordance with the provisions of said deed of trust, showing the name
each purchaser and the price or amount bro't by such lot or p

238 cel of land.

Int'y 7. How do the prices paid for said property at said sa
compare with the amounts the property could be sold for now if it we
in the same condition it was at the time said sales were made?

Int'y 8. State what you did with the proceeds of the sales of all
said property, and how much, if any, of said proceeds were applied
you to the payment of the debts mentioned in said Schedule A, ma
part of said deed of trust.

Int'y 9. State whether or not all the debts mentioned in said Sched
A have been fully paid; and, if not, what per cent. or proportion
them still remain unpaid?

Int'y 10. Have you sold all the property mentioned in said deed a
therein conveyed to you as trustee; and if you say you have not, sta
why not, and what property rema ns unsold, and what it would n
bring, or would have brought, at any time since the date of said de
of trust if sold at public auction for cash.

Int'y 11. Did you ever have any conversation with said defe

239 ant Shanks, or hear him converse with others, or say anythi
touching the execution of said deed of trust, or the sale there
der? if so, state all he told you or heard him tell others on that subje
and especially whether he wanted the deed of trust made, or approve
or desired the sales to be made under it for the purposes mention
in it.

Int'y 12. What did you and the purchasers at the sales made by y
as trustee understand at the time of the sales to be said Shanks' vie
and wishes on the subject of the sale as expressed by him, and es

cially in regard to his approval of that whole proceeding and desire that the sales should be made?

JOHN A. KLEIN being produced & by me first duly sworn, deposes:

Answer to int'y 1st. I reside in Vicksburg, Miss., and have for forty years.

Answer to 2d. I was acquainted with both members of that firm; it was composed of Shepperd Brown and Joseph H. Johnston, & knew them for over thirty years. They were bankers in the city of Vicksburg.

Answer to 3d. I have looked on the deed of trust referred to. I am the trustee therein.

240 Ans. to 4th. I have sold all the lots in the city of Vicksburg mentioned in that deed of trust, but have not sold any other of the lands or property named in it. I first advertised it for thirty days, or the usual time, and sold it at public auction for cash to the highest bidder. It all brought an immense price—at least one-third more than it would have done at any time since. Most of it now would not sell for more than one-half the price it brought then.

Ans. to int'y 5th. I have bought and sold real estate to a large amount—several hundred thousand dollars—personally and as agent and trustee, and have known of many sales made by others, and this is the source of my knowledge on the subject of the value of real estate in Vicksburg.

Ans. to 6th. Witness here went to his office and furnished the commissioner with the paper hereto annexed, marked B, as his reply hereto.

Exhibit B, in answer to question No. 6, by J. A. Klein.—Lay Lindsay, U. S. Comm'r.

Lot 24 feet 6 in., corner of Washington & Clay, known as Brown & Johnston comn. (no improvements), sold to B. R. Thomas for	11,500
Veranda lot 73 ft. by 147-6, no improvements, sold to Bloom for	5,925
241 Store-house on Washington street, 24 feet 6 in., to Genella, for	14,200
Vacant lot on Clay street to Fritz Ackerman for	4,350
Stable on Clay street, back of Hardaway's store, to Fritz Ackerman for	7,100
Martin House, on Washington street, to Jos. Bolto for	11,800
Mill machinery	1,000

By J. A. KLEIN, *Trustee.*

Ans. to 7th. Take it in whole it would not now sell for one-half the price it brought then—some might bring one half, some would not—some might bring a little more. I would not now give one-half it then sold for & take it all.

Ans. to 8th. I paid the proceeds to the creditors of Brown & Johnston, after paying expenses attending the sale. I made pro-rata distribution to about 62½ cents on the dollar.

Ans. to 9th. The balance above the 62½ cts. remains unpaid.

Ans. to 10th. I have sold none other but the Vicksburg property; the balance remains unsold. The West Jackson property I had laid off

in lots. I went out there in person and have advertised it twi
242 and failed to get a bid that I thought was fair, and declined
sell, and all remains unsold except the Vicksburg property. T
lands are all wild lands, and I never could get a bid for them. Nev
since the execution of that deed of trust would they sell for enough
pay the taxes in cash.

Ans. to 11th. I had no particular conversation with him on the su
ject, though he never made any objection; we only talked about t
general business. I never heard him talk to others on the subje
that I recollect. I remember he said the whole thing was a hopele
ruin.

Ans. to 12th. I considered that we had his whole approval, and th
he desired the debts should be paid. He stated that he hoped som
thing would turn up out of which the debts might be paid.

J. A. KLEIN.

Sworn to and subscribed before me this 27th day of October, 1876.

LAY LINDSAY,
U. S. Comm'r.

Interrogatories to Alexander H. Arthur.

1. What is your name, age, and place of residence, and how lo
have you resided there?

2. What has been your vocation and business during yo
243 residence in Vicksburg, and what position and offices have y
occupied in that time?

3. Were you acquainted with Shepperd Brown, and were you a
quainted with Joseph H. Johnston in his lifetime, and where and ho
long did you know them, respectively?

4. Who composed the firm of Brown & Johnston? Where did the
do business, and how long and what was the nature and character
the business of the firm, and was it or not part of their copartnershi
business to buy and sell real estate on speculation or for profit, a
was or not that just as much the regular business of the firm as buyi
and selling notes, bills of exchange, and drafts?

5. State whether or not you were well acquainted with their busines
and especially the business of said firm. Give your means and oppo
tunity of knowledge on that subject, and state what positions of tru
and confidence you held towards them, and the business of said firm?

6. Did they have any uniform rule or custom in the mode or nan
of taking deeds and titles to real estate purchased in the course of th
business and with the funds of the firm? If they did, state wh
244 that rule or custom was, and whether the deeds were not som
times taken to Shepperd Brown and sometimes to Joseph H
Johnston, and sometimes to Shepperd Brown and Joseph H. Joh
ston?

7. Were said Shepperd Brown and Joseph H. Johnston partners i
any other firms or under any other name than that of Brown & Joh
ston at any time during your acquaintance with them? If they were, gi
the names and style of the several other firms, the nature and charact
of the business of each, the places of business respectively, and whe
and how long they were engaged in it, and your means of acquain
ance with the business of each; and state generally the amount and e
tent of the dealings and transactions of each firm, including that
Brown & Johnston, per annum.

8. At or about the close of the late civil war what was the conditio

of said several firms and how much did they respectively owe, and whether or not all or either of them were solvent or insolvent, and how much they respectively owed?

9. Have the debts of Brown & Johnston, or of either of said firms, yet been paid; and how much, including interest, do they still respectively owe?

245 10th. Look on the deed of trust made exhibit to the bill of complainants herein, and also Schedule A made part of said deed of trust, and state who made out and furnished the list of lands and town lots embraced in said deed to the draftsman thereof, and who made out and wrote the original Schedule A.

11th. State whether the list of debts or claims set out in said Schedule A were or were not just and legal liabilities of Brown & Johnston, and of the character respectively stated in said deed of trust and Schedule A. Have they all been yet paid; if not, what proportion, including interest, still remain unpaid?

12. Were you acquainted with the property, including especially all the lots and houses mentioned in said deed of trust, situated in the city of Vicksburg? If yea, state how all the lots and property in Vicksburg were paid for, and with whose funds, and particularly whether with the individual funds of Shepperd Brown and Joseph H. Johnston or the partnership funds of Brown & Johnston; and whether they held and treated the property as partnership or individual property, as belonging to the firm or to the partners severally.

246 13. Were you present when said lots and city property were sold under said deed of trust by John A. Klein, or do you know the prices at which they were sold by him? If so, state whether they were well sold or not, and for their full market value; and how do the prices then paid compare with what the same lots in their then condition could now be sold for in cash? Has property of that kind in Vicksburg since then advanced or declined in marketable value, and what per centum?

14. State whether you are, and have been for years, very well acquainted or not with the value of real estate in Vicksburg, and what opportunities your positions of member of the city council, board of of police, and board of supervisors have afforded you of becoming well informed on that subject.

15. What was done by John A. Klein, trustee, with the proceeds of sales of said city property, and to whose debts, if any one's, were they applied to the payment of, and what proportion of the deferred debts mentioned in said Schedule A were paid by said proceeds, and what proportion, if any, still remain unpaid, and how much would the unpaid portion, including interest, now amount to?

247 16. Are you acquainted with the defendant, David C. Shanks, and did you have any conversation with him at or about the time said deed of trust was executed, or at any time? If so, state all he said to you on the subject of it, and its being executed by Shepperd Brown as survivor of Joseph H. Johnston, and why he did not, as executor of Johnston's will, join in the deed.

17. Did he, Shanks, approve of the execution of the deed of trust by Brown, as survivor, and want the property sold for the payment of the debts of the firm as mentioned in the deed, and consider that course right and proper? And state, also, whether at the time of the sale of the Vicksburg property by Kline, as trustee, it was or not generally known or understood amongst the purchasers at the sale that both Brown and

Shanks desired it to be sold for the purposes mentioned in said deed of trust.

A. H. ARTHUR, being first duly sworn, deposes and says:

1st. Answer to 1st interrogatory. My name, Alexander H. Arthur; age, in my 64th year; & residence, Vicksburg, Mississippi, & where I have resided continuously nearly 41 years.

248 2d. Answer to 2d interrog. I have been clerk & banker, and held the offices of city councilman, member of county boards, State senator, clerk of circuit & chancery court, & judge of city court.

3d. Answer to 3d interrog. I know Shepperd Brown, and also knew Joseph H. Johnston in his lifetime, both in Vicksburg & in New Orleans. I believe it has been about 38 or 39 years since I first became acquainted with them respectively.

4th. Answer to 4th interrog. The firm of Brown & Johnston at Vicksburg was composed of Shepperd Brown & Joseph H. Johnston. They did business in Vicksburg from about the year 1837 to the time of the late civil war—a general banking business—buying and selling bank notes, gold & silver, bills of exchange & drafts, Louisiana & Mississippi land scrip, United States soldier's bounty-land warrants, buying & entering & selling real estate, &c.; and the buying & selling real estate, entering land scrip, & selling the land was part of the regular business of the firm for speculation & profit.

5th. Answer to 5th interrog. I was well acquainted with the business of the firm by having business with it; and from the year 1853 transacting business for the firm as a confidential agent, until April, in the year 1862, when they took me in as a partner in the banking
249 business at Vicksburg, of Brown, Johnston & Arthur, Messrs. Brown and Johnston residing in New Orleans and I at Vicksburg.

6th. Answer to 6th interrog. They did not seem to have adopted a uniform rule in their purchase of real estate, for sometimes the deeds were made out in the name of Shepperd Brown, who attended the sales of property, and sometimes to Shepperd Brown & Joseph H. Johnston, but where it was purchased for the firm, or to secure some debt to the firm, the cost was charged to the property, as partnership, for the firm of Brown & Johnston. There are many of the deeds of firm property made to Shepperd Brown. When property was bought for the use of either of the members, the deeds were made to them respectively, and the cost charged to their separate individual accounts.

7th. Answer to 7th interrog. Shepperd Brown & Joseph H. Johnston, during my acquaintance with them, were partners in other firms besides that of Brown & Johnston. They were partners in the cotton factors & commission house of Rotchford, Brown & Co., in New Orleans; and also partners with Raymond A. Bourk in the house of Brown, Johnston & Co., a banking house in New Orleans. They were also partners with A.
M. Boyd in the firm of Boyd & Johnston for the purchase of land-
250 scrip, & entering & selling real estate, &c., operating in Louisiana & Arkansas principally, and I think that H. P. Hunt, with A. M. Boyd & Brown & Johnston, constituted another firm in entering & speculating in real estate in Arkansas, the firm being Boyd, Johnston & Hunt. The cotton house & banking house in New Orleans both did a very large business, but I cannot tell the extent of it, though I know it was large from the extent of it passing through the house at Vicksburg, & from my general knowledge of it. The banking-house at Vicksburg, including exchange business, real estate rents, & plantation profits, did a very large business, but I did not charge my memory with the amount

and cannot give the extent per annum. I cannot recollect the dates of the establishment of these firms, but they existed many years.

8th. Answer to 8th interrog. At the close of the late civil war the condition of the firms of Rotchford, Brown & Co., Brown, Johnston & Co., & Brown & Johnston were considered insolvent from the loss of negroes & personal property, depreciation of lands & securities, &c. I know that Rotchford, Brown & Co., the cotton house in New Orleans, had a very large amount of liabilities outstanding; so also had the banking house of Brown, Johnston & Co., of New Orleans, but I have no means of knowing how much they owed respectively or what they now owe; the house of Brown & Johnston, at Vicksburg, did
251 not have so much out as the other houses, and but for the loss of negroes, cotton, depreciation of securities, and a large amount of confederate notes which they had received from debtors, and from sale of property, which proved worthless, their immediate liabilities, I think, could have been met, but the loss left nothing comparatively to pay their liabilities but their real estate.

9th. Answer to 9th interrog. The debts of Brown & Johnston, nor of Rotchford, Brown & Co., or Brown, Johnston & Co. have not yet been paid, but I have no means of knowing how much they still owe.

10th. Answer to 10th interrog. I think I furnished the list of lands & lots of Brown & Johnston, specified in the deed of trust; I do not know who made out & wrote the original schedule A of the debts to be provided for in the deed, but I think it is in the handwriting of one of the clerks of the cotton or banking house in New Orleans, but I find from memorandums thereon, that I made some corrections in it after its arrival at Vicksburg, when the deed was made.

11th. Answer to 11th interrog. The list of debts or claims in schedule A were just & were liabilities of Brown & Johnston, debts
252 created by and for the said firm, with the exception of a certificate of deposit No. 11, in favor of the Merchants' Ins. Co. of Richmond, Va., for $78 30, which was collected by Brown, Johnston & Arthur, though it was sent to Brown & Johnston & collected for them; since the war the holders presented the same to me, as my name was on it, and I paid it individually; the other certificates issued by Brown, Johnston & Arthur, per Gordon Robinson, were simply renewals of debts due by Brown & Johnston. The debts mentioned in schedule A have not all been paid, but what proportion remains unpaid I have no means of knowing, but suppose the assignee can tell.

12th. Answer to 12th interrog. I was well acquainted with the lands & lots in Vicksburg, specified in said deed of trust; they were bought & paid for by the partnership funds of Brown & Johnston; one of them bought for the banking house for the firm; some of them bought to secure debts due the firm, and some on speculation; the partners always treated their real estate as partnership property in their instructions to me as their agent, the rents & profits of which, at the end of each year, was placed in with all the other profits of the firm in banking business and speculation, to the general account of profit & loss. Mr. Brown &
Mr. Johnston, if I remember correctly, had separate real estate
253 and kept separate individual accounts.

13th. Answer to 13th interrog. I was present when part of the Vicksburg property was sold by Mr. Kline, as assignee, & I thought then & still think that the property brought its full value; the same property, in its then condition, would not now command such prices; many of the lots have since been highly improved; the pressure of late has depreciated property, but to what extent I cannot state.

14th. Answer to 14th interrog. My position as banker, city councilman, member of the county boards, agent of Brown & Johnston, owner of real estate, &c., has given me opportunity of becoming acquainted with the value of real estate in Vicksburg; but this year, as member of the board of supervisors of Warren County, in which Vicksburg is situated, & representing the city in that board, where the taxable value of all the property is tested, my attention has been more particularly called to the general depreciation of real estate as compared with former years.

15th. Answer to 15th interrog. Mr. John A. Kline, as trustee in said deed of trust from Brown & Johnston for the benefit of creditors, has, so far as I know and believe, apportioned the funds arising from
254 the sale of the Vicksburg property among the creditors specified in schedule A, amounting to about 62½ cents on the dollar of the principal of said debts, as near as I recollect; I think the other property in other counties is still unsold; at least I have never heard of the sale & do not know how much remains unpaid.

16th. Answer to 16th interrog. I am acquainted with D. C. Shanks, the def't; after the war he came to Vicksburg to look after the business of the firm, but I do not remember any conversation with him in relation to the deed of trust, nor do I remember that he was here when it was executed; in all my conversations with him about the business of the firm, he seemed to be satisfied with what Mr. Brown had done & was doing to settle up the business; & he would not qualify as ex'or of Mr. Johnston in Mississippi, but let Mr. Brown, as surviving partner, settle up the business.

17th. Answer to 17th interrog. I do not remember that Col. Shanks was here at the time of the execution of the deed of trust to Mr. Kline, or that I had any conversations with him approving its execution; nor do I know that he was here at the sale of the property, but the impressions left on my mind in conversations with Col. Shanks & with Joel H. Willis, a large creditor, & who was intimate with Col. Shanks
255 when he visited Vicksburg, was that Col. Shanks was satisfied with the prices of the property sold at Vicksburg & with the sale; and would not qualify as ex'or of J. H. Johnston, dec'd, in Mississippi; I recollect no particular conversation in which he approved the execution of the deed, but I have always been under the impression, from conversations I did have with him, that he was satisfied with what Mr. Brown had done & was doing in the business. And having answered all the questions, deponent saith not.

A. H. ARTHUR.

Sworn to and subscribed before me, Oct. 27, 1876.

LAY LINDSAY,
U. S. Comm'r.

Cross-interrogatories to A. H. Arthur by Pittman & Pittman, solicitors for def't.

1st. In answer to int'g. 6th you say that real estate was sometimes bought in the name of one member of the firm and sometimes in the name of the other, and sometimes in the name of both, but when it was bought by either partner for his individual use, the purchase-money was charged to the individual account of the partner purchasing; now, if this was the case, was there any way in which you could tell whether property purchased was for partnership account or individual
256 account, except by the entries on the books?

2d. X. Where are the books of Brown & Johnston and Brown, Johnston & Arthur?

3d. X. If you say that a portion of them are lost, state what portion and what books are still in existence, and in whose possession said books now are.

4th. X. Is it possible for you to recollect & state positively what entry was made when each particular piece of property was purchased?

5. X. For instance, can you give from memory, and without looking at the books, the entries that were made when the firm purchased the property known as the Martin House? If so, give the entries.

6th. X. Can you specity any piece of property bought in the name of Shepherd Brown for account of the firm of Brown & Johnston?

7th. X. Who kept the books of Brown & Johnston from the year 1854 to the time of the change of the firm to Brown, Johnston & Arthur?

8th. X. How long since you examined the books of Brown & Johnston?

257 9th. X. What lands were owned by Brown & Johnston at the time of the change of the firm to Brown, Johnson & Arthur, in Louisiana, Arkansas, Missouri, & Minnesota?

10th. X. Were those lands in the State bought with individual funds or with funds of Brown & Johnston?

11th. X. What difference was made in the entries when Brown & Johnston purchased in those States and when they purchased in Mississippi?

12th. X. Were there any written articles of copartnership between Brown & Johnston or Brown, Johnston & Arthur? If yea, and you have them or either of them in your possession, please attach the original as an exhibit to this answer.

13th. X. Can you give schedule of the bills receivable and other personal property belonging to Brown and Johnston at the time Johnston's death and the disposition made thereof?

14th. If you can, append a copy thereof to your answer.

15th. Examine paper hereto attached, marked Exhibit A, to
258 this interrogatory and state whether this statement was written by you, and whether it was correct at that time.

16th. X. Examine the books in your possession and state what was the debit of Shepherd Brown to the firm of Brown & Johnston at the time of the dissolution of the partnership.

17th. X. Examine the printed list of lands of Brown & Johnston attached as an exhibit to Shepperd Brown's testimony in this case and state if the same is a correct list of the lands belonging to Shepperd Brown and Jos. H. Johnston at the time of the dissolution of the firm of Brown & Johnston.

Answer to cross-interrogatories.

1st. Answer to 1st cross-interrogatory: There was no way in which I could tell besides entries on the books, except from personal knowledge or by information from the partners themselves. I was frequently present at sales of property & saw Mr. Brown bid for property that I was satisfied was for the firm, but cried out to him, as it was to secure debts to the firm, though the deeds were made to him; and when I became their agent in 1853, I had their books in the office and could see the entries & know whether the amounts of the purchases was
259 charged to the partners individually or to the firm, & when they

sold the property they directed me to make deeds in the name of the firm if it was partnership property.

2d. Answer to 2d cross-interrog.: Mr. Johnston came up from New Orleans on the approach of the Federal fleet on that city, and took part of the books of Brown & Johnston in May, 1862, to the interior of the State, whilst I remained at Vicksburg. Again in May, 1863, Mr. Johnston was in Vicksburg, & when the fleet approached took some more of the books to Jackson and this was the last I ever saw of Mr. Johnston. I understood that on the approach of the Federal Army to Jackson, he went to Mobile & then to Virginia, where he died, I believe, in July, 1863, & many of the books and papers he took with him got scattered and lost. The books of Brown, Johnston & Arthur, together with a large number of the old books and papers of Brown & Johnston were in the vault of the banking house when it burned down during the latter part of the siege of Vicksburg, and when the city was taken the vault was broken open & nearly everything destroyed or scattered over the foundation of the building and in the streets of Vicksburg.

260 3d. Answer to 3d cross-interrog.: After the war I learned that Mr. Brown found a lot of the books of Brown & Johnston at Jackson—2 old bill books in which were entered bills purchased by the firm; 1 bill collection book in which was entered the collections sent to the firm; 1 old memo. land book; an individual ledger from 1858 to 1862; 2 general ledgers from 1851 to 1862, and a lot of old cash scratcher books from 1851 to 1862, which he ordered to be sent to me at Vicksburg, and I have them yet. I don't know what became of the books in the vault, but suppose the army officers got hold of the individual ledger & gen'l ledger of Brown, Johnson & Arthur to see who kept accounts there, but I never recovered them. There was so many books accumulated in 25 years' business that I cannot give a detailed statement of what were lost, and I have given those I recovered.

4th. Answer to 4th cross-interrog.: It is not possible; most of the property was purchased before I became their agent.

5th. Answer to 5th cross-interrog.: I cannot give the entries made for the purchase of the Martin House as there were several entries made before I became agent. I was present at the sale (Judge Martin being a relative of mine) & I think it was purchased by Mr. Brown for

261 the firm, which held mechanic's lien on it, and I think they had G. P. Cosby, one of their clerks, appointed com'r to sell it. They also had to purchase other claims on it to perfect title, one, I believe, of D. Swett; one J. H. Hay, adm'r of J. H. Martin; and perhaps some tax titles. But no matter in whose names the deeds were made, or the entries on the books at the time, it was always regarded as partnership property, and they instructed me as their agent to offer it as such for sale.

6th. Answer to 6th cross-interrog.: I was present at the sale of the Mielke property, & as well as I remember, Mr. Brown bought the property now known as the Hardaway corner, on Washington street, and I think some of the other property was bought by Brown & Johnston; and after I became agent the firm directed me to enter the proceeds of the sale to Mr. Hardaway to the credit of the firm. I was also present at a sale by the U. S. marshal, & I think Mr. Brown bought some of the property on China street, in the block of the Washington Hotel, which I think was afterwards firm property; but I speak of this last from memory and remember no conversation with either Mr. Brown or Mr. Johnston on the subject.

7th. Answer to 7th cross-interrog.: G. P. Cosby, G. H. C. Shaw, & W. S. Wheeler kept the books of the firm of Brown & Johnston from 1854 to 1862.

262 8th answer to 8th cross interrog. I had the books sent to me packed away, & had no reason or occasion to examine the books of Brown & Johnston until your present questions to me in these cross-interrogatories, to see what I had left, so as to give you a description of them.

9th answer to 9th interrog. I had a list of the lands & lots of Brown & Johnston made out before the war, & had it printed for them to send to purchasers; but I cannot tell or recollect what portion had been sold prior to the change of the firm in 1862. Mr. Brown & Mr. Johnston, who resided in New Orleans, sold some and made deeds, and I sold some as their agent; but though I held a power of attorney from the firm to sell, I preferred to send the deeds to them to be executed. Mr. Johnston himself sold some in 1862 & 1863. Some of these lists I found among the scattered papers, & I gave one of these printed lists to Mr. W. B. Pittman, one of the counsel in this case, and I cannot find another; but if found, or Mr. Pittman can find the one I gave him, I will attach it to this answer as an exhibit. The list contained or included those in Louisiana, Arkansas, Missouri, and Minnesota, as well as I recollect, in full. The new firm of Brown, Johnston & Arthur had nothing to do with the lands of Brown & Johnston, and I only acted

263 as their agent about their lands, and settlement of the business of the firm.

10th answer to 10th interrog. The lands and lots in the printed lists referred to in 9th answer in the State (that is in Mississippi, if I understand the question), claimed as belonging to the firm of Brown & Johnston, were bought for and charged to the firm, no matter in whose names the deeds were made. The individual property of neither Mr. Johnston or Mr. Brown was included, for I think they both had purchased and were interested in other real estate for their friends, which were never included in the list of firm property.

11th answer to 11th interrog. The only difference I know was, that when Mr. Brown lived in Vicksburg, before he went to New Orleans, he attended to all the land sales by sheriffs, tax collectors, U. S. marshals, &c., and made purchases for the firm, and sometimes the deeds were made to him alone. After Mr. Brown went to New Orleans, Mr. Johnston bought some property for the firm, and, I believe, on one occasion Mr. Johnston and Mr. Aiken made a purchase, and the deeds were made to them; but after I became agent I know by the books and entries and the instructions of the parties that it was for the firm; and this was the case in their Mississippi property; but the firm was

264 purchasing land scrip, land warrants, &c., and had lands entered in other States, and these their agents would enter in the name of the firm, and this is all the difference I know between entries in their Mississippi property and that in other States. I have an impression that Mr. Brown, in one of his visits to Minnesota, many years ago, made a private purchase of some lots or property in St. Paul; but it was before I became agent, & had nothing to do with it.

12th answer to 12th cross-interrog. If there was any written article of copartnership between Brown & Johnston, I never saw or heard of it. There was no written articles of copartnership between Brown, Johnston, & Arthur. They were to give us ⅓ interest in the profits of the

banking business at Vicksburg. I wrote a hasty agreement; but it never was fully executed.

A. H. ARTHUR.

Sworn to and subscribed before me this 28th day of October, 1876.

LAY LINDSAY,
U. S. Commissioner.

X 13. answer to 13th interrogatory. At the time of Mr. Johnston's death the books and papers were in the interior, taken out by Mr. Johnston himself before the siege of Vicksburg, and Mr. Johnston took them off in such haste that no schedule was made.

265 X 14th answer to 14th interrogatory. I cannot append a copy for the reasons stated.

X 15. answer to 15th interrogatory. The paper attached referred to, being a list of property belonging to Brown & Johnston, is all in my handwriting. It is a hasty sketch made out by me some two summers before the late war, at the request of Mr. Johnston, and sent to him in Virginia, to give him a general idea of his property at that time. It was a rough and hasty sketch, taken from the books, and gave the prices which the firm considered their property worth at that time, and was as near correct as I could make it at that date, August, 1859.

X 16th answer to 16th interrogatory. The books show that the amounts charged to Shepperd Brown at the date of the dissolution of the firm of Brown & Johnston was $58,525.04, and the bookkeeper calculated interest on it up to 1 August, 1862, and added $5,870 $\frac{33}{100}$, making the indebtedness up to 1 August, 1862, $64,395 $\frac{37}{100}$. This seems to be a running account, including petty expenses, charities, and everything which was charged to Mr. Brown's private account from the commencement of the firm—say 25 years previous.

266 X 17. answer to 17th interrogatory. I have examined the lands of Brown & Johnston referred to, and cannot say it is a correct list of lands belonging to the firm at the date of the dissolution of the firm. It was made out by me from the books at the request of the parties and sent to them in New Orleans before the war, that the partners in New Orleans might effect sales, if an opportunity offered, and I think they did sell some of it in New Orleans, and some of it was sold in Vicksburg before the dissolution of the firm. Mr. Johnston came up to Vicksburg after the fall of New Orleans and sold several pieces of real estate for Confederate and cotton money, against my advice and judgment, & against that of Mr. Brown, in New Orleans. Mr. Johnston seemed afraid that all the houses in Vicksburg would be destroyed when the Federal army reached it, whilst I thought differently; and even if they did, the vacant lots would be worth as much as the money received for the property: and I am satisfied Mr. Brown agreed with me, and I mention this in justice to him; and they already had more Confederate money than they could use or pay their liabilities with.

A. H. ARTHUR.

Sworn to and subscribed before me this 29th March. 1877.

LAY LINDSAY,
U. S. Commissioner.

267 A.—*Exhibit to cross interrogatory 15th.*

Land and property statement of Brown & Johnston, at Vicksburg, outside of banking business.

Real estate in Vicksburg	$188,000
Negroes—Vicksburg—mechanics, &c	10,000

Lake place—negroes, mules, stock, &c	250,000
St. Paul—house & lot—Minnesota	5,000
House & lots in Jackson, Miss.	5,000
	$458,000

ARKANSAS.

Lands.	Acres.	
Phillips County	805.15	
Monroe Co.	1,270.85	
Chicot Co.	160	
Do., B & J.	14,257.11	
Miss. Co., B. J. & H.	2,450.08	
Pulaski Co. (lead)	560	
Marion Co., do.	1,179.69	
Independence Co., do.	120	
		29,802.88

LOUISIANA.

Carroll Parish	1,189.87	
Claiborne do.	1,600	
Livingstone do.	3,077.80	
St. Helena do.	607.40	
St. Tammany do.	13,659.51	
Madison Parish	3,622.24	
Ditto, Paw Paw Is'd	609.90	
Ditto, Hynes	1,200	
		25,566.72

MISSISSIPPI.

Washington Co	4,940.36	
Yazoo Co	1,456.57	
268 Tallabatchee Co	1,948.10	
Sunflower Co	798.88	
Warren Co.	364.41	
		8,608.32

MISSOURI.

Harrison, Nodaway, & Gentry Co's	360
Acres	55,337.92

Our books show—

Town lots, negroes, Lake place, &c., as per summary on the other side	$458,000	
Am't paid out for & value of lands, as per books	144,688	24
Am't owing to us on books over & above liabilities	373,844	94
Am't cash on hand	114,297	32
	$1,090,830	50

This am't worth at Vicksburg, without any increase in value of lands, and entirely independent of what you own in Brown, Johnston & Co., Cuddy, Brown & Co., & Rotchford, Brown & Co., at New Orleans.

In haste,

A. H. ARTHUR.

(Endorsed:) Filed April 11, 1877. Geo. T. Swann, clerk.

REC. 448—6

269 And afterwards, to wit, on the 29th day of May, A. D. 1877, being a day in the May term, A. D. 1877, of said court, a final decree was rendered in said cause, which is in words and figures following, to wit:

Circuit court of the United States for the southern district of Miss., before the Hon. Robert A. Hill, dist. judge, present and presiding. May term, A. D. 1877. In equity.

TUESDAY, *May 29th, A. D.* 1877.

JOHN A. KLEIN ET AL.
vs.
DAVID C. SHANKS, EXECUTOR OF JOSEPH H. Johnston, dec'd. } 241.

Be it remembered that, this cause coming on for final hearing before the hon. the circuit court of the United States, sitting in equity, for the southern district of the State of Mississippi, at the regular May term, 1877, thereof, upon the bill of complainant, the answers of defendants, David C. Shanks, executor, the replication of complainants to
270 said answer, the exhibits and *and* proofs filed in the cause. And the court now being fully advised in the premises, and of the opinion that the complainants have, as against the defendant herein, David C. Shanks, executor of the last will and testament of Joseph H. Johnston, deceased, and all those claiming under him, a perfect, equitable title to the several lots or parcels of real estate set forth in their said bill and described as owned by them and in their possession, and for the recovery of which the said David C. Shanks, executor as aforesaid, has brought his several actions of ejectment on the law side of this court against the tenants of complainants in possession of said real estate, and that complainants are entitled to relief under the prayer of their said bill.

It is ordered, therefore, by the court, adjudged and decreed, and the court doth hereby order, adjudge, and decree, that the injunction heretofore granted in this cause at the suit of said complainants, pro-
271 hibiting and restraining the said defendant, David C. Shanks, executor, &c., of the last will and testament of Joseph H. Johnston, deceased, from any other and further prosecution of his action of ejectment numbered 2368, instituted by him on the law side of this court October the 25th, 1875, and now pending there, against Bettie B. Willis, Thomas R. Roach, Edward S. Butts, and Mrs. Virginia Thomas, for recovery of the possession of the undivided half of that certain real estate situate in the city of Vicksburg, State aforesaid, to wit, that part of lot 286, in square No. 60, commencing at the southwest corner of Clay and Washington streets, and running thence southwardly along Washington street 24 feet 7 inches; thence westwardly, in a line parallel with Clay street, 147 feet; thence north to Clay street; thence east 147 feet to place of beginning; being the property of complainants Bettie B. Willis, Virginia Thomas, Rosa C., Lillie H., Annie F., and Nathaniel W. Thomas.

272 And from any other and further prosecution of his action of ejectment numbered 2269, instituted by him on the law side of this court on 25th of October, 1875, and now pending there, against John R. Kain and Harry H. Kain, for recovery of possession of the undivided one-half of that certain real estate situate in the city of Vicks-

burg, to wit, part of lot No. 90, in square 61, o. p., fronting 24 feet 9 inches on Washington street, running back that width to an alley, bounded on the south by lot sold by Brown & Johnston to S. B. Brown, June 1st, 1858, and north by lot sold by Shepperd Brown to W. S. Wheeler, June 10th, 1865, being the property of complainants Mary Gennella and John A. Klein.

And from any or further prosecution of his action of ejectment numbered 2267, instituted by him on the law side of this court on the 25th of October, 1875, against George V. Wood, for the recovery of the undivided one-half of that certain real estate, situate in the said
273 city of Vicksburg, to wit, part of lot 284, in square 59, fronting south on Clay street, bounded on east by lot of Harper Hunt, on west by lot formerly owned by John C. Bull, on the north by lot 283, being the lot upon which there is now a livery stable, occupied by said Wood, being the property owned by complainant Frederika Kellogg (late Ackerman), executrix of Fritz Ackerman, deceased.

And from any other or further prosecution of his action of ejectment numbered 2266, instituted by him on the law side of this court October 25th, 1875, and now pending there, against Mrs. E. C. Burgess, for the recovery of possession of the undivided one-half of that certain real estate situate in the city of Vicksburg, to wit, a part of Gordon square, fronting on Washington street on east and bounded on the west by Gordon street and on the south by lot sold by Brown & Johnston to Patrick Hogan & wife, and on the north by the lot formerly sold by
274 Brown & Johnston to Mrs. Elliott, formerly Mrs. Maguire, being the premises upon which the hotel known as the Pegram House now stands, being the property of complainants James and Catherine Botto.

And from any other and further prosecution of his action of ejectment numbered 2265, instituted on the law side of this court on 25th of October, 1865, and now pending there against the school directors of the city of Vicksburg, for the recovery of the undivided one-half of that certain real estate situate in said city of Vicksburg, to wit, lot No. 3 on the plat of lots recorded in the chancery clerk's office with a deed from Brown & Johnston to Wm. H. Stevens, bounded on the west by Washington street, on the east by Walnut street, on the north by lot of W. H. Stevens, and on the south by land formerly belonging to the estate of S. B. Newman, being the property of said board of school directors.

275 And from any other and further prosecution of his action of ejectment numbered 2264, instituted in the law side of this court 25th of October, 1875, and now pending there against John A. Peale for the recovery of the undivided one-half of that certain real estate situate in the city of Vicksburg, to wit, part of lot number 290 in square 61 beginning 25 feet from NE. corner of the square, thence south 24 feet 9 inches on Washington street, thence west to alley, thence north 24 feet 9 inches, thence east to place of beginning, being the property of complainant Elizabeth B. Klein.

And from any other and further prosecution of his action of ejectment numbered 2263, instituted on the law side of this court on the 25th of October, 1875, and now pending there against George T. Stacey, John B. Harris, and Eisliffel for recovery of the undivided half of that certain real estate situate in the city of Vicksburg, to wit, that
276 part of lot 287, in square 60, fronting on Clay street the full distance from lot 286 to part of lot 287, sold by Brown & Johnston to A. Novra, running back that width 147½ feet, bounded on east by lot 286, and on the west by the said lot of Novra, and on the south by lot

288 in same square, the same being the property of the said complainants, Antonie and Rachel Starke and Kate, John, Susan, and George Smith, be, and the same is hereby, made and declared to be perpetual, and no further prosecution of said actions of ejectment shall be had by the said David C. Shanks, executor, or any other person therein, by, through, or under him.

It is further ordered, adjudged, and decreed that the said Da-
277 vid C. Shanks, executor, &c., do pay the costs of this proceeding to be taxed.

Ordered, adjudged, and decreed this 29th May, 1877.

R. A. HILL, *Judge.*

278 STATEMENT OF FACTS.

In circuit court of United States for southern district of Mississippi, May term, A. D. 1877. In equity.

JOHN A. KLEIN ET ALS.
vs.
D. C. SHANKS, EX'R OF JOS. H. JOHNSTON, dec'd. } N. S. 241.

This cause is now submitted for final hearing on the pleadings and proofs. The court upon a careful examination of the proofs in this cause finds the following facts to be established: That in the year 1837 Shepperd Brown and Joseph H. Johnston formed a general copartnership to conduct in the city of Vicksburg, Mississippi, the business of a bank of discount and deposit, the purchase and sale of commercial paper, and the purchase and sale of real estate, the firm name of said copartnership being Brown & Johnston. The business of the firm was successfully conducted in its several branches until interrupted by the late war between the States, that branch of it relating to the purchase and sale of real estate being quite extensive. In the purchase of real es-
279 tate on partnership account, for the sake of convenience, it was sometimes conveyed to the individual partners and sometimes, to them as constituting the firm of Brown & Johnston. A land book of the firm was kept showing the purchases and sale of real estate on partnership account, and it was a rare and exceptional case when either partner purchased real estate on his own account. The firm of Brown & Johnston continued as originally organized until May, 1862, when A. H. Arthur, an old and confidential clerk of the firm, was added to it, and the firm name became changed to Brown, Johnston & Arthur. Arthur's interest was only in the profits of the business. After he became a partner of the firm the business was merely nominal and continued only a short time, the active operations of the Federal army about Vicksburg causing it to be brought to a close in about sixty days. Some years before the war both Brown & Johnston became interested in, as partners, in the firm of Brown, Johnston & Co., and
280 Rotchford, Brown & Co., both being in New Orleans, La. These firms however had no partnership connection or relation with the firm of Brown & Johnston, of Vicksburg. At the date of emancipation of the slaves, Brown & Johnston, as a co-partnership, had invested largely in cotton and sugar lands, and owned some five hundred slaves engaged in their cultivation. In June, 1863, Jo. H. Johnston died in Virginia. Shepperd Brown was at this time residing with his family in Georgia. Said Johnston left a last will and testament conveying his estate of

every kind to David C. Shanks, who, in addition to being named a legatee of one-fourth of the estate, was made sole executor with plenary power over the estate, subject to the rights of certain other legatees named in the will, to become operative after administration of the estate by Shanks, as directed by the will, in Virginia, but nowhere else.

281 The real estate involved in this suit and which was conveyed by Brown to Klein by trust-deed, dated September 15th, 1865, was partnership property of the firm of Brown & Johnston, acquired with partnership funds on account of the firm, and the creditors named in the schedule annexed thereto comprised the deposit creditors of that firm, except two or three for small sums, who became creditors of the firm of Brown, Johnston & Arther. Their property was fairly sold by the trustee Klein at public sale and brought large prices, larger than it would command now, and the proceeds of sale were equally distributed among the trust creditors of the firm, who received about 62½ cents on the dollar of their claims. The remainder is still due and unpaid. The complainants in the cause are either direct purchasers at said sale

282 or hold under them who were such direct purchasers.

The complainants have filed this bill to enjoin actions of ejectment instituted by said Shanks, as executor of Joseph H. Johnston, dec'd, to recover an undivided half of the property so purchased and held by them.

R. A. HILL,
Judge.

283 *Opinion of R. A. Hill, judge.*

In the circuit court of the United States for the southern district of Mississippi, November term, 1876.

JOHN A. KLEIN ET AL.
vs.
D. C. SHANKS, EXECUTOR JOSEPH H. JOHNSTON.

T. A. Marshall, for compl't.
W. B. & A. Pittman, for defendant.

This cause is now submitted upon defendant's demurrer to complainants' bill. The bill is necessarily lengthy, but so much of the allegations as are necessary to understand the points raised by the demurrer are substantially as follows: Shepperd Brown and Joseph H. Johnston, in 1873, formed a partnership in a banking and general trading business, to be conducted in the city of Vicksburg, in this State, which business was to embrace the purchase and sale of lands, and all of which was to be conducted on joint account under the firm name and style of Brown

284 & Johnston. The business was commenced and carried on until the commencement of the war, embracing very large transactions in all its departments. The results of the war suspended and finally broke up and ruined the business, and ended in hopeless insolvency. Johnston di*d*e in 1863, leaving a last will and testament, which has been duly proven and admitted of record, and of which the defendant is appointed executor. The will vested in the defendant the title to all the estate of the testator, real and personal, legal and equitable, with power to continue the business or wind it up as the defendant might deem most to the interest of the estate, and when wound up, that defendant should retain one-fourth and distribute the remainder among certain of

the testator's relations named and in the proportions stated in the will; and providing further that if any of the beneficiaries should complain of the action of the defendant, it should forfeit his or her interest under the will. That at the close of the war Brown, the surviving partner,
285 found the assetts of the firm wholly insolvent and insufficient to meet the liabilities of the firm, and being pressed by the creditors not only of this firm but of others with which both he and Johnston were connected, thought those who had deposited their funds with the banking house at Vicksburg the more meritorious, and desired to make provisions for their payment out of the wreck that remained, the principal part of which consisted of the real estate owned and held by the firm as part of the firm property; that after consulting with the defendant, who was then vested with all the title and interest which his testator had in and to this real estate, with as full power and disposition as the testator would have had over it if living, and with the full and free assent of the defendant, Brown, as such surviving partner, conveyed the real estate described in the bill to J. A. Kline, one of the complainants, in trust for the payment of the debts due these depositors, whose names and the amounts due each were given in a schedule annexed to and made part of
286 the conveyance. Power and direction were given to the trustee to sell and convey this real estate, and from time to time, as he might receive the proceeds, to apply them to the payment of these debts pro rata. That the trustee proceeded to sell the real estate described in the bill, which was done for a fair and full price, and the proceeds applied as directed. That the complainants, who are either the original purchasers, or who held under them, went into the possession, paying taxes upon it, keeping up repairs, etc., without any claim whatever being set up to it by the defendant until served with writs of ejectment to recover possession brought by the defendant against them upon the law side by this court, and which action this bill seeks to enjoin, and for a decree compelling the defendant to convey to the complainants respectively all the title which the defendant as such executor and devisee has in and to the real estate so respectively held by complainants.
287 The demurrer admits the truth of the allegations of the bill as above stated. The questions, as above stated, are: First, are the complainants entitled to the relief prayed for, and if so, to what relief? They pray first that the actions of ejectment shall be perpetually enjoined; secondly, that defendants shall convey to them all the title he holds, and if mistaken in both of these, that they be subrogated to the rights of Brown, the surviving partner, and those of the creditors. The questions presented are important not only in consideration of the large value of the property involved, but on account of their being of first impression in this State, in some of their features. Being questions of property, the rights of the parties, so far as they have been settled by the courts of last resort in the State, must control the decisions of this court upon the question presented. The rule laid down by the supreme court of the State is as follows: Real estate held by partners either as capital
288 stock for partnership purposes, or as purchased with partnership means, is for the purpose of paying the debts due by the partnership, or the balance due its members, considered as personal assetts of the partnership; the legal title being vested in the partners as tenants in common in trust for the creditors and members of the firm as stated in the articles of copartnership, and upon the death of one of the members the legal title so vested in him descends to his heirs or devisees, who continue to hold as tenants in common with the survivors in trust for

the payment of any balance found due upon final settlement to the survivors according to the articles of the copartnership. This is as far as any of the decisions have gone, and will be found decided in Scraggs vs. Blair, 44th Miss., 406; Hanning vs. Robert Shaw, 49 Miss., 756; and which coming before the court again at the present term the same doctrine was reaffirmed. The learned council for defendant insists that this is only a
289 lien or right to have partnership real estate by proceedings in a court of competent jurisdiction sold and the proceeds applied to the payment of the demands with which it is charged. A careful consideration of the questions presented satisfies me that it is something more than a lien; it is a special equitable interest in the estate, and the right upon the surviving partner, who is charged with payment of the partnership debts, to control and manage it for the purpose of satisfying the trusts which the supreme court of the State has declared rests upon it; for this purpose he may rent it and receive the rents, may sell it and receive the purchase money, and convey to the purchaser not only legal and equitable title in himself, but the equitable title which he holds as such trustee as surviving partner, and if the sale be a fair and bona fide one and for a fair consideration, such a one as a court of equity would
290 sanction, had it been under its own order and decree, the court will compel the party holding the legal title under the deceased partner to convey such legal title to the holder of the equitable title, and thereby make the title complete. This is the rule held in California in Dupy vs. Landreth, 17 California, 262. Chief Justice Field, now one of the justices of the Supreme Court of the United States, in delivering the opinion of the court, uses this language: "In equity real estate acquired with partnership funds for partnership purposes is regarded as personal estates, so far as the payment of partnership debts and the adjustment of partnership rights are concerned. The real and beneficial interests which each partner possesses in this partnership property is the balance coming to him after the payment of the partnership debts and the settlement of account with his copartners, and in view of equity it is immaterial in whose name the title to the property stands,
291 whether in the individual name of one partner or in the joint names of all, it is first subject to the payment of the partnership debts and is then to be distributed among the copartners according to their respective rights. The possessor of the legal title in such case holds the estate in trust for the purposes of the copartnership; each partner has an equitable interest in the property until the purposes are accomplished upon the dissolution of the co-partnership by the death of one of the partners; the surviving partner, who is charged with the duty of paying the debts can dispose of this equitable interest, and the purchaser can compel the heirs at law of the deceased partner to perfect the purchase by the conveyance of the legal title." The same doctrine was held by the supreme court of Alabama in the case of Andrew's heirs vs.
292 Brown's heirs, 21st Alabama. In that case Chief Justice Dargard delivering the opinion of the court, in stating the rule, among other things says: "It will not do to charge the surviving partner with the duty of paying the partnership debts, and at the same time withhold from him the means of doing so."

The supreme court of Mass., in Burnside vs. Merrick, 4 Metcalf, 582, holds that this equitable interest in partnership real estate vests in the surviving partner, and that neither the widow or heirs of the deceased partner have any beneficial interest in such real estate, or the rents or profits thereof, until the partnership debts and obligations are discharged, and that such real property must first be applied to that pur-

pose. I have been reffer'ed to no adjudicated case in any of the States, or by the Supreme Court of the United States, holding a different rule from that above stated.

293 I am satisfied that if the rule were not as stated, defendant must be held in equity estopped from setting up title to the estate so conveyed, and compelled to convey the legal title he holds as such devisee to the complainants.

The doctrine of equitable estoppel is now so well settled that reffer-ence to authority to maintain it is useless, and was perhaps never so clearly stated than by Chief Justice Simrall a few days since in the case of Ragsdale vs. Railroad Campany, in which it was held that a verbal agreement to convey lands sustained by a valuable consideration, acquiesced in and acted upon for a considerable time until the land had been sold and conveyed to others by the party to whom the conveyance was agreed to be made, estopped the party so agreeing to convey from setting up his title, and that a court of equity will compel him to

294 convey legal title to the holder of the equitable title under the estoppel, and thereby complete the title.

Having arrived at the conclusion stated, it is unnecessary to consider the doctrine of subrogation, so ably combatted by defendant's council as applied to the facts stated in the bill; I am compelled, both from reason and authority, to the conclusion that the demurrer must be overruled, and it is so ordered.

(Signed) R. A. HILL, *Judge.*

295 In the circuit court of the United States for the southern dist. of Miss.

JOHN A. KLEIN & OTHERS
vs.
DAVID C. SHANKS, EX'R OF JOS. H. JOHNSTON, dec'd.

To the honorable the Supreme Court of the United States:

The appeal of David Shanks, as executor of Joseph H. Johnston, deceased, the above named defendant and appellant, respectfully showeth:

That upon the 20th day of May, A. D. 1876, the above named complainants filed their bill in equity in the circuit court of the United States for the southern district of Mississippi against the above named defendant & appellant, alleging in substance that they were equitably entitled to conveyances of certain lands therein described and were the equitable owners thereof, and that the defendant and appellant, in whom is vested the legal title, had instituted and was prosecuting suits at law in said court for the recovery thereof from said sev-

296 eral complainants, certain parcels from each respectively, and praying in their said bill that he be perpetually enjoined from the prosecution of said several suits, and that he be decreed to make deeds to them respectively, conveying to each such parcels as each of them therein respectively claim.

And afterwards said defendant and appellant demurred to said bill in due form for want of equity, and said demurrer was overruled.

Afterward said defendant answered, fully denying many of the material allegations of said bill.

That afterwards, on the 29 day of May, A. D. 1877, a final decree was pronounced in said cause, wherein it was in substance adjudged and decreed that said defendant and appellant be perpetually enjoined and

restrained from prosecuting his said suits at law, & from taking any other proceeding for the recovery of said lands, & pay the costs of
297 said suit. Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of the said circuit court, and the bill, answer, pleadings, depositions, evidence and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said circuit court and every part thereof may be reversed and a decree made dismissing said bill with costs, or such other decree as to the Supreme Court shall seem just.

Dated January 8th, 1878.

ALFRED B. PITTMAN,
Solicitor for Appellant.

It is ordered that the appeal of the defendant in the foregoing case be and the same is hereby allowed, and the transcript of the record & proceedings in said cause be sent to the Supreme Court as prayed.
298 Ordered this 15th day of Feb'y, A. D. 1878.

R. A. HILL, *Judge.*

299 Supreme Court of the United States.

JOHN A. KLEIN ET AL.
vs.
DAVID C. SHANKS, EX'T'R OF JOSEPH H. JOHNSON, deceased.

Know all men by these presents that we, David C. Shanks, principal, and William B. Pittman and A. B. Pittman, sureties, are held and firmly bound unto John A. Klein & Elizabeth B. Klein, his wife; Mary Genella; J. A. Kellogg and his wife, Fredericka Kellogg, as executrix of the last will and testament of Fritz Ackerman, deceased; Virginia Thomas, Rosa C. Thomas, Nathaniel W. Thomas, Annie F. Thomas, and Lillie H. Thomas; Alexander Kuhn, J. C. Blum, Isador Brown, the mayor and aldermen of the city of Vicksburg, James Botto and Catharine Botto; Antoine Steike & Rachel Steike, his wife; and Kate Smith, John Smith, George Smith, and Susan Smith, in the sum of five hundred dollars, to be paid to the said obligees, their executors or administrators. To which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 15th day of February, A. D. 1878.

Whereas the above named David C. Shanks hath taken an ap-
300 peal to the Supreme Court of the United States to reverse the decree rendered in the above entitled cause by the circuit court of the United States for the southern district of Mississippi:

Now, therefore, the condition of this obligation is such, that if the above named David C. Shanks shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

DAVID C. SHANKS,
By W. B. PITTMAN, [SEAL.]
Attorney in fact.
WILLIAM B. PITTMAN. [SEAL.]
A. B. PITTMAN. [SEAL.]

Approved:

R. A. HILL,
Presiding Judge.

301 (Copy.)

By the Hon. Robert A. Hill, one of the judges of the circuit court of the United States for the southern district of Mississippi.

To John A. Klein and Elizabeth B. Klein, his wife; Mary Genella; J. A. Kellogg and his wife, Fredrika Kellogg, as executrix of the last will and testament of Fritz Ackerman, deceased; Virginia Thomas and Nathaniel W. Thomas, Annie F. Thomas, Rosa C. Thomas, & Lillie H. Thomas; Alexander Kuhn, J. C. Blum, Isador Brown, the mayor and aldermen of the city of Vicksburg, James Botto and Catharine Botto, Antoine Steike and Rachel Steike, his wife, and Kate Smith and John Smith, and George Smith and Susan Smith, and their next friend and guardian Henry B. Bruser;

Whereas David Shanks has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Mississippi, made in favor of you, and has filed the security required by law. You are therefore hereby cited to appear before the said Supreme Court at the city Washington, on the 2nd Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at Jackson, in the State of Mississippi, in the southern district of Mississippi, in the 5th circuit, this 15th day of February, A. D. 1878.

R. A. HILL,
Judge Presiding.

302 I acknowledge service *service* of the within this 5th day of March, 1878.

T. A. MARSHALL,
Of Counsel for Defendants.

303 In the circuit court of the United States for the southern district of Miss. In equity.

JOHN A. KLEIN & OTHERS
vs.
DAVID C. SHANKS. } N. S. 241.

John X. Foley, being duly sworn, saith that on the 27 day of February, A. D. 1878, he served on att'ys (viz, Mess. Buck, Clark, and Gillard) of the above named appellees, and on each & every of them,
304 a copy the appeal and a copy of the citation filed in this cause with the clerk of the circuit court in and for the southern district of Mississippi, by delivering the said copy of the said citation to each & every of said appellees respectively, personally, & by leaving said copy of the appeal for said appellees in the clerk's office of the circuit court aforesaid.

JOHN X. FOLEY.

Sworn to this 5th day of March, A. D. 1878, before me.
[SEAL.]
LAY LINDSAY,
United States Commissioner.

305 UNITED STATES OF AMERICA,
Southern District of Mississippi, ss:

I, Geo. T. Swann, clerk of the circuit court of the United States for said district, hereby certify that the preceding annexed pages contain a true and complete transcript of the record of said court in the cause therein stated as the same now remains in our said court.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at office, in Jackson, in said district, this 4th day of April, 1878.

[SEAL.] GEO. T. SWANN, *Clerk*,
By J. M. McKEE, *D. C.*

(Indorsement on cover:) No. 448. David C. Shanks, ex'r of Joseph H. Johnston, dec'd, appellant, vs. John A. Klein et al. S. Mississippi C. C. U. S. Filed 18th July, 1878.

IN THE

UNITED STATES SUPREME COURT.

No. 174.

DAVID C. SHANKS. Executor,

vs.

JOHN A. KLEIN, et al.

BRIEF OF J. Z. GEORGE.

R. O. POLKINHORN, PR., 632 AND 634 D STREET, WASHINGTON, D. C.

IN THE

UNITED STATES SUPREME COURT.

No. 174.

DAVID C. SHANKS. Executor,

vs.

JOHN A. KLEIN, et al.

BRIEF OF J. Z. GEORGE,

OF COUNSEL FOR APPELLANT.

The argument of Mr. PITMAN states the views upon which the appellant relies as to the existence of a partnership between Brown & Johnston in the lands in controversy as well as on the points discussed in this brief. My duty is to examine the question raised by the record, as to the legality and validity of the disposition made of these lands by the surviving partner, upon the supposition that they have been shown to be partnership stock.

At first the courts in England did not recognize a partnership in real estate, as they regarded that species of property incapable of being subject to commercial dealings. (See Parsons on Cont., side page, 363.) When partnership in that kind of property was afterwards admitted, the courts were incapable of dealing with it except upon the theory that by be-

coming partnership stock it also was converted into personalty. With the view of impressing upon real estate purchased with partnership funds, for partnership purposes and appropriated to the use of the firm, with certain incidents necessary for the convenience of transacting business, it was usual to insert in the deed by which it was acquired, or in the articles of partnership, some provisions respecting its ultimate conversion into personalty. These provisions, in accordance with a well-known rule of equity, which treated realty as personalty when directed by the owner to be converted into money, at length began to be considered as necessarily implied from the mere bringing into the partnership of real property. (See *Riply* vs. *Watersworth*, 7 Ves., J.) From the date of this case, in which the realty was expressly agreed to be converted into money by the partners, the doctrine, with some varying fortunes, soon acquired a firm footing in English equity jurisprudence, that partnership real estate was, in fact, in all cases, and to all intents and purposes, personalty—though no express provision for its conversion was contained either in the deed by which it was acquired, or in any other agreement between the parties; and that now seems to be the settled rule in England. (See Parsons on Part., side page 369, and numerous authorities there cited, and 1 Lindly on Part., 667, *et seq.*) The rule extends to the treating of the realty as personalty for all purposes, and gives the personal representatives of a deceased partner the land as personalty, to the exclusion of the heir.

In America this rule of conversion has not ob-

tained general recognition, though in following the nomenclature adopted by the English courts there are expressions used by some of the judges which would indicate an adoption of the English rule. The American doctrine may be stated thus: that at law the real estate is regarded in all respects as realty, both as to the mode and ~~form~~ of disposition by the partners, and as to its transmission upon the death of one or more of them.

power

See Parsons on Part., side page 367, and cases cited;

And especially is this so in Miss.;

Scruggs vs. *Blair*, 44 Miss.;

Whitney vs. *Cotton*, 53 Miss.;

But courts of equity will treat the realty as personal estate so far, and only so far, as it is necessary to protect the rights and interests of the creditors of the firm, and to adjust the rights of the parties *inter sese*.) See *Scruggs* vs. *Blair*; *Whitney* vs. *Cotton*, *supra*.) So much seems to be settled.

What is meant by a court of equity treating partnership realty as personalty, to the extent necessary for partnership purposes, is not so clear; and because clear and determinate ideas have not always been affixed, confusion has arisen in some of the authorities, and conclusions reached which are unwarranted. It is, hence, necessary to determine the exact meaning of the phrase as used by American courts, and in what sense it may be asserted as being true. It does not mean here, as in England, that the realty has been converted out and out, and is, therefore, for all purposes personalty. Nor is it necessary, as in Eng-

land, to consider the conversion as having been made, in order that the realty should be partnership stock, for here partnerships are recognized solely for the purpose of commerce in realty. This ideal conversion in England was necessary to render the land liable for the simple contract debts of the partnership, (and they could make no other) and to prevent the operation of the rule of primogeniture, and possibly to prevent the *jus accrescendi* of the legal joint tenancy in it.

But in America (especially in Miss.) there is no survivorship among joint tenants, nor right of primogeniture, and the realty, just as personalty, is liable to the payment of debts, except as to dower and homestead rights. The American rule reaches the same end as the English rule as to the absolute liability of partnership realty for partnership debts, and to the results of partnership accounting, by postponing the dower and homestead rights to the superior claims of the creditors and partners. The dower and homestead rights are allowed, because the land remains realty; but they are allowed to attach only to the surplus remaining to the individual partners after the claims of the partnership have all been satisfied.

Markham v. *Merrit*, 7 How., Miss. R;
McGrath v. *Sinclair*, 56 Miss., 89.

The courts of Mississippi, as well as other American courts, give the partners a lien on the partnership realty to secure the payment of the creditors of the firm, and the balances due to the partners on

final accounting; and it is through this lien—which, like a vendor's lien, is superior to dower and homestead rights – that these rights are secured.

Whitney v. *Cotton*, 53 Miss.;
Dilworth v. *Mayfield*, 36 Miss. 40, 52.

And the widow's right, and the exemption in the personalty, would be first bound in the same way. The phrase, "treated in equity as personal estate," therefore means only this—that the legal estate vested in the partners as tenants in common is subject to the prior claims of the social creditors and of the several partners, and this liability, to its full extent, attaches, whether the land be considered as personalty or as realty.

This liability depends, therefore, not on the *conversion* of the real estate into personalty, but upon its *convertibility* through the agency of a court of equity. The phrase owes its origin in England to the fact before alluded to, that partnership was first recognized in personal estate; and when afterwards extended to realty, the liability of the latter for debts was said to be like, or the same as, personalty. If partnership in realty had first existed, the phrase would have been that personalty would, like realty, be liable for the partnership claims.

Real and personal property are distinct. To say that one is the other is to affirm that things distinctly different are the same. If the one be directed by the owner to be converted into the other, then a court of equity, in carrying out the intention of the owner, may, and should, treat the conversion which was di-

rected as having been accomplished. But where there is no such direction, no such agreement superadded to the mere agreement of partnership, we have no right to say that because the property is, under certain circumstances and by certain agencies, so *convertible*, it shall, therefore, be considered as actually converted. Real estate as such can be made subservient to all the just rights of creditors and partners without a resort to the fiction that it is—what it manifestly is not—personalty. And these claims can, and, indeed, are in America, made good on doctrines applicable to realty. It is said that partners have a lien on the realty, or, which is the same thing, that each holds his share as trustee for the just claims of the others. This lien results from principles strictly applicable to real estate.

There can be no partnership in land not bought with partnership funds and for partnership purposes.

Thompson v. *Ford*, 6 Wall., 316;
Alexander v. *Kimbro*, 49 Miss. R., 529;
Parson's Partn., page 369 *et seq.*

This raises an implied trust in favor of the partnership whose funds were used.

Alexander v. *Kimbro*, supra.

From this we reach on well-settled principles, the lien impressed on the property in favor of the rights of creditors and the other partners. There is no necessity for calling in the doctrine of ideal conversion; and by a well-known law in physics we are not at liberty to extend a rule or make one beyond the necessity for it. The lien recognized in

equity, or the implied trust, if that term be preferred, in favor of creditors and partners, is ample to secure all their rights in the partnership realty; and to this extent, and no further, will a court of equity go in attaching incidents to the legal estate vested in the separate partners.

It will aid us in understanding this part of the argument to recur to the rules of law on this subject and their modification by courts of equity.

In this case the deeds were to the partners as tenants in common, the legal title to a moiety being in each partner. At law the estate will always be treated as thus expressed in the deed. No enquiry will be made into the means by which and the purposes for which the purchase of the legal estate was made. For all the purposes of ownership and the transmission of title the ~~land~~ thus conveyed is held to be the property of the tenants in common, as shown by the paper-title and the records of the registry. The partnership, if any, comes in afterwards and upon the showing of other facts. These facts can be shown only in a court of equity. In every other court, for all purposes and at all times, nothing can be alleged against the ownership and title thus exhibited by the deed. A court of equity will, for certain purposes, hear other evidence and make out a trust or a lien, and with it burden the legal estate.

But to what extent and for what purpose does the court interpose? This enquiry is important. At law the partners are tenants in common—the separate owners of undivided but separable moieties of the

property. Equity follows the law. It always does this, and impresses no other change on the legal estate than is necessary for the purposes of justice. It recognizes the legal title as it exists and charges it with the just burdens necessary to protect the rights of the parties. It does no more. It can do no more. No court can create rights; it can only ascertain and enforce them. So a court of equity, by all the American authorities, does not undertake to convert the realty into money (personalty) beyond the necessity. It provides, first, for the creditors of the partnership after the exhaustion of the personalty. (Parsons Part., side p. 376 and authorities there cited.) It converts into money so much and so much only of the realty as is necessary to pay the debts. It then enquires into the state of the accounts between the partners, and if there be a balance due one it fixes a lien on the realty to pay that, and converts as much more of the realty into money as may be needed for that purpose. Here its power ends. It does not convert the surplus into money for a division among the partners as in case of personalty. (See Parsons Par., side p. 376; *Scruggs* vs. ~~Sinclair~~ Blair, 44 Miss.; *Whitney* vs. *Cotton*, 53 Miss. R.) If the conversion out and out of the whole be asked for, it must be not on the ground of the mere partnership relation, but in virtue of a separate ~~grant~~ agreement between the parties themselves directing a sale and conversion.

This being the office and duty of a Court of Equity, and the whole extent of both, can it rightfully do either, more or less? It is insisted that it may abdicate its powers in favor of ~~the~~ a partner, when living

and of the survivor when one is dead, and allow them to make the conversion and sale, which, we insist, the court alone can do.

It is claimed that, from the mere relation of partnership, each partner when living, and the survivor when one is dead, may sell the realty, and that a Court of Equity will compel the other, or the heirs of the deceased, to convey the legal title in pursuance of the sale. We deny both these propositions, and we deny, also, the power claimed for the survivor even if the alleged power of the partners should be held to be established.

The contract of partnership is a legal one. The powers and duties and rights of the partners are fixed and defined by law, as applied to the contract of partnership between the partners. There is no such thing as an Equitable partnership, where that relation does not exist in law. That each partner has the power to dispose of personal estate, and bills and notes belonging to the firm, and to make notes and other commercial paper, results from the rules of law *applied to the agreement of partnership.* If it be a commercial partnership, the law *infers* the power, from the mere relationship alone, and it can only be divested by agreement, and then only as against parties having notice of the restriction. But if the partnership be not of a commercial nature, as for farming or mining—see *Davis* vs. *Richardson*, 45 Mis., 507; *Cooper* vs. *Frierson*, 48 Miss., 309; *Prince* vs. *Crawford*, 50 Miss., 344,—the power of alienation and of making commercial paper is not implied, and must be expressly given.

So, if the law imposes any particular formality in the making of contracts—as the statute of frauds, in relation to the sale of goods above a certain value, or the making of guaranties for the debt or default of another—these formalities must be observed, or the contract is invalid,—tho' the power to make sales and guaranties be, by the terms of the partnership, vested in the several partners. So the partners are governed by the rules of law in alienating the realty belonging to it. The law requires the alienation to be in writing, signed by that member, if only one, or those members if more, in whom the title is vested, unless special authority be conferred by the others. So in case of a farming partnership—the law requires all notes and bills to be signed by both partners, if there be no special authority conferred. It is a mistake, also, to suppose that *the law* confers on, or withholds from, the several partners any powers over the partnership property. The power is given by the contract of partnership; and it is regulated and restricted by its terms. I speak now of *real* not of apparent power, implied in favor of the rights of third persons, from a holding out to the world of the partners as possessing it. By the terms of the contract the joint assent of all may be required to the transacting of any business, however trivial, or the sole power of conducting the business may be vested in one alone, or these powers may be modified. Of course these powers may, as to third persons, without notice, be inferred, contrary to the express agreement of the parties; and such inference is more or less extensive—like the powers of an agent,—according to

the nature of the business. And these powers as they really exist, are the same exactly at law and in equity. There is not the slightest difference between them. There is no such thing in equity as the power of a partner denied to him at law. In both there is no power except such as is conferred by the agreement of the parties.

If this be correct, what becomes of the alleged power of each partner to alienate realty - said to be recognized in equity and denied at law? It is not such a power, if there be such, as being good in equity *could not exist at law;* for it is certain that in the deed by which the realty is acquired by the partners, provision might be made for the exercise of the power of sale by one of the partners to the exclusion of the other, or by each, without the special concurrence of, and joining in the act by, the others. So, by a provision simply providing for the right of survivorship as joint tenants, the power of the survivor to sell would be secured. So by the terms of the articles of partnership it might be provided that, as to all the realty of the firm, mutual powers of alienation and conveying should be conferred on the several partners—each being made the agent of the others, as in case of personalty, for the purposes of selling the realty. In such cases the power would exist at law. Why? Because the power would be conferred by the agreement of the partners. Since the power is concededly not conferred by the simple relation of partnership, is it not the irresistible conclusion that the failure to confer it in some of the modes above indicated is conclusive of an intention

to withhold it? And if withheld by the parties, how is it possible that a court of equity could *confer* it? Suppose that by the terms of the partnership and the course of dealing under it, all notes and bills given to the firm were given jointly to the partners in their individual names, with the statement on their face that they were only assignable by the joint indorsement of each, would it not be clear that no other mode of assignment could divest the title of the partnership? That case is strictly analogous to real property taken in the names of the partners as tenants in common—in which deed the law writes, as an inference, that alienation could take effect only in that way. But suppose the deed contains on its face this provision, which the law infers without its being expressed, could a court of equity, in opposition to the express provisions made by the parties, infer a power in one to alienate the whole? And if not, how can it do so in violation of the legally implied negation of power impressed on the deed?

The power of alienation of the partnership property, as above remarked, results from the agency to sell and dispose of it given to each partner by his associates. See Story on Partn., § 94. This power—it must be borne in mind—is a grant from each partner to the other; it is not conferred by law. The difference is material. The law infers a power of sale, where none is expressly granted, from certain acts of the partners. In commercial partnerships, it infers it as to personalty, from the mere relation of partners. Story Part., § 94 and note to § 92. But it does not infer it when it is expressly withheld; nor does it

treat the power, as we have seen, as essential to the relation. Commercial partnerships may, and do, exist when this power is withheld; and a partnership of that character is not something else when this power is so withheld. The essence of the partnership consists in the community of rights and interests in the property of the partnership and its profits; and not in the powers of administration granted to the several partners. The power to alienate and dispose of the joint property, springing as it does from an agency either expressly given or implied, and subject to modification and regulation by the contract of the parties, expressed in the articles of partnership, or in the instrument by which their title to partnership property is acquired, it results, as a necessary conclusion, that the taking of a deed to realty, as tenants in common, unquestionably indicates their intention that there should be no alienation except by the joint deed or contract of all.

Story on Part., § 92 and 94 and note.

That the power of each partner to alienate the realty does not exist unless special authority be given is affirmed by Judge Story, in his work on Partnership, § 94, and by Parsons on Partnership, side page 377. Chief Justice Marshall, in a suit in equity, annulled a sale of the realty made by one partner expressly upon the ground of the want of authority to make it.

Anderson and Wilkins vs. *Tomkins*, 1 Brock, C. C. R., p. 456.

But if it were conceded that the several partners during the existence of the partnership could exer-

cise the power of alienation, it would still be true that a surviving partner could not.

The real estate does not, like personalty, survive to him who is alive. As to the choses in action and personalty owned by the partners, and in the firm or their joint names, at law the title and ownership accrue on the death of one to the survivor; clothed, it is true, with a trust enforcable only in equity, in favor of the personal representative of the deceased, to deliver to him the share of the deceased remaining after the payment of all the creditors and the settlement of the accounts between the partners. At law the survivor is the owner, and in virtue of this ownership, the agency being revoked by the death of the deceased, the power of disposition remains. A justification even in equity, for its exercise is found in the fact that with this title and ownership are joined the power and duty of paying the debts and of converting the personalty *into money* for the purpose of distribution among those entitled to it. The personalty is subject to execution against the survivor, and the choses in action to garnishment to satisfy a judgment against him.

See *Scruggs* vs. *Blair*, 44 Miss., 406.

But as to realty, the case is far different. When, as in this case, under the statutes of Mississippi (See Rev. Code of 1857, Art. 18, p. 309,*) the deed is made to them as tenants in common, and not as joint tenants, and there is no *jus accrescendi* on the death of one, the title goes to the survivor as to his moiety,

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*See Statute at end of this brief.

and to the heirs of the deceased as tenants in common. After death, as before, the survivor has no title or ownership in the deceased partner's share. He cannot, therefore, derive a power of alienation from his ownership of the estate nor from his duty to convert the realty into money for the purpose of division. For, as to realty, the law is that it will be divided in kind without conversion.

It hence follows that the power of alienation rests, if it exists at all, alone upon the agency conferred by the partners' *inter vivos*, which is revoked by death and the dissolution of the firm.

There is still another reason, based on the nature of the estate and the duties of the survivor in relation to it, which prohibits his exercise of this power. In the American States, and certainly in Mississippi, the sole interest of the partnership in the realty held by the firm in the names of the partners, as tenants in common, is a lien on it for the payment of debts, and the satisfaction of balances due in the settlement of the partnership accounts. Suppose we call it a trust in the several partners having the legal title, impressed by a court of equity for these purposes; both expressions mean the same thing. Neither recognizes in the survivor any beneficial ownership in the estate for the purpose of use and enjoyment. It is exactly like the lien of a judgment creditor as to its extent; and both in its nature and extent exactly like the trust in the vendee, which results in a lien in favor of the vendor for the purchase-money. It is not like the trust resulting by implication, where the holder of the dry legal title is a trustee bound to sur-

render it for the benefit of the *cestui qui trust*, who is the real and beneficial owner. It is a mere right in the creditors and in the surviving partner to have the debts paid out of the realty, if necessary for that purpose. This being its nature and extent, whence comes the power of alienation? The legal title and ownership are in the heirs of the deceased partner, subject only to the enforcement of this lien. They may remove the lien, as any other owner may, by paying the debt which constitutes the incumbrance; and if they do this, all the rights of the creditors and surviving partners are removed.

It is said by Parsons, in his work on Partnerships, p. 369 *et seq.*, that the right of the surviving partner is the same exactly as that of a creditor, and no more. Can the creditors, without judicial process, determine for themselves the amount of their debts, and the insolvency of the personalty, and proceed at once to sell the land and give such right to it that the purchaser can come into a court of equity and compel the heirs to convey the legal title? No one has pretended they could. Can the surviving partner—the debts all being paid—determine for himself that a balance is due him, and proceed to sell for that balance? And if he cannot, there being, as he alleges, a debt due to others, can he, under cover of that, sell the land for that debt and the balance alleged to be due him, so that a court of equity would compel a legal title to the purchaser? The questions seem to answer themselves under any system of jurisprudence which recognizes that no man can be deprived of his estate without due process of law. The

judgment-lien creditor must resort to a court of law and a sale under judicial process to enforce his lien. The holder of an equitable lien, as in this case, must resort to chancery, summon the parties, give them an opportunity of defence, procure his decree, and then have a sale by a master. In no case can the holder of a lien render judgment for himself, then execute it by a sale. Such a power over men's estates does not exist in the jurisprudence of the American States.

The sale, if allowed to the surviving partner, being shown to be for the purpose of enforcing collection of a debt due to him, or to other creditors, and not in the exercise of the just powers of a proprietor, we will consider *when* it may be exercised, and its force and efficacy.

There must be first debts unpaid due by the firm, and an insufficiency of personalty to meet them; or there must be a balance due to him on a full settlement of partnership accounts, or both of them. Who is to determine the existence of these facts, necessary to give the power of sale? If the surviving partner may validly sell, without first obtaining a decree establishing these facts, then he must be the final judge, and by his will alone the estate of the heirs of the deceased partner is to be divested. If, however, it be argued that when the purchaser comes into a court of Equity to compel a relinquishment of the legal title by the heirs. these circumstances may be enquired into, and if it be ascertained that there are no legal and valid debts, or that there is sufficient personalty to pay them, the legal title will not be

disturbed, then what is the value of a power of disposition, which rests for its validity upon the subsequent approval of it in a suit afterwards to be commenced, in which may be successfully controverted not only the fairness of the sale to be litigated, but the facts upon which the power itself to make it depends.

Under this view, the purchaser (however meritorious) gets nothing but a right to bring a suit in which he may or may not succeed in establishing the power of the vendor to make the sale. If he delays payment until this power is established, how are creditors benefited by the summary proceedings for a sale, through this power of administration supposed to exist in the surviving partner? Such a proceeding seems to be as absurd as it is useless. The power of the survivor to sell becomes a mere right to select a person to whom a Chancery court may, if it likes the terms and is satisfied as to the existence of the facts necessary to give the power, afterwards adjudge to have a right to a conveyance.

On the other hand, suppose the purchaser pays the price, and it is distributed among the creditors, or retained by the survivor in satisfaction of his claim; then, if the Court should afterwards find that the facts authorizing the power of sale did not exist, he will be without remedy for his money, except by suit against a person who may be utterly insolvent. There is no place for such a sale in our laws. It must result, therefore, that, if a power of sale be allowed, it must confer a good equitable title—it being fair and bona fide, as respects the purchaser, and a court of Equity

must compel a conveyance of the legal title, notwithstanding the heirs may be prepared to show the utter non-existence of all the facts, which would justify the sale, or give rise to the power to make it. In that view they are deprived of their estate without opportunity of defense, under the false color of enforcing a lien on it. They have for their inheritance the irresponsibility of a faithless, insolvent and fraudulent intruder.

If possible, this alleged power of sale is rendered still more absurd by an additional consideration, viz.: that the power to sell, if it exist at all, may be exercised for an alleged lien for an alleged balance due to the survivor on a final settlement of the partnership accounts. In this case the survivor is the judge of the extent of his own rights, and the executor of his own judgment. He cannot state a final account. and sue the executor of the deceased partner-at-law for its collection. Only a court of equity can ascertain the balances between the partners; but if he will not resort to due process of law—if he will assume to judge as to the existence of his own rights and their extent, and then proceed to execute his judgment—he may divest the heirs of their estate, and convert it irrevocably to his own use. It is no answer to this view to say that he may do all these things with reference to the personalty, and that if he is suspected of fraud, and it is proven on him, the personal representatives of the deceased partner may cause the estate to be taken from him and put in the hands of a receiver; and the same thing may be done with reference to the realty. As to the personalty,

as before shown, he is owner and has the power of disposition, without reference to the existence of debts or the state of the accounts between him and the deceased partner. It is true he is absolute owner as to one-half only, and a trustee with power of disposition as to the other half. All *cestuis qui trust* must take this risk as to the good faith and solvency of the trustee, when the latter has the power of disposition. But as to the realty—the survivor is not a trustee as to the moiety which has descended to the heirs. They are *the trustees*, or rather owners, with a lien on their estate for certain purposes. As to them the surviving partner has no title—no ownership— only a right, under certain circumstances, when judicially established, to enforce a lien.

Strong support for these views will be found in the case of *Ruffner* v. *McConnell*, 17 Ill., 216, in which the court held "that one partner had not the power to convey the real estate of the firm, either by deed or assignment, or make contracts, written or verbal, specifically enforcable against the others, in equity," remarking that partners have not, under the law of partnership, an implied power individually for the firm to do what may be done by a court of equity in paying creditors out of realty of the firm.

This was a Mississippi partnership, and the real estate attempted to be conveyed is situated in that State, and the law of Mississippi does not authorize such a disposition. There is no direct decision of the Supreme Court of the State on the precise point. No such case has arisen ; and it is confidently believed that

this is the sole instance in which a surviving partner ever undertook, in that State, to dispose of the realty of the firm. But, whilst we have no direct decision on the precise point, the principles settled by the Supreme Court of that State deny this power by the plainest and strongest implication.

In *Scruggs* vs. *Blair*, 44 Miss. R., 406, a bill in equity was brought by a creditor against the survivor and the heir of a deceased partner to collect out of the realty of the partnership a partnership debt. The bill was demurred to for the want of jurisdiction.

On this point the court said:

"The land in controversy is averred in the bill to have been purchased with their joint funds and to be held in their joint names. This converts the real estate into *equitable assets*; so that, *in equity, it will be* dealt with and *disposed* of as joint effects and credits. At law, however, the several partners are tenants in common. On the death of a member his heirs hold in common with the survivor. A judgment against the survivors would only reach for the purpose of satisfying their interests. Upon the dissolution of the firm by the death of one of its members the credits and personal effects vest, by operation of law, in the survivor, and under judgment against them the effects of the firm may be sold and the credits garnished. The real estate, however, preserves its distinct qualities and descends to the heir, who holds in common with the survivors in trust for the purposes of the partnership: first for the benefit of creditors, and, second, for the members of the firm and their representatives according to their several interests, as fixed by the articles of the copartnership. A court of equity would regard land bought and held, as was this land, as assets for creditors to the same extent

as personal effects *so far as might be necessary;* the residue would immediately resume its quality as real estate. The law is incompetent to administer the trusts in favor of creditors. The survivors and legal representatives of the deceased may be sued together, [this is by statute] but under a judgment in such a suit the interest of the decedent could not be made available for the creditors. Complainants' redress *can only be meted out in chancery* where all the interests in the land can be brought before the court and by one decree the estate converted into *money* for creditors. Unless this be done the legal representatives of the deceased partner *must*, through the Probate Court or the Chancery Court exerting that jurisdiction [the Probate Court was about this time abolished and its jurisdiction over decedents' estate conferred on the Chancery Court] sell the land of the decedent."

The court cited and relied on *Dyer* vs. *Clark*, 5 Metc., (Mass.) 562; *Gulbraith* vs. *Gedge*, 16 B. Monroe, 631; *Buckly* vs. *Buckly*, 11 Barb., 43; and *Markham* vs. *Merritt*, 7 How. Rept., 444.

Whitney vs. *Cotton*, 53 Miss. R., 689, was a bill filed by the surviving partner against the heir of the deceased partner to procure a decree directing a sale by a master in Chancery to pay the debts. On motion of the guardian for the heir the bill was dismissed for want of jurisdiction. The court said:

"When the conveyance is to both partners they are tenants in common, equal owners; but *in equity*, whether the title be in them jointly or in one of them, the property is assets amenable to creditors, and the surplus is to be disposed of between them on settlement of the partnership account. A

partner *has a lien on the partnership property*, not only for the amount of his interest, but for money advanced beyond his contribution to the capital, to the use of the copartnership. And the *lien* attaches to the real estate held for the partnership purposes as well to their joint personal estate. * * * And the right of partnership creditors to a preference [over individual creditors] is dependent on this lien."

The court continues:

"Complainant [the surviving partner] avers that the individual estate of the deceased partner is insolvent. He points out several tracts of land as partnership assets, and that this *real property* is needed to pay off joint debts. A court of equity, as we have seen, would consider the real property as assets as much liable to the claims of creditors as personal effects, and would interpose to prevent the administrator of the deceased partner from selling for the individual creditors." Citing—

Winslow vs. *Chaffelle*, Harps' S. C. Eq. R., 25;
Devine vs. *Metcham*, 4 B. Monroe, 488.

"The lands mentioned in the bill, or, *more properly, the interest of the deceased* partner in them, descended to his heirs, clothed with a trust to respond to all the purposes of the copartnership in them (citing *Isly* v. *Graham*, 45 Miss., 425.) *It is manifest that a court of equity is alone competent to administer proper relief either to the surviving partner, the complainant, or creditors* of the partnership. The bill is not framed properly. It sufficiently alleges the lands are needed to pay joint creditors. But Cotton's (the deceased partner's) administrator is interested in the partnership accounts, and the heirs *have also an interest in the question of the divestiture* of the legal title for the joint creditors, &c. * * * The bill should have been framed on the theory of a settlement of the accounts between complainant (the survivor) and the

intestate, and between them and the creditors." The court then allows an amendment for this purpose, and remands the cause.

From these decisions, it is manifest that the only interest that creditors or the survivor have in the estate of the deceased partner, is a *lien* on it—and that this lien can only be established in a court of equity. It is said in the last case that a court of equity is *alone competent to give relief to the survivor*, or to the creditors of the partnership. This could not have been truly said if the surviving partner had the power to make a sale binding on the heirs, and thus receive the money needed to pay the debts. And it is, moreover, to be observed that if the alleged power existed, there was not the slightest ground for the filing of the bill, or the interposition of the court, and the bill should have been dismissed for want of jurisdiction. According to the view we are combatting, the time for the interposition of the court is *after* the sale has been made; and the party, whose rights are to be protected by the interposition, is not the survivor but the purchaser—who had already acquired a valid equitable title, and who must come into equity in order to procure a legal title.

There was nothing in the facts alleged in the bill, that the survivor could complain of. He had already the power to make a valid sale, and having this power, it seems a work of supererogation that he should ask a court of Equity to make it for him. And in fact if he had the power, a good answer to his bill would have been to say that the power to sell is in the complainant and *not in the Court*. For it must

be noted that the power to cause a conveyance of the legal title in consummation of a sale actually made, is very different from the power to order the sale itself to be made. In the one case the Court is the vendor, and has the right, and it is its duty to fix the terms of the sale; in the other, it orders merely a conveyance, because a valid sale *has been* made. At the instance of a creditor the Court could order a sale, in virtue of its jurisdiction, to enforce a lien in his favor, because he has no other remedy. At the instance of the survivor, if the power of sale be vested in him, the Court has no powers. If the power be vested, it must be a pure case of agency—the survivor being the principal. A Court of Equity cannot be made the recipient of a power, conferred on it, as agent of the complainant.

The first case cited—*Scruggs* v. *Blair*—is utterly irreconcilable with the principle that the survivor may sell. In that case, a creditor was the complainant. It was objected that his remedy was at law. He could, by the statute, sue at law both the survivor and the representatives of the deceased; but the court said that under this judgment the realty could not be reached. The reason was that the interest of the survivor was a mere *lien*, which, of course, is not seizable under an execution, either at law or equity. It is a thing which can't be sold. It is not property—it is a mere right by which property can be secured; a mere means of securing collection of a debt. But in Mississippi a complete and perfect

equity may be sold under execution at law. This is well settled. I cite only a few cases—

Wolfe v. *Dowel*, 13 S. & M., 103.
Boarman v. *Cattell*, Ib., 149;
Henry v. *Fullerton*, Ib., 631;
Thompson v, *Wheatly*, 5 S. & M., 499;
Moody v. *Farr*, 6 Cushman, 100.

Whoever has such an equity in land as authorizes him to demand the conveyance of the legal title, without the performance by him of any other thing as a consideration or condition precedent, is the equitable owner of the land, and his estate may be sold under execution.

The vendee of the survivor, under the view we are combatting, is such owner, and his estate, derived solely from the survivor, is subject to sale under an execution against him. This is incontestibly true. It would result, therefore, from this power of sale that the survivor could convey a greater interest than he possesses. A sale by him who has only a lien—who has no estate or title, legal or equitable,—whose interest, whatever it may be, is so thin and shadowy as to be incapable of being touched or handled—would, by a sort of legal alchemy, result by the mere act of transfer, into a substantial corporeity capable of seizure and sale under execution.

Under the Rev. Code of 1857, p. 308, Art. 12,* in force when the bill was filed in *Scruggs* vs. *Blair*, any kind of equitable estate could be seized and sold under execution at law.

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*See Statute to Appendix to the brief.

But if we are wrong in all the foregoing, and the power of sale exists in the survivor, this deed in trust is void. It is not a sale, but a mere authority granted to a third party to sell. It is more than this—it is an abdication of the power of the survivor and its transfer to another. It substitutes another person in the place of the survivor, divesting the latter of his proper powers and vesting them in another. The power for the survivor to sell is claimed mainly upon the ground of his personal fitness for the administration of the estate. The *delectus personae* made him a partner. His interest in the estate and his duty to wind up the affairs are supposed to give him the right to make this sale. His contract divests the estate of the heirs—can he transfer this power to another irrevocably? His right to sell results from his duty to convert the estate into money and pay the debts. In making this deed he makes no conversion. He gives only a security, and stipulates that neither he nor a court of chancery will make the conversion, but only his trustee. He is a trustee himself as to the share of the heirs. He transfers his trusteeship to another. This he cannot do.

See—

Barcroft v. *Snodgrass*, 1 Cold. (Tenn.), 441.

Again, he includes in the deed debts due by the firm of Brown, Johnson & Arthur. This vitiates the whole.

See—*Buckly* v. *Barber*, 1 Eng. L. & Eq., 306.

Again, the deed in trust contains this provision:

"And he [Klein, the trustee] shall also—when-

ever he is satisfied from evidence adduced to him that any of said debts have been paid by said Brown or others, either before the execution of this deed, *for some of them have been paid*, and the evidence of payment lost when a portion of the books of said Brown or Johnston were burned, or may have been lost or mislaid, &c.,"—enter satisfaction of such debts.

This renders the deed void—

1. Because it conveys the property to pay claims concededly not debts, but false and fictitious.

2. It leaves it to the trustee to determine, as a court, whether or not such debts have been paid. There was no power in the survivor to do this. Instead of this scheme being a sale, it is a plain attempt to create a special court of equity to determine upon the validity af the debts and the necessity of a sale. No provision is made for the rights of the heirs of Johnston. They are ignored. Even the surplus—whether of lands or money—is directed to be conveyed and paid to the survivor. It is confidently believed that such a transaction cannot stand, and that a court of equity will give no other relief than to allow complainants a lien on the lands for the money which they can show actually went to pay a valid charge on the lands and estate—allowing the defendant rents, and the complainants, for valuable and permanent improvements, to the extent that it can be shown that they have actually enhanced the value of the lands they have severally purchased.

J. Z. GEORGE.

Addendum.

Revised Code of Mississippi of 1857, p. 309, Art. 18:

"All conveyances or devises of lands made to two or more persons shall be construed to be estates in common and not in joint tenancy, unless it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy, with the right to the survivor or survivors: *Provided*, This provision shall not apply to mortgagees or devisees or conveyances made in trust."

Revised Code of Mississippi of 1857, p. 308, Art. 12:

"Estates of every kind holden or possessed in trust for another shall be subject to the like debts and charges of the person to whose use or for whose benefit they are holden or possessed, as they would have been subject to if the person had owned the like interest in the thing holden or possessed, as he may own in the uses or trusts thereof, *whether the trusts be fully executed or not;* and may be sold under execution at law so as to pass whatever interest the *cestui qui trust* may have; and before a sale under a mortgage or deed in trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed in such mortgage or deed in trust, except as against the mortgagee and his assigns, or the trustee, after the breach of the condltion of such, or deed in trust."

Re-enacted in the code of 1871, § 2295.

Construed in *Bowen* v. *Carpenter*, 42 Miss. R., 28, to which the court is respectfully referred.

IN THE

UNITED STATES SUPREME COURT.

No. 174.

DAVID C. SHANKS,

Executor.

vs.

JOHN A. KLEIN, ET AL.

Brief of W. B. PITTMAN,

of Counsel for Appellant.

R. O. Polkinhorn, Printer, 511 and 513 D Street, Washington, D. C.

UNITED STATES SUPREME COURT.

DAVID C. SHANKS, *Executor*,
vs.
JOHN A. KLEIN, ET AL.
No. 174.

Brief of W. B. Pittman of Counsel for Appellant.

Before entering upon the argument of the law of this case, I will briefly state the material facts developed in the record.

In the year 1837, the testator of complainant, formed a partnership with Shepherd Brown for the purpose of carrying on the business of banking, in the City of Vicksburg, under the firm name and style of Brown & Johnston. There were no written articles of co-partnership. (See cross-interrogatories, 9 & 10, to Shepherd Brown, page 39, of the record, and his answer thereto, page 52, record.)

The capital of the firm was, altogether, only $13,000. (See answer No. 11, of same witness, same page.)

It is alleged in the bill, and denied in the answer, that this partnership originally included an agreement to buy and sell real estate. The proof fails to show this to be true. The only testimony on this point is the answer of the surviving partner, Shepherd Brown, on page 49 of the record, to fourth interrogatory, which is as follows: "We commenced business in a small way (with capital together of

about $13,000) in buying and selling uncurrent monies, and doing what is called an Exchange or Brokerage business. We made a great deal of money, dealing in every thing, pretty much, including the buying and selling of real estate, which was then at very low figures, caused by the commercial and financial convulsions, in the Southern country; nearly all the banks in Mississippi and Louisiana suspended at that time."

This testimony does not sustain the allegation that they originally entered into a partnership with an agreement to buy and sell real estate, as a part of their business, but only shows that they did afterwards buy and sell real estate. The insignificance of their capital, which was too small to do much of a banking business, would negative the idea that the dealing in real estate, was originally included as within the scope of their partnership. A very little of real estate, would have absorbed their whole banking capital.

The firm prospered, and in the year 1859, Brown & Johnston, were worth in lands, negroes and money, (exclusive of their interests in the banking and cotton firms, of Brown, Johnston & Co., Cuddy, Brown & Co., and Rotchford, Brown & Co., at New Orleans, La.,) $1,090,830.50.

(See statement on page 81, record.)

These New Orleans firms were composed of the testator Joseph Johnston, Shepperd Brown, and others whom they associated with them. They had no connection with the Vicksburg firm. The capital put into them by Joseph Johnston and Shepperd Brown, was withdrawn from their bank in Vicksburg, as in the case of purchases of real estate on joint account. (See answer of Brown to cross-interrogatory 43 page 54, record.)

They purchased large plantations and about five hundred slaves in the same way. (See Brown's deposition and A. H. Arthur's.)

Brown testifies that these slaves were purchased to be used in planting cotton. (See answer 26, page 54, record.)

The partnership of Brown and Johnston continued until April, 1862, when it was dissolved and the new firm of Brown, Johnston and Arthur, succeeded to it, and continued the banking business until the capture of Vicksburg by the Federal Army on the 4th day of July, 1863.

The articles of partnership between Brown, Johnston and Arthur, signed by Arthur and Brown, will be found on page 64, record. In August 1863, Joseph H. Johnston died in Virginia, and left all his property, real and personal, to David Shanks executor, upon certain trusts therein mentioned, the said executor to have a beneficial interest of one fourth of the whole estate, and the balance to go to legatees mentioned in the will.

Upon the 15th day of September, 1865, Shepherd Brown, as surviving partner, conveyed to John A. Klein, as trustee to pay the depositors in the bank of Brown and Johnston, and Brown, Johnston and Arthur, a large quantity of real estate in the city of Vicksburg, and elsewhere in the State of Mississippi, to be by said Klein sold, and the proceeds to be distributed among creditors, a schedule of whom, together with the amounts respectively due them set down opposite their names, will be found upon pages 22 and 23 of the record.

Among other lands sold by said Klein, under said trust deed, were the lands in dispute, which were deeded before the war, by various parties to Shepherd Brown and Joseph H. Johnston. Afterwards appellant brought suit in ejectment to recover from various purchasers the undivided half interest of his testator, in and to the lands mentioned, and appellees filed their bill, and obtained an injunction, which was made perpetual by the decree of the court below. Appellant assigns for error that decree.

The questions involved in this case are as follows:

1st. Were the lands in question partnership property?

2d. Admitting that the property involved was the real estate of the partnership of Brown and Johnson, could the surviving partner sell the equitable title to the undivided half of these lands, which were at law held by the executor and devisee of the deceased partner, as tenant in common with the surviving partner?

I will discuss these two propositions in the order in which I have stated them.

First, then, were the lands in question, partnership property?

There are two ways in which real estate may become partnership property, and as such be treated in equity as the assets of the firm. The first is where a commercial partnership, with the funds of the partnership, purchases real estate for *partnership purposes*. That is to say, it must be convenient or necessary in the conduct of the main business, and an incident or adjunct thereto. As for example, the site upon which a mill or other manufacturing establishment is erected and the business of the firm conducted. See:

Galbraith vs. *George*, 16 B. Munroe, 631;
Coder vs *Huling*, 27 Penn., 84.

The rule is cited in Parsons on Partnership, marginal page, 364, as follows:

"Real estate purchased for partnership purposes and appropriated to these purposes becomes partnership property."

A long list of authorities, English and American, are cited in the note to sustain this proposition, with which I will not encumber this brief, as it is well settled that the property must be bought for, and appropriated to, partnership purposes, in order to make real estate partnership property.

The proof in this case shows that the property in dispute was not bought for *partnership purposes*, and was not so appropriated, and was not of a character to be incident to, or useful to, a banking business. The bill itself does not proceed upon that theory. (See bill, pages 1 & 2, of the record.) It is there alleged (on first page) that the original agreement of partnership included within its scope the purchase and sale of real estate, and upon page 2, second paragraph, "that every purchase and sale of real estate, made in the State of Mississippi, by said partners or either of them after the organization of said co-partnership, as aforesaid, was a purchase with the funds, and on account of said partnership, in pursuance of the original terms of agreement."

It is nowhere alleged, in the bill of complaint, that this property was purchased for *partnership purposes*. The appellees, then, do not proceed upon the theory that these lands became partnership property, because they were bought for and appropriated to partnership purposes. But the bill sets up another theory, and it is that alone we have to consider.

The position taken in the bill is that the dealing in real estate on speculation was included in the original agreement of partnership, and that these lands being purchased in pursuance thereof, became, by virtue of said agreement, partnership lands. Let us see if this can be maintained from the record. The bill shows, section 1st, that there were no written articles of partnership between Brown and Johnston. The rule is laid down in Story on Partnership, Gray's Edition, sect., 88, page 134, as follows: "But although there is no positive incompetency at the common law of creating a partnership in the buying and selling of lands on joint account, and for the benefit of the parties by way of commercial speculation and adventure, yet such a contract must from the nature of the case, and the positive rules of

law, and the Statute of Frauds, be reduced to writing, and then the stipulations of the parties, will constitute the sole rule to ascertain their intent, and to enforce their respective rights."

There are several cases cited in the note to the above paragraph in Story on Partnership, which the editor seems to think conflict with the principle therein stated. I have examined these cases and do not find that they sustain this view. One of the cases, *Crowell* v. *Watt*, 2 Hall & Tweis, does not pass upon the question even incidentally. The next, *Foster* vs. *Hall*, 3 Vesey, page 696, simply holds that a partnership in a colliery, may be proved by letters and other writings as to the business and profits of the coal-mine, but expresses doubts as to how the title to the real estate would stand.

The only English authority cited in the note in which the law is said to be different, is *Dale* vs. *Hamilton*, 5th Hare, 367, and this opinion is really *obiter dictum*—because a written acknowledgment or memorandum, signed by the parties in whose names the lands had been purchased, stated that the plaintiff in the action was to have one-third of the net profits of the sale of the land, for his services in selecting and buying the same. On the contrary, Judge Story's position, that a partnership for the purchase and sale of real estate must be proved by writings signed by parties, is sustained by many respectable authorities—among others the following:

Hale vs. *Henry*, 2 Watts, Pa.;
Jones vs. *McMichael*, 12 Rich., S. C.;
Smith vs. *Burnham*, 3d Sumner, Cir. R.;
Gray vs. *Palmer*, 9 Cal., page 640;
Forsythe vs. *Clarke*, 15 Wendell;
Darby vs. *Darby*, 3 Drewry, 495;
Wheatly vs. *Calhoun*, 12 Leigh., 264;

Patterson vs. *Grace*, 10 Ala., 444;
Black vs. *Black*, 15 Ga., page 445;
Parsons on Partnership, page 368.

In *Forsythe* vs. *Clark*, it is held that a purchase of real es, tate, by one of the parties, in his own name with partnership funds does not make realty so bought partnership property unless it be shown that such an appropriation of partnership funds was made in pursuance of an agreement.

In *Reid* vs. *Morrison*, 12th Wisconsin—not cited in Story—where all of the authorities on the subject are fully considered, it is held that an agreement for dealings in real estate is within the Statutes of Fraud, and void unless in writing; and that the fact that the parties making the purchase, were, at the time, partners in a mercantile business, does not alter the case, or take such an agreement out of the Statute of Frauds.

I think, therefore, that the doctrine that a partnership for the purchase and sale of real estate on speculation must be evidenced by writings, is pretty well established in this country, although it cannot be denied that one or more respectable courts have refused to give their assent thereto. The true rule I take it to be, is, that where the land is incidental and necessary to carry on some commercial or manufacturing enterprise, and is bought with partnership funds for that purpose, that there results a trust in favor of the partnership, which comes within the exception to the statute of frauds, and may be proved by parol evidence; but that where it is intended as in this case to prove, that the lands are partnership property "*ex contractu*," and not because

they are purchased for partnership purposes, being appurtenant and convenient to the principal business of the firm, the evidence thereof must be in writing.

But as some courts have not given their full assent to the doctrine as above stated, let us examine the evidence and see whether the allegations of the bill, that it was agreed and understood that the firm was to engage in real estate speculations, is sustained.

This averment of the bill is flatly denied in the answer thereto. (See section 1 of answer, page 27 of the record.) The only evidence offered by appellees is that of Shepherd Brown, surviving partner, in his answer to Int. 4, page 49 of the record, quoted on page of this brief.

Not one word of his testimony supports the theory that the original partnership contemplated the purchase of real estate; on the contrary, the limited capital precludes the idea that such could have been their intent. The use of the words "*then at a very low figure*" might lead one to conclude that *then* referred to the time when their partnership began, but the witness shows that this was not true, for, in answer to cross-Int. No. 30, he says, page 54: "As soon as we made the money and saw any good opportunities."

In answer to Int. 5, which puts the answer into the mouth of the witness, he says (page 49): "Yes; all purchase of real estate in Mississippi were made with partnership funds, for partnership account and charged upon the books of the firm like any bill, note, &c.," but he nowhere says that this was done in pursuance of any agreement entered into by them, when they formed a partnership or at any other time.

In answer to another leading question, No. 7, page 38, answer No. 7, page 49, the same witness says: "The property had been acquired by the firm with partnership funds, and for partnership purposes."

This, however, as the court will see, is a conclusion of fact and law put into the mouth of the witness by counsel in his interrogatory, and is not true nor responsive to any allegation in the bill, which nowhere alleges that the lands were bought for partnership purposes.

Whether the lands were suitable, convenient, and appurtenant to the business of the partnership, if the necessary averments had been made in the bill, would have been a matter for the chancellor to decide from all the facts and circumstances, and not a fact that could be established by the oath of a witness that it was so. It is in its nature a deduction, or mental conclusion, from many facts.

Now are the facts stated by witness, even by inference, persuasive that it was alleged or contemplated, that these lands should be partnership lands?

All the lands in question were bought in the names of Shepherd & Brown and Joseph H. Johnson, as tenants in common.

The surplus funds which had accumulated in the bank, belonged equally to each of these partners. They could have withdrawn them and made separate purchases in their own names; they had equally the right to withdraw any given sum and invest it in lands as tenants in common; and an entry in their books, showing that so much money had been invested in lands, in which the two partners were tenants

in common, was all that was necessary. That this was their course of business is shown by the testimony of Brown as to the formation of the New Orleans firms of Rotchford, Brown and Co. and Brown, Johnston and Co., in New Orleans, in which Shepherd & Brown and Joseph H.Johnston each became partners. The capital which each put into these firms, was drawn from Brown and Johnston, in the same manner as the money that was invested in these lands.

The 43d cross Int., page 41 of the record, is:

"Was the money transferred by a check in the bank of Brown and Johnston given by the firm, or did you individually give your check for your part of the funds, upon private funds of your own, and Johnston in the same way contribute his part of the capital of the firms of Rotchford, Brown and Co., and Brown, Johnston and Co., out of individual funds to his individual credit?"

Answer, page 54 of the record. "There was a general account between the two houses; the money was transferred by drafts and other securities; neither one of us contributed separately out of individual funds. *In fact we had no individual funds.*"

This answer shows what their course of business was. It appears to have been that whenever both partnars concluded to become investors in anything outside of their business in equal amounts, the money was drawn from their common bank. They declared no dividends, and when funds thus withdrawn and invested, were returned by the sale of the thing bought, they went again into the common purse.

In *Markham* vs. *Meritt*, 7th Howard, Miss., 444, Chief Justice Sharkey, discussing a state of facts very similar to those exhibited in this record, where the evidence showed, that a commercial firm had dealt largely in real estate, purchased by them with joint funds, withdrawn from the partnership, says: "These lands were not purchased for the purposes of the firm according to its original design. They were not necessary to enable the parties to carry on a mercantile establishment, nor have we any evidence that the lands purchased were by *contract* to be considered as personalty."

He also holds that "the purchase of these lands with the joint fund constituted them tenants in common, and might be regarded as a division of the fund to that extent."

Every word that I have quoted from the above case, would be applicable to the facts in the present case. The lands were held not to be partnership property, and the widow was given her dower in them.

See also, *Reid* vs. *Morrison*, 12 Wisconsin, which I have cited for another purpose, also, *Coder and Peterman* vs. *Huling*, 27th Penn., St. R., 184.

In order to constitute a partnership in dealing in real estate, there must be an agreement to sell as well as to buy. This was not the case here, for we find two partners, buying plantations and negroes, from 1845 to 1855, and continuing the cultivation of the plantations for fifteen or twenty years, without making any effort to sell them, and

buying town lots, improving them and renting them out indefinitely. I suppose that, like most business men, they would have sold any of these lands, if they had been offered more than they thought they were worth to them as an investment; but their history shows, that their purchases of real estate instead of being temporary holdings for com, mercial speculation, were, in most cases, profitable investments of surplus funds, and more than ordinarsly permanent for a new country. Nor was this withdrawal of funds in fraud of the creditors of the Bank, for the record shows, that in 1859, the Bank had cash, and cash assets to the amount of nearly $500,000.00 over and above its liabilities. The withdrawal of large sums of money from the Bank. and their investment in real estate by the firm, as tenants in common, in the absence of any agreement that these lands should be partnership property, and in the further absence of any agreement to sell the same. does not, I submit, prove a partnership in the lands; nor does the fact, that the witness Brown testified that they were part. nership lands, even end to establish it, for the question of whether they were partnership lands or not, is a conclusion of law and fact, to be deduced from all the circumstances and testimony.

The testimony of Brown does not even suffice to show that these lands were purchased with *partnership funds*, (which, if true, would not of itself, as I have demonstrated, make them partnership property,) for while it is clear that as long as these moneys remained in the Bank, they were partnership funds, it is equally certain, that as soon as they were withdrawn from the Bank, and invested in the names of the original partners in things not appurtenant to the

firm's business, they ceased to be partnership funds, in the absence of a valid agreement that the things bought therewith, should be partnership property.

In *McGrath* vs. *Sinclair*, 51 M., page 91, the above is held to be the law in Mississippi. The facts were as follows: The commercial firm of Ferguson, Sinclair & Co., composed of E. V. Ferguson, A. M., and A. G. Sinclair, purchased a town lot with a house on it. In 1873, the partnership was dissolved by the retirement of Ferguson. Ferguson conveyed his interest in the property to A. M. & A. G. Sinclair, who constituted the new firm of A. G. Sinclair & Co. The payment was made out of partnership funds. A. G. Sinclair, one of the partners, moved into the house and used it as a residence. A. G. & A. M. Sinclair mortgaged the lot to secure money advanced to the co-partnership of A. G. Sinclair & Co. Upon bill to foreclose, it, was held not to be partnership property, and that A. G. Sinclair's moiety was exempt as a homestead, his wife not having joined in the mortgage. The reasons given by the Court, for deciding it not to be partnership property, were, that although the lot was purchased with the social fund, it was not necessary or incident to their main partnership business, and there was no valid agreement, by force of which it became partnership property. The same doctrine is announced in Alexander vs. Kimbrough, 49 Miss., 529.

In the case of *Coder and Peterman* vs. *Huling* 27 *Penn. St. R.*, page 84, the Court says: "When two partners, engaged as such, in a particular business, specified in their articles, buy land not necessary for their particular business, but with views beyond and outside of it, such land is held by them as tenants-in-common. I tis not partnership property. The fact that the purchase money was taken out of the capital, or the profits of the partnership business, does not alter the case, nor does it seem that the

deed being taken inthe name of one partner changes the equitable relations."

Brown's testimony shows no such agreement, and his evidence that these funds were partnership funds, must only receive the credit it may be entitled to, as his legal opinion. If my position, that these lands were not partnership realty, is correct, whatever I may add will be surplusage, but out of abundant caution, I will now address myself to the second proposition involved in this case, to wit:

Admitting that the real estate involved was the property of the firm of Brown and Johnston, could the surviving partner sell the equitable title to the undivided half of these lands, which were at law held by the executor and devisee of the deceased partner, as tenant in common with the surviving partner?

The court below proceeded upon the theory that the surviving partner had a full equitable title, and therefore made the injunction against the executor and devisee of the deceased partner perpetual. It does not need to be argued that unless the surviving partner himself had the equitable estate in these lands, he could not convey it to his grantors; and that unless his grantees acquired this equitable title from him, the court erred in finding that they possessed such title, and in enjoining appellant from recovering the lands. It is an axiom in natural philosophy that a stream of water does not rise above the level of its source, and it is equally axiomatic in law that a grantor cannot by his deed impart to his grantee a title higher or greater than he himself possesses. Therefore, the pertinent question is what title did the surviving partner have in these lands; for, whatever right, title or interest he had therein went to appellee, and none other. Both in England and America the surviving partner, and the executor or heir, have a lien upon such real estate, to secure the balance due either the

one or the other, and as an indemnity against partnership debts, and through this lien in favor of the surviving partner, the creditors of the partnership have an equity sometimes called a *quasi* lien, by means of which they can in a Court of Equity have the realty of the partnership subjected and sold, if necessary to pay the debts of the firm.

In England, the realty is in equity held to be converted into personal assets, and the surplus, after paying debts, goes to the executor or administrator.

Nearly all the American courts, however, hold that it does not become personal property, but remains real estate and descends to the heir, subject to dower if there be a widow, and to a charge or lien to satisfy the partnership debts. The American rule is stated in Parsons on Partnership, page 372, as follows:

"Real estate purchased and held as partnership property is so treated in equity and subject to all the incidents of partnership property." In one or two States, the English rule has been followed, of treating it as personal property; but a large majority of the courts hold, that it descends to the heir, and that the widow has her dower, unless it be sold under the lien to pay partnership debts. I will not encumber this brief with citations on this point, as it is sufficient to show that such is the law in Mississippi, where the land in controversy is situated. See *Scruggs* vs. *Blair*, 44 Miss. R., 406.

The American rule, as above stated, simply means, that if necessary, it may be reached in proper proceedings in equity, and sold to satisfy claims upon it for partnership liabilities. I do not ignore the fact that some of the very authorities I have quoted, speak of it as resuming its qualities as real estate, after these liabilities are settled. This is only another way of saying, that the lien which exists to secure these liabilities, follows and attaches to it

in the hands of the heir, and like a vendor's lien, is paramount to the right of the widow for dower.

Parsons on Partnership, page 307, says: "No partner, and no proportion of the partners, can sell or transfer the real estate of the firm,—outright for money, or by way of mortgage to secure a debt, or to assignees in trust for debts—without the consent and authority, of the other partners."

And the same authority also says, "if he" (speaking of the partner who holds the legal title in his own name,) "make a mortgage to secure a debt, or an assignment in trust for creditors, by which the legal title would pass, it seems that equity will not sustain the transaction, even supposing it free from the taint of fraud." Parsons on Partnership, page 377.

See, also, *Ruffner* vs. *McConnell*, 17 Illinois, p. 217, and *Anderson & Williams* vs. *Thomphins et al.*, 1 Bro.

It is also held that the personal property of the partnership must be exhausted, before ever a court of equity will sell the realty, to pay the debts of the partnership. *Lany* vs. *Waring*, 25 Alabama, 625. The power of a partner during the existence of a partnership to sell all, or any portion of the personal property of the firm, arises from two facts: the first, that the legal title to such property is in each and every partner, and that in addition to this, the law holds, that he is the authorized agent of his partner or partners, to dispose of the property, including the equity of his partners in the same.

It is a well known principle of law that all powers of attorneys and agencies, are revoked by the death of him from whom those powers spring. In cases of partnership, however, in order to protect creditors, the power of the surviving partner is preserved. His powers are not increased, but greatly diminished, and limited to the control

and sale of the personal assets, for the purpose of settling the partnership affairs. He cannot mortgage or hypothecate them, even to raise money to pay partnership debts.

Bank of Port Gibson vs *Baugh*, 9 S., & M., 290, Miss.

He cannot renew a note of the firm so as to bind partnership assets; in fact all of his powers over even the personal estate are abrogated, except to sell it and liquidate the affairs of the firm, and this, although the legal title to the personalty remains in him. We have seen before that the partner cannot sell, mortgage or assign the realty during the existence of the partnership, and that his powers are not increased but diminished by the death of his partner. Then how can it be held, that as surviving partner, he can do about the realty that which he could not have done, during the lifetime of his partner? His relation to the property is simply that he has a lien upon it—to secure any balance due him on partnership account, and to indemnify him against partnership debts. This lien is generally inaccurately called a trust, and it is from the use of that word, I think, that certain courts have become confused, and held, as did the court below in this case, that the equitable title to the property remained in the surviving partner, and that the heir held the legal title in the trust for the surviving partner and creditors. Now "a trust," says Judge Story, "in the most enlarged sense in which the term is used in English Jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from legal ownership."

Story's Equity, Vol. 2 Sec. 764.

Implied trust, however, is frequently used as the synonym of lien.

Story's Equity, Sec. 1,243, says: "Another species of tacit or implied trust, or perhaps, strictly speaking, tacit or

implied lien, is that of each partner in and upon the partnership property, whether it consists of land, or stock, or chattels, or debts, as his indemnity against joint debts, as well as, his security for the ultimate balance due him for his own share of the partnership effects."

In another place he says: "The lien of the vendor arises from an implied trust, because in good conscience, the vendor ought to be paid out of the lands he has sold, and equity will hold that the vendee took the title upon this trust."

We see, then, that when the books say, that the heir holds in trust for the surviving partner and creditors, it simply means that the creditors and surviving partner have an equitable lien upon the lands for the satisfaction of their debts. Story defines a lien as follows:

"A lien is not, strictly speaking, either *jus in re* or *jus ad rem*; that is, it is not property in the thing itself, nor does it constitute a right of action for the thing. It properly constitutes a charge upon the thing."

Sect. 1,215, Story's Eq.

The surviving partner and the heir have a mutual lien upon the undivided interest in the partnership realty for the same purpose and to the same extent, but neither has an equitable estate in the other's interest, and therefore neither can be compelled to convey to the other. The interest of the deceased partner descends to his heirs, subject to a lien for partnership purposes, and his title can only be divested by means of a judicial sale, made under a decree of a court of competent jurisdiction, to satisfy the lien.

The personal property must be exhausted first, and the heir must be made a party when it is sought to sell the land for the firm debts.

Lang vs. *Waring* 25 Ala., 625.

The widow must also be made a party, or she will not be divested of dower.

Collins vs. *Warren*, 29 Missouri, 236.

There is, therefore, no other way in which the interest of the deceased partner in the lands can be reached, to pay debts, by the surviving partner or the creditors, except by proceeding in Equity to have the lands sold to discharge the lien. As there is no survivorship between partners, either at law or equity, the surviving partner does not, by the death of his partner, acquire any right, interest, title, or control of the realty that he did not have whilst his partner was living. I know that several very respectable Courts have held, that the equitable estate in the deceased partner's moiety of the real estate was in the surviving partner, and that he could sell and convey it to pay debts, but they do not appear to be sound, and evidently arise from a confusion in the minds of the Judges, in not distinguishing between an implied trust, or rather, as Story says, a lien arising from an implied trust, and a trust in the sense of an equitable estate.

"The vendor's lien on land," Mr. Story says, "arises from an implied trust." So that it could be called a trust in the same sense that the lien of the surviving partner and creditors is called a trust; and Mr. Story and other authors do, in fact, say that the vendee holds in trust for the vendor. But would any Court hold that if a vendor of land, to whom a balance was due for the purchase of the land should sell the land, and convey it to a third party, for money to pay the debt due him from the vendee, that his grantee would get an equitable title to the land, and that if he got into possession, the Court would restrain the legal owner from asserting his title thereto?

I apprehend that no Court would go so far. The vendor

judicial determination of the principles involved.

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I apprehend that no Court would go so far. The vendor could only assign his debt and his equitable right to pro-

ceed against the land to recover the debt, and yet, if the authorities and books are right upon the point (and I believe there is no conflict or contradiction between any of them), it is only an implied trust or lien on the interest of the deceased partner in the partnership effects, whether real or personal, that the surviving partner holds. As to personal assets, he has the legal title, and his right to dispose of them is by law continued after the death of his partner, but as to the realty, he never had the legal title to but one-half of it, and was never the agent of his partner for disposing of his interest therein. During the existence of the partnership, even where one partner has the legal title to the partnership real estate, he cannot sell it and give a good title to one having notice, without the consent of the other partner.

Parsons on Partnership, page 390.

From which it would seem that one partner is not the agent of the other to sell his moiety in the partnership lands, although the latter may only hold an equitable interest therein.

The cases upon which the court below relied, in deciding that a surviving partner could convey a full equitable title to the partnership realty, are *Andrews* vs., *Brown*, 21 Ala., ~~*Murphy* vs., *Adams*~~, 17, California. The first of these is directly in point, and goes the whole length of the decision of the court below in the present case. *Andrews* vs. *Brown*, however, is questioned and criticised, and virtually overruled, though not so in terms, by the same Court, in *Lang* vs. *Waring*, 25, Ala., 625.

The California case by Justice Field, then Chief Justice of California, is not an authority exactly in point, although the decision in *Andrews* vs. *Brown*, is quoted and relied on in support of the decision rendered in that case.

~~*Murphy* vs. *Adams*~~, was not the case of a surviving part-

Dupuy. v. Leavenworth.

ner at all; one partner had fraudulently absconded with all the personal assets of the partnership, leaving his partner nothing with which to pay their partnership debts, except some real estate belonging to the firm. This the remaining partner sold to one of the creditors of the partnership, for a debt which he held against the firm of a much larger sum than the value of the realty. Years afterwards the absconding partner returned, and after having approved and ratified the sale of the realty, transferred his interest to a fraudulent vendee for the purpose of recovering the property for his own use, in the name of this fraudulent vendee, free from the debt and lien which he justly owed to the creditor who had purchased it. Under the circumstances of that case, a Court of Equity would be most diligent and astute in its search for some principle, by which it could prevent these fraudulent conspirators, from enjoying the fruits of their rascally scheme, and protect the innocent purchaser. If there were no precedent, the court would be apt to make one; if there were a precedent, the court would not be disposed to criticise too closely the reasoning by which the much desired conclusion had been reached. I do not pretend to say that in the California case the court did not make a correct decision, and one justified by the soundest principles of equity; for the result attained in that case fully satisfies the natural sense of justice which belongs to every educated conscience, and I hope, therefore, is not inconsistent with the principles of equity, as administered under our jurisprudence. What I mean to say is, that without criticising the conclusion reached in that case, I may respectfully dissent from so much of its reasoning as approves the doctrine laid down in Andrews *vs.* Brown, and I may say that the *obiter dicta* therein are not entitled to the same weight as persuasive authority, as they would have been had these questions been presented to the same learned judge, under circumstances more propitious for an abstract judicial determination of the principles involved.

The Alabama case, *Andrews* vs. *Brown*, is decided upon the authority of *Delmonico* vs. *Guillaume*, 2 Sanford's Chancery, 336, and the California case cites as authority the Alabama case and *Delmonico* vs. *Guillaume*, so that both the other decisions are founded upon the authority of *Delmonico* vs *Guillaume*. The Court in the latter case, is the discoverer, inventor and creator of the rule of law, if it be one, upon which is based the idea that the surviving partner can convey a full equitable title to the deceased partner's moiety therein, provided it is done to pay debts, it rests upon no authority or precedent, except the *ipse dixit* of the judge in that case. It is true that the judge does not claim the merit of originality, but quotes six or seven decisions, which I must conclude he did not have before him, in support of the principles upon which he based that decision. The authorities cited by him, are as follows:

Dyer vs. *Clarke*, 5 Metcalf;
Cookson vs. *Cookson*, 8 Simmons, 520:
Howard vs. *Priest*, 5 Metcalf, 582;
Townsend vs. *Devaynes*, 11 Simmons, 468, note;
Fereday vs. *Wightwick*, 1 R. & Mylne, page 45;
Phillips vs. *Phillips*, 1 Mill & Keene;
Brown vs. *Brown*, 3 Mill & Keene.

I have examined each of these authorities carefully, and I do not find that any of them sustains or lends the least support to the doctrine announced in Delmonico *vs.* Guillaume.

Dyer vs. *Clark*, 5th Metcalf, holds that the surviving partner has an equitable lien on the partnership realty, and that having collected rents, he was entitled to retain them to satisfy balance due him in settlement of the partnership.

The heirs and widow had sold the real estate, and this was a bill filed by them to recover rents accrued and col-

lected by the surviving partner before the sale. In this case the partner is not said to have an equitable estate in, but an equitable lien upon, the lands.

Ferreday vs. *Wightwick*, 1 R. Mylne, does not discuss or pass upon any point decided in Delmonico *vs.* Guillaume. Phillips *vs.* Phillips, holds that under the English law, as administered in equity, the realty of the partnership becomes personal estate, and goes to the administrator or executor and not to the heir. The decision goes no farther.

In *Broom* vs. *Broom*, it is held that the deceased partner's interest in real estate of the firm goes to the administrator, and the administrator having sold in course of administration to the surviving partner, a Court of Equity would compel him to convey. This is directly opposed to the doctrine of Delmonico *vs.* Guillaume, as the latter case decided that the full equitable estate was in the administrator instead of the surviving partner who became the purchaser from the administrator. In Mississippi, however, as we have seen, this realy would have gone to the heir in whom would have been the equitable as well as the legal title.

In *Cookson* vs. *Cookson*, father and son were partners, and articles of partnership stipulated that certain land should be a part of their joint stock, and that within twenty-four years if either died, the other might buy at agreed price. Neither died within the time, but they continued business for some time after the twenty-four years. When the father died, it was held that the realty was not converted, and descended to the heir.

In *Townsend* vs. *Dewagne*, the surviving partner claimed the right to purchase at a certain stipulated price. Held, if the stipulation was in writing, the executor might sell to him and the heir be compelled to convey.

In *Howard* vs. *Priest*, the surviving partner of insolvent firm filed a bill to subject rents of deceased partner's moi-

ety of the realty to partnership debts. Held, that he could do so, as the heir took the legal estate in subjection to a trust and equitable lien in favor of surviving partner.

It will be seen from this digest of the authorities relied on to sustain *Delmonico* vs. *Guillaume*, that I am justified in saying that it is to be presumed that the Judge did not have access to these cases when he cited them, and that it is not sustained by one single authority. Its reasoning is bad, because it proceeds upon an erroneous premise, to wit: that one surviving partner has an equitable estate in the deceased partner's moiety of the realty, instead of a lien upon it. The only argument is, that the surviving partner must have the right to sell the realty because he must pay the debts.

In the United States, the administrator, must pay the debts of his intestate, and when there is not sufficient personal assets, he may have the Court sell the realty also, but no lawyer has ever been heard to argue, that because it is the duty of an administrator to pay the debts of his intestate, and the realty may be subjected to the payment of these debts, that the administrator therefore, holds equitable title to the real estate, and may proceed at private sale to dispose of it for payment of debts, and that his vendee under such a sale can acquire the equitable title and through a court of equity compel the heir to convey. And yet the reason for it is as strong in the one case as the other. It is based upon the fallacious idea that the law must provide a surviving partner, with means under all circumstances of winding up the partnership affairs, according to his own views, without appealing to the salutary directions of a court of equity, and that to reach this end the law ignores and breaks down all of the fixed, and in other cases, inflexible distinctions between personalty, and realty.

In *Howard* vs. *Priest*, surviving partner had taken the benefit of the insolvent laws, and the effects of the partnership had been, by the court, placed in the hands of commissioners. The heir sued for rents collected by the commissioners; held that he could not recover, as the heir took in subjection to a trust and equitable lien in favor of the surviving partner.

To maintain this doctrine, it is necessary to show that the surviving partner has powers greater than those of a court of law, and equal to those of a Court of Equity. The books say, that a Court of Equity may treat the realty of the partnership as assets, so far as necessary to pay debts, but the decisions that I have criticised, have transferred the powers of the chancellor to the surviving partner. He may ascertain for himself the insolvency of the firm, the fact that the lands are partnership lands, divest the widow of dower and the heir of title, without a hearing, and execute his own decree in favor of himself, by a sale of the property, without giving the heir the privilege of paying the debt or discharging the lien. I have said that, according to these decisions, his powers were equal to the chancellor's. I might have said that they are far greater even; for the chancellor cannot enter a decree against the heir, without having him summoned and giving him his day in court, nor can he decree the sale of his land, without giving him an opportunity to discharge the lien by payment.

But we are asked to believe that a surviving partner *may* do all these things. If such are indeed his powers, future writers of books on partnership, should state the rule some what in this fashion: "While a court of law is not empowered to treat real estate as partnership assets, a surviving partner may treat it as personal estate, and dispose of it as seems best to him. Further, a Court of Equity may, with the consent, and by the authority of the surviving partner, under certain limitations and restrictions, treat the realty

of the deceased partner as partnership property, and decree that the same be sold to pay debts, unless the heir is willing to redeem."

He might add: "A Court of Equity may also acquire jurisdiction, when the vendee of the surviving partner requires its aid to enforce against obdurate and rebellious heirs, the decree made by him. And in such cases, the Court will issue its injunction to prevent the heirs from disturbing the possession of purchasers under such decree, or, if necessary, grant its most beneficial writ of assistance to put each purchaser in possession of lands held by the heirs."

There is another ground on which appellees claim they were entitled to the decree given them by the court below —although that court did not in its opinion, sustain them in that theory. It is argued that appellee is estopped from recovering these lands by his conduct touching the sale. It is alleged in the bill that Shanks was present, when the deed of assignment to Klein was made, and that he advised the making of said deed, and that Klein accepted said trust on that account. This the defendant denies, and says that he was not informed that said deed had been made until several months after its execution. See page 31, Record.

Brown, in his testimony for appellees, confirms this, but says that Shanks verbally to him ratified and confirmed the assignment after it was made, and Shanks in a letter to Brown, admits that Klein afterwards sold with his *consent* and *knowledge*.

The answer of the defendant to the bill shows the meaning of the last words, and the character of the *knowledge* and *consent*. Shanks, in his sworn answer, says that he was advised by Brown, the surviving partner, and by Brown's lawyer, that Brown had the full, equitable, and

legal title to the property as surviving partner; and that at that time he had great confidence in Brown, and that whatever he said about the matter to Brown was not said by him as one having any authority or right in the premises. (See answer, p. 30, Record.)

Brown corroborates the statement of Shanks that he was deceived by Brown and his lawyer as to his rights in the premises.

Cross-interrogatory 54, p. 42, is:

"Was not Shanks told by your lawyer that you had the legal and equitable title to the lands conveyed in your assignment to John A. Klein, and the full right to dispose of the same?"

"Answer. As surviving partner, yes."

"55 cross-int. Did you not yourself take him to the Hon. T. A. Marshall, who gave him the advice?"

"Answer. I do not recollect."

In answer to cross-int. 56 Brown says that T. A. Marshall was his legal adviser at Vicksburg,

From this it is evident that as Brown and his lawyer both were of opinion that the former had the full, legal, as well as equitable title to the lands, it is not true that he was influenced to make the deed by Shanks. No ratification of the deed from Shanks was sought from or given by him. The deed of trust itself demonstrates this: for it contains among its whereases a legal argument to show that the grantor had a right to make the title therein conveyed.

In the bill it is charged that Klein accepted the trust because he understood that Shanks approved it.

The 11th int. to John A. Klein, on p. 70. Record, is as follows:

"Did you ever have any conversation with said defendant Shanks, or hear him converse with others, or say anything touching the execution of said deed of trust or the sale thereunder? If so, state all he told you or heard him tell others on that subject, and expressly whether he wanted

that deed of trust made or approved, or desired the sales to be made under it for the purposes mentioned in it."

To this leading and suggestive question the witness, who is one of the defendants, answered (p. 72): "I had no particular conversation with him on the subject, though he never made any objection; we only talked about the general business. I never heard him talk to others on the subject, that I can recollect. I remember he said the whole thing was a hopeless ruin."

This shows that Klein never thought of his approval or disapproval enough to converse with him on the subject, and that it is not true that he was induced to accept the trust by the approval or advice of Shanks. Neither is there any proof that Shanks ever, by word, act or deed, influenced Klein or made any statements to him for that purpose; nor is there any evidence that any of the purchasers at Klein's sale ever heard of Shanks or knew of his existence. It also demonstrates that all that Shanks means in his letter, by saying that Klein sold with his *knowledge* and consent, is, that having been led to believe by Brown and his lawyer that he (Shanks) had no title, either legal or equitable, he did not interfere, and when asked by Brown his opinion of the propriety of Brown's having executed the deed, may have said, that he thought it was the best that could be done.

"The following elements must be present in order to establish estoppel by conduct," says Bigelow on Estoppel, page 438, 2nd edition.

"1st. There must have been a representation or concealment of material facts

2nd. The representation must have been made with knowledge of the facts.

3rd. The party to whom it was made, must have been *ignorant of the truth* of the matter.

4th. It must have been made with the *intention* that the other party should act upon it.

5th. The other party must have been induced *to act upon it.*"

It is enough that the representations be implied either from acts or silence, when there was an obligation to speak. The representation must be as to a *fact* and not as to a proposition of law.

The principles of law upon which the above stated propositions are founded, are established by numerous decisions cited by Herman on Estoppel. The Supreme Court of Mississippi, in the case of *Davis* vs. *Bowmar*, 55 Miss., 780; and in the case of *Staton* vs. *Bryant*, page 261, same volume, has decided that all the above elements must enter into an equitable estoppel.

In *Staton* vs. *Bryant*, there was a stronger reason than in the present case for the application of the doctrine. The plaintiff had lived adjoining the defendant for years, and was fully aware of his own title to the lands which defendant had bought, but never informed defendant of the fact, and permitted him to go on and improve the land and use it as his own. He was not present however, when the sale took place, and the Court held, that as defendant had not been deceived into making the purchase, by plaintiff's conduct at the time of the sale, he could not be estopped from asserting his title, but that equity would require that he place defendant in *statu quo*., by paying for improvements he had suffered him to make, and by repaying the money which had been used by the executor for satisfying a charge or lien on the land, the defendant being required to pay rent.

Which of the four necessary elements of estoppel is present in this case?

Shanks did not misrepresent or conceal any material fact. It his conduct in not enjoining the sale by Klein, could be construed into a representation that Brown owned the title, it certainly cannot be said that he *knew* this to be untrue.

Who acted upon or was deceived by his representations? Certainly none of the appellees, because it is not shown that any of them, except Klein, ever knew Shanks or had any conversation with him. Klein was not a purchaser at his own sale, and besides he testified that he never had any conversation with Shanks about the matter.

Nothing that Shanks might have said to Brown, the surviving partner, could estop, because Brown lost nothing by the sale, and did not himself buy any of the lands.

The doctrine of ratification is nothing but a form of estoppel and the same elements must enter into it.

If a man cannot make a parol sale of land, neither can he confirm or make valid such sale by anything he may say afterwards. A parol ratification is as much within the Statute of Frauds as a parol deed.

Ratification to be an estoppel must be a representation made or an act done, with the intention to lead another to do something to change his position for the worse, and the party who invokes the doctrine must have been deceived by such representation and have acted upon it.

The pretended confirmation or ratification of the sale in this case was something said by Shanks to Brown, but not communicated to any of the appellees who invoked the estoppel, nor acted upon by them.

The doctrine quoted in brief for appellees from Story, sec. 121, is not by Story applied to real estate, but bonds and deeds of the partners other than the conveyance of real estate.

The seal is not the only obstacle. If the deed be given in some matter in which the partners are the agents of each other, and the absent party afterwards ratify it, the deed and the seal become his; but as to real estate the partners are not empowered to act for each other, even, as we have seen before, in disposing of the equitable title or in making contract for the sale thereof enforcable in equity.

In England. contracts of a partner about the land of the firm, as for its sale, for example, have no force unless they are made with the consent and by the *authority* of all the partners. See Parsons on Partnership, 390.

And this, although the realty of the partnership is held in equity to be only personal property. The distinction is that, as to the personal estate, all the partners own it jointly, *per my et per tout*, and they can dispose of it as owners, but as to real estate, they own it as tenants in common, each his interest in his own right, subject to a lien in favor of each other for partnership balances that may be found due to one or the other.

Some authorities talk of the equitable title of the lands being in the *partnership*, and speak of the partnership as though it were a corporation or artificial person.

The partnership is a *contract* between the partners, and the property belongs to the partners whose rights and liabilities are controlled by the contract of partnership. Certainly a contract cannot own property personal or real.

The deed in the present case does not purport to be the deed of Shepherd Brown and David Shanks the devisee of Joseph H. Johnston, deceased, but is a deed made and signed by Shepherd Brown alone, and does not upon its face pretend to convey any title except such title as might be in the said Brown himself under the circumstances recited, See page 43 Record. Now we may admit, though it is doubtful, that if A makes a deed or contract about land, in

the name of B without authority, but claiming to be agent for B, B may ratify verbally and will certainly be bound by the deed if he accept the consideration.

But this arises from the fact, that although the Statute of Frauds requires the contract to be in writing, it does not require that power to the agent shall be in writing.

But to say that A can make a conveyance of land to C in his own name and without any pretense that he is the agent of B, that the deed may afterwards become the deed of B, and binding upon him by verbal ratification, is to say that B may convey his interest in the land by parol, which is directly against the provisions of the Statute of Frauds.

With a few perjured witnesses any man's land might be taken from him in this way without the scratch of a pen.

A wanting B's land would only have to get some irresponsible party to quit-claim the land to him, and then by his own oath and that of another false witness, prove that B verbally ratified the sale.

The point I make is, that a man may by spoken words ratify a deed made in his name by an unauthorized person, but that the doctrine of ratification has no place where the deed is made by a third party in his own name and right. I think that in all cases where a parol ratification has been held of any binding effect, it will be found that the deed purported to be made by or for the ratifier. If there are any exceptions, the decisions, I am sure, are erroneous.

The principle I contend for has been settled as the law of Mississippi in the case of *Dickson* vs. *Green*, 2 Cushman, 612, in which the Court says:

"Where one of two joint tenants sold the whole interest in the estate, and made a deed therefore in his own name and took notes for the purchase money in the names of both, and the co-tenant afterwards transferred his interest in the note to the tenant making the deed, this is not a sufficient writing as between the joint tenant to take the case out of the Statute of Fraud."

Full justice may be done in this case without doing violence or straining any of the well-settled principles of equity.

The Court has the power as I have shown from the cases of Staton vs. Bryant, 55 Miss., page 261, to subrogate the appellees to the rights of the creditors, whose liens or charges their money has satisfied, and to order an accounting of rents and profits and permanent improvements.

In conclusion, I ask that if the court be of opinion that appellees are entitled to this last mentioned relief, that it definitely fix the principles upon which such accounting is to be had.

In the present case most of the property consisted of business houses, and were leased or rented from year to year by the appellees, so that the actual amount received by them would be a satisfactory mode of reaching the amount of rents, which appellant is entitled to recover. In the few cases in which the property has been occupied by appellees themselves, it will be easy to fix what would have been the fair rental value.

W. B. PITTMAN,

for Appellant.

"ART. 1. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer any debt or damage out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt or default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract for the sale of lands, tenements or hereditaments, or the making any lease thereof for a longer term than one year; or upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him or her thereunto lawfully authorized."

"ART. 5. Hereafter all declarations or creations of trusts or confidence of or in any lands, tenements or hereditaments, or of or in any slaves, shall be made and manifested by deed in writing, signed by the party who declares or creates such trust, or by his last will in writing, or else they shall be utterly void; and every deed declaring or creating a trust, shall be acknowledged or proved as other deeds, and shall be lodged with the clerk of the probate court of the proper county to be recorded, and shall only take effect from the time they are so lodged for record: *Provided*, That where any trust shall arise or result by implication of law, out of a conveyance of lands or tenements, or slaves, then such trust or confidence shall be of the like force and effect as the same would have been if this act had not been passed."

The Statute of Frauds is construed in Mississippi more strictly than in England, and perhaps than in any of the other States of America. It is construed in the following cases, and held by the Supreme Court: A parol contract for the sale of land is invalid though partly performed;

there is no exception to the statute and the courts will engraft none.

Beaman vs. *Buck*, 9 S. & M., 207;
Box vs. *Stanford*, 13 S. & M., 93;
Bacon vs. *Collett*, 4 G., 269;
McGuire vs. *Stevens*, 42, Miss., 724.

In *Box* vs. *Stanford*, the Court hold that the fact, that there was an agreement between the parties that the contract should be reduced to writing, and that the vendor had fraudulently prevented its being done, does not relieve against the Statute of Frauds. And the Court repudiates all of the exceptions to the Statute maintained by the Chancery Courts of England, and says: "The doctrine which lets in one equitable exception opens the door for the whole innumerable series." There is no consistent medium course. Either all the equitable exceptions introduced by the English Courts must be admitted, or we must adhere to the plain provisions of the statute. In this case a demurrer to the bill was sustained, and the Court say that the Statute of Frauds need not in such case be pleaded, nor need the charge of fraud, preferred in the bill, be answered, because if the fraud be admitted, complainants would still be entitled to no relief.

ARGUMENT IN REPLY.

I have examined carefully all the cases cited by Mr. Clark in his brief on page 36 to sustain the view that to make ands partnership property, *ex contractu*, in contradistinction to their becoming so as a resulting trust from being bought with partnership funds for partnership purposes; that is to say, for the use of the firm in and about its main business, I find that they are nearly all impertinent to this question, being cases in which the property was purchased with the social fund and appropriated to use in the conduct of the commercial or manufacturing business.

The case of *Fairchild* vs. *Fairchild*, 64 N. Y., not only does not overrule the doctrine as stated by us, but strongly supports it, recognizing the distinction between real estate becoming partnership property as a resulting trust and cases in which it is sought to hold it as such, *ex contractu*.

Distinguishing the case under consideration from *Smith* vs. *Barnum*, the Court say:

"Proof of a partnership for the purpose of buying land presents a different question from that which arises where an existing partnership purchases land for its use or benefit, and STORY, J., in delivering the opinion in *Smith* vs. *Barnum* (*supra*), recognizes this distinction." He says: "It is not the case of a purchase confessedly paid out of the funds of the existing partnership for partnership purposes and the deed taken in the name of one partner. In the latter case he concedes a resulting trust would arise, while in the former he held that it would not—the difference being that in the former the trust resulted from the payment of the money consideration, while in the latter it arises from the contract."

I believe I may safely say that the Court will not find more than two cases out of the whole nine cited that lends the least countenance to doctrine contended for by counsel. I do not claim that these cases have been cited by counsel to mislead the Court, for I am satisfied from his brief that he himself fails to see the distinction made by Justice Story and many other learned courts between lands which become partnership property, as resulting trust, and those made so by contract. And so nearly all of his cases only go to prove what I admitted in the opening, to wit, that lands bought with partnership funds and appropriated to uses incidental and beneficial to the business in which the firm are engaged became partnership property as a resulting trust, and that the necessary facts to establish this trust may be proved by parol testimony.

In *Whitney* vs. *Cotton* the question is not discussed, but the court does say that the surviving partner has a lien upon the deceased partner's money and that the heirs of the deceased are necessary parties to a bill to enforce such lien.

McAllister vs. *Plant*, 54–106, page 54, of Mr. Clark's brief, is cited to show that a title conveyed to two parties as trustees upon the death of one trustee survives to the other. It is the legal title discussed there and if the position taken that the partners are mere trustees is correct, then it follows that the *legal title* and not the equitable would survive to the surviving partner. We have shown from numerous cases in Mississippi and other States that this does not occur.

The erroneous application of the doctrine of this decision by Mr. Clark comes from the inaccurate use of the words *holds in trust*, instead of holds subject to a trust charge or lien.

It seems that the chaotic confusion that has overspread

the decisions of some of the courts upon this subject have all arisen from the same cause.

The case of *Tillinghast* vs. *Champlin*, 4 Rhode I., cited on page 60 of Mr. Clark's brief, is *obitu dictum*, and is not even used, in argument, to reach the necessary conclusion in that case.

It is a mere statement by the learned judge of some general principles of partnership, (derived as shown by his citation from *Delmonico* vs. *Guillaume*,) preliminary to the discussion of quite a different question.

The case of *Robertshaw* vs. *Hanway*, page 72 of Mr. Clark's brief, was not when decided upon a bill to foreclose a mortgage, but upon an amended bill to subject the property to the lien in favor of the creditors.

Originally there was a bill filed to foreclose a mortgage made by the surviving partner and the wife of the deceased; upon demurrer it was dismissed as to the wife, and upon an appeal to the Supreme Court the action of the court below was sustained.

See 49 Miss., page 760.

In that opinion the court say:

"The personal assets in the hands of the survivor are liable at law for the payment of the partnership debts, and the real estate of the partnership is held by the partners as tenants in common, and upon the death of one of them his estate in the lands descends to his heirs. *And whenever it becomes necessary to apply the real estate thus held, for the payment of debts, a bill in chancery for that purpose should be brought against the heirs and surviving partner as tenants in common.*"

Robertshaw vs. *Hanway*, 52 Miss., 713, the court says, after reciting the above quotation from the case in 49 Miss., "Acting upon these suggestions complainant dismissed his bill, as in the lower court, against Mrs. Robertshaw in her

individual capacity, retaining it, however, against her in her character of guardian for the minor heirs of her former husband. Having established his case by proof he had a decree condemning the land to be sold, from which this appeal is taken."

Again, to the plea of the statute of limitations of three years, which could not have been interposed if the bill had been for foreclosure of a mortgage to secure a note, the court reply, that there had been an *account stated.*

The citations of counsel on page 715 of *Sparks* vs. *Pittman*, 51 Miss., 51 Maine, and 11 Ohio, show conclusively that the effort was not to foreclose the mortgage but to show that having taken it by *mistake* their client was not thereby debarred from his original rights in the premises.

The case of the *Bank of Port Gibson* vs. *Baugh*, 9, S. & M., decides that a mortgage given by surviving partner to secure his own note given for money *borrowed and used* for the payment of debts due the partnership is *void.*

The case of *Robertshaw* vs. *Hanway*, is conclusive against the power of the surviving partner to mortgage the interest of the deceased partner in the real estate for a partnership debt.

For, if he had the right, the fact that one not obligated for the debt had joined him in a note and mortgage for a partnership debt, would not have made the note or the mortgage void as to him, and the suit could have been dismissed as to the party not bound, and the mortgage foreclosed to pay the note of the surviving partner.

In Mr. Clark's brief, on page 59, it is said to be a "*fundamental* error to suppose that the legal title to the personalty vests in the survivor."

The Supreme Court of Mississippi has decided this to be the law in two other cases, besides the one cited in 49 Miss., to

wit: in *Mason* vs. *Beasly*, 5 Cush., page 106, and in 6 Cushman, page 396. And no court ever held that the personal property in the hands of the surviving partner was not subject to execution in a judgment against him founded on a partnership debt.

In order that the court may have it in a compact form, I will give here all of the evidence on which the estoppel is sought to be based.

Interrogatory 20th, page 39, to Shepperd Brown, surviving partner:

"Did Shanks visit Vicksburg with you to look into the affairs of the late firm of Brown and Johnston, with same object that he visited New Orleans? What aid did you afford him in the investigation of the affairs of that firm? Did you consult with Shanks as to the expediency and justice of your making the deed of trust before referred to? If you did, what did he advise with reference to it? Answer, p. 51."

"I did visit Vicksburg with Shanks and met him there twice. I gave him all the aid I could.

Shanks was not present when the deed of trust was made, but he came shortly afterwards."

21st interrogatory. "Was Shanks not fully advised that you intended to execute the deed to secure the creditors of Brown and Johnston; and did he ever object to it or dissent from the justice or propriety of the act before a sale of the property by the trustee, as in that instrument provided?"

Answer, page 51.

"Shanks knew of the deed of trust *soon after it was made.* He ratified and confirmed it verbally, and declared that it met his views; and acknowledged the justice and propriety of the act verbally, and did the same thing in several letters.

It cannot, therefore, be contended that Shanks knew of or advised the making of the deed to Klein; but the es-

toppel, if any, must be based upon his subsequent verbal approval of the same made to Brown, and not as far as shown by the evidence ever communicated to any of the appellees or their privies. We have shown that Shanks at the time was under a mistake as to the law, and that he was led into that mistake by the surviving partner and his lawyer. We will now show that he was also deceived by Brown as to the facts; for it appears from the evidence that Brown, the surviving partner, had funds in his hands properly belonging to Brown and Johnston, sufficient to pay all these debts without selling the real estate.

Interrogatory 16, page 77, to A. H. Arthur.

"Examine the books in your possession, and state what was the debit of Shepperd Brown to the firm of Brown & Johnston, at the time of the dissolution of the partnership?"

Answer on page 80.

"The books show that the amount, charged to Shepperd Brown at the date of the dissolution of the firm of Brown & Johnston, was $58,525.04, and the book-keeper calculated interest on it up to 1st August, 1862, $5,870$\frac{33}{100}$, making the indebtedness up to August 1st, 1862, $64,395.37 That the surviving partner was fully able to settle this balance, see his answer to 70, cross-interrogatory, page 56."

Again, on page 53 of the record, Brown says, that two pieces of property belonging to the partnership in New Orleans were sold for $90,000, and went to the benefit of their creditors.

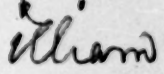
The total estimated debts of the firm of Brown & Johnston, were $150,000. Answer of Brown to 9th interrogatory, page 49, record; although there is no evidence that they owed more than the debts provided for in the deed of trust, less than $70,000.

But taking Brown's own estimate and the $90,000 realized for property in New Orleans, and the $64,395.37 due

from him, was amply sufficient to pay all the debts of the firm of Brown and Johnston. These facts were not known to Shanks until just before he brought his suit. A perusal of Brown's answers and refusals to answer cross-interrogatories propounded to him, will convince the court, that there are many other things which were concealed from Shanks by this surviving partner, and of a characterthat he is not yet willing to divulge.

The cases cited in Mr. Clark's brief upon the doctrine of estoppel, are all in harmony with the principles of the law, as cited from Bigelow on Estoppel, on page 25 of this brief. The elements there said to be necessary, were in all the cases by him cited present or thought to be present, by the Courts who rendered the decisions. The evidence shows that they were wanting in this case;—for it is not proven that any of the parties who invoke the doctrine of estoppel, have been deceived by the representations or conduct of Shanks as to any *fact*, of which they were *ignorant*.

W. B. PITTMAN.



UNITED STATES SUPREME COURT.

No.

DAVID C. SHANKS, EXECUTOR OF JOSEPH E. JOHNSTON, DECEASED, *Appellant.*

vs.

JOHN A. KLEIN, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF AND ARGUMENT FOR APPELLEES.

R. O. POLKINHORN, PR., 439 AND 441 D STREET, WASHINGTON, D. C.

Supreme Court of the United States.

No. 448.

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DAVID C. SHANKS, EXECUTOR OF JOSEPH H. JOHNSTON, DECEASED, APPELLANT.

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Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

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STATEMENT OF THE CASE.

It is submitted that the record in this case will fully corroborate the following as a substantial statement of its facts:

1. In 1838 Sheppard Brown and Joseph H. Johnston became general partners at Vicksburg Mississippi, under the firm name of Brown & Johnston. The co-partnership, understanding and agreement was, that the business of the firm should embrace a general banking and brokerage business, and the buying and selling real estate.

2. The firm was successful in business, and at the out-break of the war owned a valuable estate, consisting chiefly of wild lands in Louisiana, Mississippi, Arkansas and Missouri, several plantations, with some four hundred slaves, and

property in Vicksburg, which forms the subject of this suit, all acquired with partnership funds, in course of partnership business, and for partnership purposes.

3. Some years before the war, the members of this firm became partners in a banking business in New Orleans, conducted under the firm name of Brown, Johnston & Co., composed of said members and one R. A. Bourke, also with a cotton factorage business in that city, conducted under the firm name of Rotchford, Brown & Co., composed of said members and Philip Rotchford. These firms had no partnership connection with the Vicksburg house. Their business in their respective lines was very extensive up to 1862, when forced to cease operations in consequence of the results of the war.

4. No change occurred in the Vicksburg firm until April, 1862, when A. H. Arthur, who had been the confidential clerk and agent of the firm for a number of years, was associated with it, and the firm name was changed to Brown, Johnston & Arthur. This association of Arthur with the firm worked no change in the ownership of its property, or obligation for its liabilities, nor did the firm after the change, acquire any assets or incur any liabilities, as within a few weeks after the change, the events of the war compelled a suspension of its business, and it never resumed.

5. Joseph H. Johnston died in Virginia in July, 1863, leaving a will, of which the appellant, D. C. Shanks, was named sole executor. His death operated to dissolve the two New Orleans and Vicksburg firms.

6. In June, 1865, Brown returned to New Orleans from Georgia, where he resided during the war, to investigate the condition in which the war had left the late firms of Brown, Johnston & Co., and Rotchford, Brown & Co., and lend his aid to a final settlement of their affairs. He found that Rotchford had abandoned the affairs of his house and gone to Ireland, from whence he never returned. R. A. Bourke, of the other firm, was in New Orleans. He found the two

firms hopelessly insolvent, owing a debt aggregating two millions of dollars, and their assets, by the disasters of the war, rendered utterly inadequate to its payment. He found that creditors of the houses had already obtained judgments against him and surviving partners, to the amount of $500,000. As the best means of settling the affairs of these firms, Mr. Brown invoked the aid of the courts, secured the appointment of a Receiver for both firms, through whose agency, under the authority of the court, their estates were subsequently wound up.

7. Mr. Brown visited Vicksburg also, in 1865, with the like object with respect to the late firm of Brown & Johnston. He found the indebtedness of the firm to be about $150,000, over $70,000 of which was for deposits of money. The loss of over four hundred slaves, the depreciation to utter worthlessness of the wild lands owned by the firm; the loss of some $177,000 in Confederate bonds and currency, that had accumulated during the war as assets of the firm—and the bankruptcy and impoverishment of the whole country, as results of the war, had rendered the firm wholly insolvent.

8. Finding this to be the situation of affairs, and sensible of the justice of devoting the property of Brown & Johnston, as far as it could be made available for the purpose, to the payment of their debts, and to avoid a threatened scramble over it among all classes of creditors, Mr. Brown deemed it advisable and proper to adopt the most direct method of effecting this object, giving the deposit creditors of the firm, whose claims he regarded as of superior obligation, the preference.

9. As before stated, Joseph Johston left a will at his decease, bearing date June 29th, 1863. By it, he devised his whole estate to appellant Shanks, as his executor, charged, *first*, with payment of all his debts, *second*, with certain legacies. Shanks being named one of the legatees, to the extent of one fourth of the estate. As executor no bond was required of

him, and he was vested with plenary power as to the manner of administering the estate, and without the aid of the courts, it practicable. As an evidence of the authority with which he was vested, the will contained this clause. "I do not wish D. C. Shanks to be restricted in any way—any one or more of the heirs complaining, he shall not receive any portion of the estate."

10. In 1865, D. C. Shanks visited New Orleans, and Vicksburg to investigate the financial condition of the several firms of which his testator had been a partner, with a view to ascertaining what, if anything, from their estates, would be coming to him as Johnston's executor In New Orleans, Sheppard Brown offered him every facility in his power to promote the object of his visit. He consulted with Rainey, the Receiver, who had charge of the affairs of the firms there, and T. S. McKay, Rainey's attorney. He had free access to the books of the firm, and the schedules of assetts, and liabilities, and upon an investigation satisfactory to him, he declared himself satisfied, that the firms there, were hopelessly insolvent, and abandoned any idea of asserting claim to any part of their assets, and refused to qualify in Louisiana as executor of Johnston's will. From New Orleans he went to Vicksburg, in company with Brown, to look into the affairs of Brown & Johnston. Every assistance was offered him there by Brown to fully inform himself as to the condition the war had left that firm. Finding that the debts of the firm largely exceeded the value of its assets, he declared himself satisfied that whatever property the war had left to Brown & Johnston, belonged to their creditors, and should go to them. He also announced his intention not to quality as executor of Johnston's will in Mississippi, but leave the administration of the affairs of Brown & Johnston, to Sheppard Brown, as surviving partner, to whom it properly belonged.

12. Acting upon the advice of counsel, that in the insolvent

condition of the late firm, it was competent for him, as its surviving partner, to dispose of the partnership real estate in satisfaction of its liabilities, Mr. Brown, in order to carry out his purpose before suggested, of devoting the available property of Brown & Johnston in Mississippi, to the payment of their debts, he, in September, 1865, conveyed all the partnership real estate of Brown & Johnston, in Mississippi, to John A. Klein, in trust, to be sold for the benefit of the deposit creditors of the late firm, whose names, and amounts due them, were embraced in a schedule made a part of said trust conveyance.

13. Under this conveyance the property in controversy was sold by the trustee in January, 1865. The public character of the sale, and large prices the property produced, testify to its *bona fides*. The purchasers paid cash for the property, and the money, amounting to $55,875, was disbursed upon the claims of the beneficiary creditors, yielding them about two-thirds of their debts—the balance remains unpaid.

14. Thomas, Botto, Ackerman and Genella, chief purchasers at the sale, died before the institution of appellant's suits. The appellees are their subvendees or heirs. The most valuable lots at the time of the sale, were without valuable improvements They were subsequently improved by the purchasers at large cost.

15. This trust sale took place in January, 1866, it was made with the approval and consent of appellant, as amply appears by the record. He was in Vicksburg before the sale was made, and several times afterwards, as late as January, 1867, but no word of dissent or disapproval of what Brown had done was heard from him, until the institution of his ejectment suits for the property in October, 1875.

16. Appellants investigation of the affairs of the late firm had satisfied him that its debts far exceeded the value of its assets of every kind, and his sense of justice influenced him to admit that the creditors, as equitable owners of the property in con-

troversy, should have it appropriated to their claims. His letters in the record show that he understood that he occupied the same relective position to the creditors and property of the insolvent firm, that his testator would, if alive, and the same obligation rested upon him to deal with them as would have been required of his testator. His letters clearly show that he would never have instituted the ejectment suits, if he had been left to the government of his own judgment and sense of right. When first beset by Koiner to forward his scheme of speculation by means of these suits, he refused to co-operate with him, and only after persistent badgering and threats of suit, rendered more active by the promise that his interest under the will should be secured him, were his scruples of justice overcome, none the less conscious, however, that he was binding himself to the project of a speculator whose hope of success rested upon a gross injustice to innocent parties.

17. In October 1875, the appellant brought his several actions of ejectment in the Circuit Court of the United States for the Southern District of Mississippi, against appellees to recover an undivided half interest in the property in controversy, as successor to the naked legal title under Johnston's will. Appellees filed their bill and obtained from said court an injunction restraining appellant from prosecuting his suits at law, at the hearing upon the merits a final decree was rendered, making the injunction perpetual, from which decree appellant presented this appeal.

The Issues of Fact Presented by the Pleadings.

In his answer to the case made by appellee's bill, the appellant mainly relies upon a denial of the following facts alleged in the bill:

I. That the purchase and sale of real estate was a part of the partnership business of Brown & Johnston.

II. That the real estate in controversy, was acquired by the firm, with partnership funds in course of the partnership business and for partnership purposes.

III. That the partnership estate of Brown & Johnston was rendered insolvent by the results of the war.

IV. That the proceeds of the trust sales by Klein were ratably appropriated by the trustee to the creditors of Brown & Johnston.

There are many statements in the answer responsive to nothing charged in the bill, the proof of which devolved upon the appellant if important to his defense. The only depositions in the case were taken by appellees, and we think we are safe in saying that not an affirmative statement in the answer of any consequence, finds any corroboration or support in these depositions—but often meet with emphatic denial. These averments, therefore, are of small importance in the case.

Review of Testimony on the Issues of Facts.

We will now examine the testimony in the record and test the correctness of these facts charged in appellee's bill and denied by appellant.

First. Did the partnership agreement of Brown & Johnston embrace the buying and selling of real estate. Sheppeard Brown in his answer to Chief Int. 3rd, p. 49 of Record, says: "We commenced business in a small way—with a capitol of about $13,000 buying and selling uncurrent monies, and doing what was called an exchange or brokerage business. We made a great deal of money and did a very large business—dealing in everything pretty much, including the *buying and selling of real estate*, which *was then* at very low figures, caused by the commercial and financial convulsions of the Southern country."

A. H. Arthur testifies that he had resided in Vicksburg continuously for 41 years; had known Brown & Johnston 38 or 39 years, and in answer to 4th Chief Inty. says: "The firm of Brown & Johnston was composed of Sheppard Brown & Joseph H. Johnston. They did business in Vicksburg from about the year 1837—a general banking business—

buying and selling bank notes—gold and silver—bills of exchange and drafts—Louisiana and Mississippi land scrip—bounty land warrants—*buying and entering, and selling real estate, &c., and buying and selling real estate, entering land scrip and selling the land, was a part of the regular business of the firm for speculation and profit.*" (p. 74 of Record.)

In answer to 5th Chief Intg.. he states his means of knowledge on this subject were his business transactions with the firm and having been their confidential agent from 1853. (p. 74 of Record.)

Second. Was the real estate in controversy partnership property in the full sense charged by the bill. Brown in answer to Chief Inty. 7th says: "I have examined the deed in trust and declare, that the real estate therein described was owned as co-partnership property by the firm of Brown & Johnston, at the date of the dissolution of the firm. The property had been acquired by the firm with partnership funds and for partnership purposes, (p. 49 of Record,) and to same effect are his answers to Cross-Intgs. 20, 21, 22, 23, and 24 (p. 53 of Record.)

A. H. Arthur, in his answer to Chief Inty. 12, says: "I was well acquainted with the lands and lots in Vicksburg, specified in said deed in trust. They were bought and paid for by the partnership funds of Brown & Johnston. One of them bought for the banking house of the firm. Some of them bought to secure debts of the firm and some on speculation. The partners always treated the real estate as partnership property in their instructions to me as their agent. The rents and profits at the end of each year, were placed in with all the other profits of the firm in banking business and speculation, to the general account of profit and loss." (p. 75 of Record.)

Third. Was the partnership estate of Brown & Johnston rendered insolvent by results of the war? In answer to chief interrogatory 9, asking a statement of the financial condi-

tion of the late firm of Brown & Johnston, at the close of the war, Mr. Brown states:

"Their financial condition was very bad. I suppose their debts were about $150,000 or more, in Mississippi. At the commencement of the war we had plenty of means to pay all the firms debts and depositors, and I repeatedly urged Mr. Arthur to pay them, but a good many paople would not take the money, thinking it safer in our hands. At the close of the war I had on hand in Confederate bonds $177,000, the result of the war, but the only available thing left to pay said debts was the real estate in Mississippi." (p. 49, of record.)

Again: In answer to chief int. 12th, he says, "I knew from the result of the war, that the firm of Brown & Johnston, and different firms, were largely insolvent. * * * * At the date of the execution of this trust deed, when the war closed, and ever since, Brown & Johnston were largely insolvent; with no amount of diligence could money have been realized out of the assets of that firm, *including all its real estate*, to have paid the just debts of the firm." (p. 50 of Record.)

Arthur testifies in answer to chief int. 8th: "At the close of the late civil war, the condition of the firms of Rotchford, Brown, & Co., Brown, Johnston and Co., and Brown & Johnston, were considered insolvent from the loss of negroes, and personal property, depreciation of lands and secureties, &c. * * *. The house of Brown & Johnston at Vicksburg did not have so much out as the other houses, and but for the loss of negroes and cotton, depreciation of securities, and a large amount of Confederate notes they had received from debtors, and from sale of property, which proved worthless, their immediate liabilities, I think, could have been met; but the loss left nothing comparatively to pay these liabilities, but their real estate." And to chief int. 9th, he says: "The debts of Brown & Johnston, Rotchford,

Brown, & Co., and Brown, Johnston, & Co., have not yet been paid; but I have no means of knowing how much they still owe." (p. 75 of Record.)

The insolvency of the New Orleans firms as charged in the Bill, meets with no denial in the answer. The answer of Brown to cross-int. 6th, that at the date of the Association of Arthur with the firm, Brown and Johnston were solvent, was evidently made upon a valuation of the property of the firm as it stood at the outbreak of the war, for at that date the destruction of the firm estate was only threatened, not actually worked out, as afterwards by the effects of the war. Such was evidently the idea of the witness in making this statement, when taken in connection with his other testimony. This statement, however, touches the question of the final solvency of the firm but remotely—what may have been considered the financial condition of the firm in April, 1862, and what it was when the war closed, and when it became a question of importance to this case, are two quite different matters. The loss of slaves, the depreciation to utter worthlessness of wild lands in the States where they were owned by the firm, that are shown to have entered largely into the question of value of the firm estate, are matters of public history, that will receive the consideration of the court upon this subject, in addition to what the record may contain in the way of testimony of the witnesses. The appellant by his answer appears to attach some importance to the fact, that the association of Arthur, with the firm of Brown & Johnston, in April, 1862, worked a technical dissolution of that firm. Admitting this to be true, we do not see that the material questions presented, are in any way affected by it. The fact being, as charged in the bill and not denied, that neither the ownership of the property and assets, or the liabilities of Brown & Johnston were in any way changed thereby. See also Brown's answers to chief int. 3d, p. 49 of Record. All the debts embraced in the schedule, A, accompanying the deed in trust, were debts of Brown & Johnston.

Those designated "certificates of deposit issued by Brown Johnston, & Arthur," were, as Arthur explains, "but renewals of certificates that had been issued by Brown & Johnston. Answer to chief int. 11, p. 75 of Record.

In answer to cross int. 9, he further states, "the new firm of Brown, Johnston & Arthur had nothing to do with the lands of Brown & Johnston." p. 79 of Record. As charged in the bill, and not denied by the answer, the firm of Brown, Johnston, & Arthur, was forced to suspend business within a short time after it was organized, and never resumed. It acquired no assets and created no liabilities, and the firm of Brown & Johnston, with respect to its liabilities and assets, stood as if no change had ever taken place.

Fourth. That the proceeds of the trust sales by Klein, were ratably appropriated by the trustee, to the creditors of Brown & Johnston; Klein, in answer to chief int. 8, states, that he paid the proceeds of the sales, less expenses incurred, to the creditors of Brown & Johnston, the *pro rata* distribution being, sixty-two and one-half per cent. (p. 71 of Record.)

Arthur, who was one of the creditors of Brown & Johnston, provided for in the trust conveyance, in his answer to chief int. 15, makes substantially the same statement as Klein. (p. 76 of Record.) The specific *averment* in appellants answer, that the proceeds of the sales were used to pay certain arbitrarily preferred creditors of Brown & Johnston, and Brown, Johnston & Arthur, and that the assignment was for that reason void, is of no force here. Brown, as surviving partner, had the right to prefer one class of creditors to another. There were no debts of Brown, Johnston & Arthur thus preferred and provided for; the debts were all those of Brown & Johnston, and if there was anything in this suggestion of appellant, it avails nothing coming from as him, none of the other creditors that he undertakes to speak for, have been heard to complain of unfairness or illegality of the appropriation.

Upon this review of the testimony in the record, we think we can safely say that the controverted facts of the case, material to the defense of appellees, are fully established.

Upon this view of the testimony we submit the following legal propositions, in support of which we shall endeavor to show that the decree appellant seeks to reverse, not only fills the measure of the natural justice of the case, but has ample authority for its support.

First. Admitting that the legal title to the real estate interest in controversy, is vested in appellant, as devisee of the deceased partner, Johnston, the appellees are, nevertheless, owners of a perfect equitable title to the same property, derived under the trust conveyance made by the surviving partner, Brown, to Klein, which, in a court of equity, will be recognized as paramount to such legal title, and protected against any assertion of it in a court of law.

Second. Admitting that appellant was not a formal party to the trust conveyance from the surviving partner Brown, to Klein, yet, having been subsequently approved and ratified by him, said deed is as effectual to bind appellant in favor of appellees as if he had signed and sealed it.

Third. Appellant is equitably estopped by his conduct, relating to said trust conveyance and sale under it, from asserting against appellees any title to the property in controversy, as devisee of Johnston, the deceased partner.

ARGUMENT.

With reference to the first proposition we understand the position of appellant to be, that he stands upon what he claims to be his legal title to the property in dispute, as derived under the will of the deceased partner, Johnston, and demands for it in a court of equity, the application of the same rule of construction and government, that might have been successfully invoked in the court of common law, in which he instituted his actions of ejectment.

We abate or yield nothing of the strength claimed for the proposition presented, when we admit, as we do, the vestiture in appellant of a legal title in the property in controversy. We further concede, that if the issue of title between appellant and appellees had been left to the jurisdiction of the common law court, in which his actions of ejectment were instituted, appellants legal title would have prevailed. That court not being competent to recognize and enforce the better equitable title of appellees.

We hold, however, upon the facts of this case, as we believe them to be established, that appellees are vested with a title to this property, that a court of equity will not only recognize as superior and paramount to the legal title of appellant, but protect it against any assertion of the latter at law. The power of a court of equity in a proper case, to adjudge an equitable title superior to a strictly legal one, and protect it against any assertion of the, latter is elementary in the nature and organization of these courts. It is exercised upon the principle of

looking through matters of form to the meritorious facts of the case. Their methods of administration enable them to mould their judgment conformably to the requirements of justice and good faith, and constitute one of the distinguishing features between courts of common law, and those of equity jurisdiction. Discussing this subject in a similar connection, the Supreme Court of Illinois says: "Equity has an undoubted right to compel one to convey land to another, when equity and good conscience require it, or it may cancel a deed or enjoin the assertion of a title. Indeed, equity may avail itself of a variety of means, or instrumentalities for the purpose of doing complete justice.

54 Ills., 281.

The position of appellant is maintainable, if at all, only in a court of law. The appellees have referred their rights in the case to a court of equity, and the issue here is not, who has the legal title, but who *ex æquo et bono*, is the true owner of the property in dispute.

It is fundamental in the law of partnerships, as administered in courts of equity, where they are special subjects of jurisdiction, that the partnership estate shall be devoted to the satisfaction of the partnership liabilities, and settlement of all equities arising out of it, to the exclusion of all other claims or demands upon it. In case of a dissolution of the firm by death, the law devolves upon the surviving partner the duty and responsibility of effecting this appropriation of the partnership estate. He is charged with liability for the debts of the firm surviving with him, and to enable him to discharge the obligations thus fixed upon him, he is vested with a limited *jus acrescendi* in the partnership personalty, and such a beneficial interest in the realty of the firm, as may be construed an equitable title to it, as distinguished from the legal title that may have descended to the heir of the deceased partner. Such legal title is held in equity not to be in conflict with the beneficial interest of the surviving partner, but for all purposes of

paying partnership debts, wholly subordinate to it. The heir holds such title as a trust of which the surviving partner is the beneficiary for the purpose named. Such residue or balance of the property as his title may represent, not needed for the payment of debts, remain his upon the final administration of the partnership estate by the surviving partner. If the estate prove insolvent, however, it necessarily follows that the heir can hold no other relation to the property than that of a naked trustee of the legal title, subject to the control of the surviving partner for the payment of debts. To this end, the surviving partner can, by the aid of a court of equity, divest the heir of his title, or he can convey his absolute beneficial interest as an equitable title, and vest his grantee with his right to equitable aid in controlling, as justice may require, the naked legal title.

Discussing this subject in the same connection the Chancery Court of New York, says: "There is no doubt that the legal title is vested in the infant defendant to the extent of one-half of the lots contracted to Gillaume, but the equitable right and interest being vested in the surviving partner, the infant is a mere trustee of the legal title, and the court of chancery must compel conveyance of the estate upon application of the surviving partner."

Delmonico v. Gillaume, 2 Sandford Chy, 365.

The principles adverted to touching the liability of the partnership estate, and the relation to it of the surviving partner, and those representing the deceased partner, are fully defined and established in the following cases:

Dyer v. Clark, 5 Metcalf, 562.

Burnside v. Merrick, 4 Metcalf, 537.

Buchan v. Sumner, 2 Barb. Chy., 165.

Smith v. Walker, 38 Cal., 385.

Tillinghast v. Champlin, 4. R. I.

Courts of equity in their administration of the law of partnership, and for the purpose of securing the

due administration of partnership estates, as regulated in these courts, further hold, that real estate, by the process of becoming partnership property, undergoes an equitable conversion into personalty, and for the purpose of paying debts, they declare and maintain the right of a surviving partner, especially in cases of an insolvent partnership, to deal with it as such, as an equitable exercise of power, arising out of his relation to the estate. Judge Story, in his work on partnerships, section 93, declares the law on this subject as follows: "Indeed, so far as partnerships, and their creditors are concerned, real estate, belonging to the partnership, is an equity, treated as a mere personalty, and governed by the general doctrines of the latter, and so it will be deemed to all intents and purposes, if the partners themselves have, by agreement or otherwise, purposely impressed upon it the character of personalty."

The Supreme Court of Mississippi in a late case, says, partnership, real estate, "constitutes assets of the firm so far as partners and creditors are concerned, quite as effectually as choses in action or merchandise. The mere fact of acquisition in that mode works an equitable conversion into personal estate."

Whitney v. Cotton, 53 Miss., 689.

See also Goodburg v. Stevens, 5 Gill, p. 1.

Buffum v. Buffum, 49 Maine, p. 108.

Hoxie v. Carr, 1 Sumner, p. 183.

Fowler v. Bailey, 14 Wisconsin, 125.

Gray's Edition of Story's partnership, p. 164, cites the cases of Ludlow v. Cooper, 4 Ohio St., p. 1.

Nicoll v. Ogden, 29 Ills. 323.

Coster v. Clark, 3 Edwds. Chy., 428.

Wylie v. Wylie, 4 Grant Chy., 278, as authority for the rule that, where partnerships acquire real estate to be sold for profit, it is an agreement of the partners to impress it with quality of personalty.

In this case the equitable conversion of the property was not only worked out by construction of law, but it is established by the testimony, that it was agreed between the partners that it should be considered and treated as any other effects of the firm of Brown & Johnston. It became therefore in the language of Judge Story, personalty for all intents and purposes. Upon the advice of counsel that he had, for the purpose of paying debts, the equitable right to dispose of this property, Sheppard Brown, the surviving partner, conveyed it in good faith to secure the payment of debts of his late firm. It was honestly sold to, and paid for by appellees, and the purchase money in good faith ratably paid over to the creditors of Brown & Johnston. In this connection we ask the attention of the court to the following cases:

In Delmonico v. Gillaume, *supra*, Peter and John Delmonico, as co-partners, had acquired as partnership property, certain real estate designated as the "Brooklyn farm." John Delmonico died, and it became necessary for the payment of partnership debts, that this realty should be sold. This Peter Delmonico, as surviving partner, did, conveying by his deed the whole partnership estate in the property to Gillaume.

In a contest between the purchaser and heir of the deceased partner, the court decreed the legal title that vested in the latter upon the death of his ancestor, should be conveyed to the former in support of his equitable title acquired by his purchase from the surviving partner, and in doing so say: "So far as the partners and creditors are concerned, real estate belonging to the partnership is treated in equity as personal property, and subjected to the same rules. In this case, Delmonico, as surviving partner, became entitled to the Brooklyn farm, and as between himself and the heir of John Delmonico he had the absolute right to dispose of it for the payment of debts of the firm in the same manner as if it had been personal estate."

See also, Tillinghest v. Champlin, 4 R. I., where the doctrine of this case is approved and adopted.

Andrews' heirs v. Brown's heirs, 21 Ala., p. 437, was a case of a sale of partnership realty by the surviving partner, to pay debts of the late firm. The court citing the foregoing case, with approval, say: "Inasmuch as the real estate is considered as personal property for the purpose of paying debts of the firm, and the surviving partner is charged with duty of paying these debts, it must necessarily follow, that he has the right in equity to dispose of the real estate for this purpose, for it would never do to charge him with the duty of paying debts, and at the same time withhold from him the means of doing so. Therefore, although he cannot by his deed pass the legal title to the purchaser, which descended to the heir of the deceased partner, yet, as the heir holds the legal title in trust to pay debts, and the surviving partner is charged with this duty, his deed will convey this equity to his purchaser, and through it he may call on the heir for the legal title, and compel him to convey it."

In Dupuy v. Leavenworth, 17 Cal., 263, Norris and Shelly were partners, and as such acquired the real estate in dispute. Shelly absconded with the funds of the firm, rendering it insolvent. Norris, to pay debts of the firm sold the realty. Shelly subsequently sold what he claimed to be his half interest in the property, and the contest was between the vendees of Norris and of Shelly over Shelly's interest. The judgment was for Norris' vendee. Chief Justice Field delivering the opinion of the court said, "The principal ground upon which defendants rely for a reversal of the judgment, is the alleged want of authority in Norris to convey the entire interest of the copartnership in the premises. The proposition asserted is, that the partners are tenants in common of this real property and that neither could transfer the interest of the other, in other words, that the rule of the copartnership by which each individual member possesses full authority to dispose of

the entirety of personal effects of the firm, and not merely of his own share, does not prevail with respect to real property, but as to this kind of property all the members must unite in the conveyance to convey the entire interest. Such is undoubtedly the rule of law, but in equity a different doctrine prevails. In equity, real property acquired with partnership funds for partnership purposes, is regarded as personal estate so far as the payment of partnership debts, and adjustment of partnership equitiy are concerned. * * * * This property is first subject to pay partnership debts, then to distribution among partners according to their respective rights. The possessor of the legal title holds the estate in trust for the purposes of the partnership. Each partner has an equitable interest in the partnership property, until such purposes are accomplished. Upon the dissolution of the partnership by the death of one of the members, the surviving partner, who is charged with the duty of paying the debts, can dispose of this equitable interest, and the purchaser can compel the heir at law of the deceased partner to perfect the purchase by conveyance of the legal title. * * There is no reason why the same rule, which governs as to the surviving partner should not apply here, and we think it does apply."

In Ludlow v. Cooper, 4 Ohio St., p. 9, it was held that real estate held as partnership property, is deemed personal property in equity, and as such the administrator of one of the partners, on settling with the surviving partner, may assign or release the interest of the decedent.

In Baldwin v. Richardson & Co., 33 Texas, p. 16. The court approve the doctrine of equitable conversion, and say: "If it, (partnership realty) be thus considered as partnership funds, it is subject to contract as other partnership funds, whatever may be the forms of law required for perfecting the legal estate in its alienation. Real estate belonging to a partnership, being treated as personalty, and each partner by

the common law view of the relation, as well as the consideration of the community of rights and interests in the funds and effects, possessing the power to sell, pledge and dispose of all the personal effects of the partnership—his acts are as valid and binding in equity, in reference to the creditors and other partners, as well in relation to the realty as the personalty, if such acts are done for purposes within the scope of the partnership." * * * * * If this be the power of each partner over the partnership effects, and real property may constitute a part of these effects, then one partner may make an assignment in equity of the realty, either to secure an antecedent debt, or to provide for debts thereafter to be contracted on account of the firm."

If the case of Lang's Heirs v. Waring, 25 Ala., 625, should be referred to by counsel for appellant as being at variance with these cases, and especially Andrew Heirs v. Brown Heirs, *supra*, we ask the close attention of the court to that case, satisfied that it will not prove an authority against us, but for us. The learned judge who delivered the opinion in that case, was a concurring member of the court deciding the former. The purchaser from the surviving partner in Lang v. Waring, was denied relief as against the heir of the deceased partner, upon the ground only, that there were grave doubts as to the honesty of the sale. The court expressly says: "If the disposition he has made of it, amounts to a proper and legal administration of it, for the objects of the firm, of course the court will uphold it, but on the other hand if the disposition is unlawful, or such as good faith requires should not be made, the court will find in the insolvency of the firm, which may have been superinduced by such mal-adminstration, an additional reason for withholding its aid."

Referring to the case of Andrew Heirs v. Brown, the court say of it. "It certainly was not intended to establish the doctrine that a court of equity, in all cases of disposition by

a surviving partner, of real estate of the firm, however unfair, inequitable or unauthorized such dispersion might be, would compel the heir to convey, and thus become the minister of injustice." If any such construction of Andrews v. Brown, was contended for in Lang v. Waring, and we suppose it was, this language of the court was entirely proper, but it cannot reasonably be construed as at variance with what the court held in that case, much less as overruling it, as may be insisted.

Second Proposition.

We submit that the evidence in the record is conclusive, that the surviving partners trust conveyance to Klein, for the benefit of creditors, was afterwards fully approved and ratified by appellant. His relation to the property thus conveyed, after Johnston's death, was just what Johnston's would have been had he been alive. He succeeded to Johnston's interest in it, and by the terms of his will was vested with just such authority over it as Johnston himself as a partner could have exercised, and the legal effect of his ratification of hte surviving partners conveyance was, in equity, as binding upon the legal title vested in him, as it would have been upon Johnston under like circumstances.

Let us see what the testimony is on this subject. Brown in his deposition in answer to chief intg. 21, p. 51, of record, says: "Shanks knew of the trust deed shortly after it was made. He *ratified and confirmed* it verbally, and declared that it met his views and acknowledged the justice and propriety of the act verbally, and did the same thing in several letters."

Klein testifies in answer to chief intgs. 11 and 12, p. 72, of record, that while he had no particular conversation with Shanks, he never heard him make any objection to the trust conveyance but from what was said about it considered that the conveyance was fully approved by him.

Arthur's testimony is to the same effect, in his answer to chief intg. 17, p. 76, of record, he says that while he recollects no particular conversation had with Shanks on the subject, he has always been under the impression from conversations he did have with him, that he was satisfied with what Brown had done. Appellant himself, however, is the best witness on this subject. In his letter to Brown dated Oct. 12th, 1875, p. 60 and 61, of record, he states in terms that the trust sale was made with his *"knowledge and consent,* by a responsible trustee, for an equitable consideration at the time and to innocent purchasers," and to the same effect is his succeeding letter, written November 13th, 1875.

We say that this parol ratification of Brown's conveyance to Klein by appellant, made it in effect from its date the deed of appellant, as well as that of the surviving partner. On this subject of ratification, Judge Story states the rule as follows: "The more general doctrine, and indeed that which is principally relied upon is, that a prior authority or subsequent ratification, not under seal, either express or implied, verbal or written is sufficient to establish the deed as the deed of the firm, and binding upon it as such."

Story on Partnership, sec. 121.

In Gram vs. Seaton & Bunker, 1 Hall, N. Y., p. 262, the Court elaborately reviewed the authorities on the subject, and say: "An absent partner is not bound by a deed executed for him by his copartner—without his previous authority or permission or subsequent assent or adoption. But the previous permission or authority of one partner to another to seal for him, or his subsequent adoption of the seal as his own, will impart efficacy to the instrument as his deed, and the previous authority or subsequent assent may be by parol."

In Cady vs. Shepherd 11 Pickering, p. 400, the Court say: "A partner may bind his copartner by a contract under seal, in the name and for the use of the firm in the course of the partnership business, provided the copartner assents to the

contract previously to its execution, or afterwards ratifies and adopts it, and this assent or adoption may be by parol."

See also Herbert vs. Herrick 16 Ala., 581; Gunther vs. Williams, 40 Ala., 861.

The same rule applies to sealed instruments affecting real estate.

Haynes vs. Seachrist, 13 Iowa 455
Wilson vs. Hunter, 14 Wisconsin 683.
Lowry vs. Drew, 18 Texas 786.

In addition to the ratification of the trust deed by appellant, as we have shown, we think the case taken as a whole shows clearly, that the deed was made with his previous concurrence and approval. As the bill states, and his answer admits, he visited Vicksburg with Brown in the fall of 1865, made a personal inspection of the affairs of Brown & Johnston, and finding the firm estate insolvent, he refused to qualify as executor of Johnston's will, but left Brown as surviving to wind up the firm affairs as best he could. It is not reasonable to suppose in view of these facts, that the trust deed, which was made in September, about the time of appellant's visit, was made without his knowledge and approvel.

The appellant's answer to this branch of the case, is, that his action respecting this conveyance, was the result of ignorance of his rights. This is in singular contrast with the contents of his letters appended to Brown's deposition. It is in these letters that the history of the origin of the ejectment suits is given. While he explains that he is forced into them by the threats of Koiner and his counsel against his sense of right and justice, he no where asserts that they are the result of a late revelation of his rights, or that he would not have suffered nine years to pass without suing, but for his ignorance of them.

The truth is apparent in the case throughout, that appellant understood his exact relation to this property from the begining, and he approved its appropriation to the creditors by the surviving partner for the simple reason that he believed it just and right, as well as lawful, as advised byhis counsel.

Third Proposition.

We finally submit that this case is one to which the equitable rule of estoppel by conduct is properly applicable. We do not see, as between the appellees who are innocent purchasers for value of the property in dispute, and appellant, standing in the place of the deceased partner Johnston, how a case of much stronger claim to the protection of the rule could be presented.

The property belonged to the dissolved firm of Brown & Johnston. The firm estate was largely insolvent, and it was the correct and commonly received idea of the law, that it must be applied to the satisfaction of the partnership debts—through the agency of the surviving partner Brown. It was sold under his sanction and authority for the payment of debts of the late firm, as evidenced by his trust conveyance to Klein. The appellees were *bona fide* purchasers for value, and the money paid by them was fairly applied in satisfaction of the firm debts.

Considering that appellant's claim to the property in dispute to be such as otherwise could be successfully asserted in a court of justice, we insist, he is estopped from asserting it against appellees.

1. Because he stood by and suffered the property conveyed by the surviving partner in trust to be sold for the payment of debts of his late firm, and the sale to be made by the trustee to appellees, and they to remain in possession of the property improving it for a period of nine years, without making known that he claimed or intended to assert any adversary interest in it.

2. Because the purchase money paid by appellees for the property being applied in payment of debts of Brown & Johnston, Appellant, standing in the place only of the deceased partner Johnston, was the beneficiary of this purchase money as Johnston would have been if alive, and is equally bound by it as Johnston would have been.

Upon the evidence in the record, it will be to deny appellant the possession of ordinary intelligence to say, he was not fully acquainted with his relation to this property, and his rights in it at the time of the sale under deed in trust in January, 1866, and his rights being such as he now asserts, it was his duty to have interposed them when Brown proposed to make the trust deed, or certainly when the trustee announced he would sell under it. A decent regard for fair dealing and the rights of innocent and ignorant parties, that would likely become purchasers at the sale, under the impression that it was all right, required that he should have done so.

It cannot be doubted that if appellant had interposed his claim in due season, either the deed from Brown to Klein would never have been made, or if made, appellees would not have purchased at the trust sale—no prudent man cares to buy a law suit or the prospect of one.

The doctrine of equitable estoppel as we claim its application in this case, is fully stated by this court in Gregg vs Von Phul 1 Wallace, 274. The Court say: "The doctrineof estoppel *in pais* or by the act of the party is founded in natural justice, and is a principle of good morals as well law. The primary ground of the doctrine is, that it would be fraud in a party to assert what his previous conduct had denied, when on the faith of that conduct others had acted. No one is permitted to keep silent when he should speak and thereby mislead another to his injury. If one has a claim against an estate and does not disclose it, but stands by and suffers the estate sold and improved, with knowledge that the title has been mistaken—he will not be allowed afterwards to assert his claim against the purchaser."

Herman in his work on Estoppel, section 323, states the law on this subject thus: "If a person by a course of conduct or actual expressions, so conducts himself, that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect, that the party using the language or who has so con-

ducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

Again, he says: "Where a party negligently stands by and allows another to contract on the faith of an understanding which he can contradict, he is estopped." Sec. 409.

See also, 37 Penn. St. Rep., 379.

6 Indiana, p. 289.

5 Iowa, 415.

12 B. Munroe, 255.

31 Penn. St., 331.

1 Johnson Chy, 354.

"When anything in order to a purchaser is publicly transacted, and a third person knowing thereof, and of his own right to the land intended to be purchased, does not give notice of his right, he shall never afterwards be permitted to set up such right to avoid the purchase. It is apparent fraud in him not to give notice of his title to the intended purchaser, and in such case infancy or coverture shall be no excuse."

Herman on Estoppel, sec. 416.

It is confidently believed that the facts contained in the record of this case bring it clearly within the rules above laid down. If it be argued in reply that appellant by his course did not design to mislead purchasers at the trust sale, we say that it was not necessary that such should have been his design in order to bring him within the operation of the rule, if his conduct had reasonably the effect of misleading.

Herman on Estoppel, sec. 418.

30 New York Rep. 226.

Or if it be argued for him, as stated in his answer, that his action was the result of a mistaken idea of his rights, still he will not be protected against the rule we invoke. "When a party acting under a mistake of law or fact does acts which mislead others, he is estopped."

Herman on Estoppel, sec. 420.

Gomar v. Bird, 57 Barb.

To the foregoing brief, prepared in advance of the filing of the briefs of appellant's counsel, we now add our

Reply to Argument for Appellant.

Before entering upon the legal questions, however, we must premise that the whole contention made by the appellant is over the law of *conveyancing* rather than that of *estates*. If the law requiring the *legal* title to land to pass by deed were abolished, or if the old system of transfer by livery of seizin were in use, the entire ground work of the arguments against the title of these appellees, even *at law*, would be swept away. The objections made to that title are to matters of *form* entirely and not to matters of *substance*.

It is not asserted, nor is there any possible ground upon which to assert, that so far as the rights and interests of the appellant are concerned, any result different from that which was reached by the transaction as it took place, would have been reached if the *mode of procedure* which he *now* insists was the proper one, had been adopted. Nobody has been wronged by what was done; everybody has got exactly what he would have had if the method insisted upon by him had been pursued. After nine years of waiting, he comes into court (against his own sense of justice, it is due to him to admit, and only under the spur of one who denominates himself a *cestui que trust*) to say in substance this: "I admit that so far as substantial rights are concerned all that was done was rightly done; that these debts were honestly due, and this property liable for their satisfaction; that the property sold at its highest value, and that the proceeds were fairly and honestly appropriated to the debts; that I, at the time, acquiesced in the propriety and legality of the method of sale and appropriation adopted, and I have no fault to find with the *substance* of the transaction; never-

theless, I *now* insist that the *strict forms* of law were not observed, and even though everything would have settled just where it is if they had been, and although I was in large part responsible for the fact that they were not, I ask a court of equity to uphold me in this position, and restore to me this estate."

It would be strange, indeed, if in a court of equity no just grounds could be found upon which to deny such a claim. Believing, however, that abundant grounds exist we now proceed to discuss them, and shall observe the same order in argument as before, viz.:

1. *That the property in question was partnership estate.*

2. *That the survivor had the power to dispose of it as he did do, and*

3. *If he had not the power, without the consent of appellant, he did have it with such consent; that appellant gave consent and thereby, and also by subsequent ratification, rendered valid the disposition made by the survivor.*

4. *That upon equitable principles, appellant is estopped both by his active and his passive conduct.*

The argument of *Mr. Pittman* sets out with an attempt to limit the scope of the bill and then to show that the proof makes a case outside of it. If we understand it correctly, it is that the bill alleges that the buying and selling of real estate was a feature of the *original* agreement of partnership between Brown and Johnston; that the proof does not establish this, but only that it became a part of their business in the course of its subseqent expansion.

We fail to see the importance of this position if correct; but it is erroneous. The *gravamen* of the bill is that the property in question was a part of the partnership estate of Brown & Johnston, and though it is not alleged, in terms,

that it was acquired *for partnership purposes* (which would have been a proper averment in case of a partnership, limited to a particular enterprise, acquiring a piece of real estate to be used in connection with and as incidental to the main business,) it *is* distinctly alleged that it was *partnership property*. In addition to the averment on this subject, quoted by counsel, the bill alleges—record p. 2, "That the transactions of said firm, during the period of its organization in all departments of its business, were of quite an extensive character, *particularly in the matter of dealing in real estate*. In this latter branch of the business of the firm, no fixed rule was adopted or pursued as to the name in which partnership real property was acquired and sold in pursuance of its agreed business. The deeds to such property were sometimes taken in the name of one partner and again in the name of the other, as might be deemed necessary to facilitate a transfer when sold. Sometimes the title was taken in the name of both partners, but it was not deeemed necessary, or required in any case, that their deeds of purchase or sale should show upon their face the partnership character of the transaction."

And again—Record pp. 3 and 4—"Your orators are advised, and upon information charge, the following real estate situated in Mississippi, *the property of said Brown & Johnston, acquired with partnership funds on partnership account*, in the ordinary course of business, constituted the sole available means left said Brown as surviving partner, &c." It cannot be material, but we think the testimony of Brown shows that speculation in real estate was contemplated by him and Johnston when they entered into partnership. He states that they commenced business as exchange and money brokers, and that they "made a great deal of money and did a very large business, dealing in everything pretty much, including the buying and selling of real estate, which was then at very low figures, caused

by the commercial and financial convulsions in the southern country;" and again, in the course of his answer to chief interrogatory 21—R. page 52,—he says: "the partnership business of Brown & Johnston included the purchase and sale of real estate."

Brown and Johnston were young men who agreed to adventure their fortunes together in the wide sea of speculation, which was then running high in the south-west. Beginning in a small way, as speculators in uncurrent monies, securities and town property, their business expanded until they became bankers, speculators in new and wild lands, and eventually, in plantations and slaves. That all their acquisitions were on copartnership account, and all their business conducted upon the basis of their copartnership relation, is clearly established by the testimony. Besides his testimony in chief, already referred to, Brown testifies on cross examination, as follows:

"Cross-int. 20. If you answer to direct interrogatory No. 7 that the lands therein designated were purchased for partnership purposes, state for what purposes?"

"A. The same as we would any note, bill of exchange, or other personal property."

"Cross-int. 21. Were not said lands purchased because they were at the time considered by you and Johnston a good investment of your surplus capital?"

"A. We always purchased with a view of making money out of them—*not to keep, but for speculation.*"

"Cross-Int. 22. How was this real estate owned by you and Johnston?

"A. In partnership."

"Cross Int. 24. Did not you and Johnston build houses on some of these lots for the purpose of renting the same?

"A. Yes, we put up a great many houses at Vicksburg to make the ground more valuable, and make interest on our outlay until we could sell."

The case is very analogous in its circumstances to that of *Lyman* vs. *Lyman*, 2 Paine 11; and the following language from the opinion of the court, as delivered by Justice Thompson, in that case, applies with equal fitness to this:

"We think the evidence in the cause will admit of no other conclusion than that the parties intended a partnership or connection in business of the most unlimited character, and it is of little importance whether it commenced in the year 1784,as contended by Elias, or whether in 1795, as contended by Justin. They began with little or no property and their business in its origin, was confined to the boating business on the Conneticut River; but as their means increased their business was extended to other objects, and in the end branched out in a very extended manner, embracing a vast variety of concerns that certainly could not fall within the ordinary understanding of regular mercantile transactions, including the purchase and sale of real as well as personal property, the title to which was sometimes taken to one or the other or both. but with the understanding that it was for the use and benefit of both. All the acts, and declarations and correspondence of the parties lead inevitably to this conclusion * * * * and declarations made by Elias and Justin, as proved by a number of witnesses, puts the question beyond a doubt that everything was understood to be held in common and the real estate must in this respect stand upon the same footing as the personal. And in a court of equity, it is immaterial whether the title is vested in one or both the partners, for in such a case a court of equity will consider the party having the legal title as a trustee for those beneficially interested. Lands therefore bought by a commercial copartnership for the purpose of the partnership concern are considered in equity, as forming a part of the partnership fund and stock in trade, especially during the lives of the partners."

the case of *Hoxie* v. *Carr*, 1 Sum., in which, in the course of a very full and able opinion on the subject of co-partnership real estate, he said, see pp. 186–7 :

"One ground relied on (in opposition to the view that the property in question was partnership estate) is that where on the face of the conveyance it is a tenancy in common, parol evidence that it is partnership property, contradicts and controls the legal operation of the words of the deed. But this argument is not well founded. The evidence is not introduced to establish any fact inconsistent with the legal operation of the words of the deed, but merely to engraft a trust upon the legal estate. Indeed, partners in a legal sense are either tenants in common of the partnership property or joint tenants without the benefit of survivorship, which is the nearest possible approach to a tenancy in common. The circumstance that the conveyance is in the name of the partners as tenants in common, may afford some presumption, in the absence of countervailing presumptions, that the conveyance is not designed to be on partnership account, but *per se* it is very slight and never decisive * * * * But it is the less necessary to decide this point absolutely on this naked ground, for if the property were purchased with partnership funds and for partnership purposes, and thus became an executed contract between the partners, it would be a fraud upon the partnership afterwards to appropriate it to the private use of either of the others."

The other cases cited by counsel under this head, are either not applicable, or have been expressly or virtually overruled by subsequent adjudications in the same state.

Thus, *Hale* vs. *Henry*, 2 Watts, is explained and limited by *Ebbert's Appeal*, 70 Penn. St., 79 ; and *Abbot's appeal*, 50 Ib.; *Jones* vs. *McMichael*, 12 Rich., is inconsistent with *Rose* vs. *Izard*, 7 So. Ca., N. S.; *Gray* vs. *Palmer*, 9 Cal.,

did not involve this question, and the passage from Story on Part., quoted by counsel, is quoted there merely *arguendo*; *Darby* vs. *Darby*, 3 Drewy, is against the proposition which it is cited to support; as is also *Wheatly* vs. *Calhoun*, 12 Leigh, in so far as they leave any bearing at all. *Patterson* vs. *Ware*, 10 Ala., we have already referred to, and *Forsyth* vs. *Clark*, we have been unable to find in 15 Wendell; but if there is any such case about that date, in New York, it is overruled by the recent cases of *Fairchild* vs. *Fairchild*, 64 N. Y., and *Chester* vs. *Dickerson*, 54 N. Y.

The whole subject is examined in *Browne on Frauds;* and the conclusion reached that according to the great weight of authority the statute of frauds opposes no obstacle to the establishment of the copartnership character of real estate held by the members of a firm either jointly or severally. See Sec. 90, 259 and 261, of the 4th ed.

Collyer, in his work says:

"There may be a partnership in the purchase and sale of lands, and it may exist and be proved by parol, although Story J. held otherwise, in a case decided by him, which was followed in several states. But, as previously stated, the rule seems to be established by the weight of authority, that such a partnership may exist by parol." See Vol. 1, Sec. 1.

And Parsons says:

"Nor is it necessary that the trust should be expressed, for, however proper and expedient this is, yet, *if the trust be wholly omitted and have no existence on record*, the law will sometimes, and equity always, supply this want and treat the ownership as a distinct trust, if only the trust exist and is capable of proof, and the land be in fact and substance partnership property." Pars. on Part., Ch. XI, Sec. II.

In so far as this part of the argument rests on the idea that any express agreement, either parol or written, is essential to constitute real estate purchased with partnership funds, partnership property, it is without the support of any respectable modern authority. The element of an express agreement was never thought to be of any importance, except in determining whether the equitable conversion of realty into personalty should be carried beyond the necessary purposes of the partnership so as to affect the distribution of the surplus.

"That the partners (says the Supreme Court of Kentucky in *Lowe* vs. *Lowe*, 13 Bush, 688,) must have intended partnership real estate to be treated as partnership assets, and therefore as personalty, so far as might be necessary for the payment of partnership liabilities, must be assumed in all cases unless a contrary intention be plainly manifested; for as Chancellor Kent said in his note on the judgment of the Vice-Chancellor in *Smith* vs. *Jackson*, (2 Edw., 28) 'There is no need of any other agreement than that the law will necessarily imply from the fact of the investment of partnership funds by the firm in real estate for partnership purposes. If the partners mean to deal honestly they cannot have any other intention than the appropriation of the investment if wanted, to pay the partnership debts.'"

3 Kent Com., 39, 5. Ed.

To the same effect are:

West Hickory Co., vs *Reed*, 80 Penn. St., 38;
Ross vs. *Henderson*, 77, No. Ca., 170;
Borden vs. *Whaling Co.*, 10 Cush., 485;
Hogle vs. *Lowe*, 12 Nev., 286;
Johnson vs. *Clark*, 18 Kan., 157.
Simpson vs. *Leach*, 86 Ill., 286;
Fairchild vs. *Fairchild*, 64 N. Y., 471;
Sherwood vs. *St. Paul*, 21 Minn., 127;
York vs. *Clemens*, 41 Iowa, 95;

Sykes vs. *Sykes*, 49 Miss., 190;
Robertshaw vs. *Hanway*, 52 Ib., 713;
Whitney vs. *Cotton*, 53 Ib., 689.

We shall hereafter see when we come to examine the decisions in the state of Mississippi, under another head of this argument, that the law, in so far as it is settled in that state, is not repugnant to, but entirely consonant with these authorities.

Suffice it to say for the present, with reference to the statute of frauds, that although the law is strictly construed in that state, it has no application to implied trusts. (See *proviso* to Art. V of the statute quoted at p. 30 of Mr. Pittman's brief), the doctrine as to which is there fully recognized.

Harvey vs. *Ledbetter*, 48 Miss., 95;
Flynt vs. *Hubbard*, 57 Ib., 471.

The law is stringent with reference to *sales* of land, but not otherwise. For instance, in that state as elsewhere, an absolute deed may be shown to be a mortgage by parol.

Klein vs. *McNamara*, 54 Miss., 106.

We think we have shown that there are more than "two ways in which real estate may become partnership property"; that no express agreement is necessary to make it such; that in cases like the present no difficulty arises on the statute of frauds, and that the great weight of authority is in favor of instead of against these views—and we leave this branch of the case with the observation that, aside from the positive testimony on the point, it would be impossible to believe that the investments of this copartnership in lands of every description, lying in four different states and amounting to some 25,000 acres, the most of it wild and uncultivated, could have been intended to be permanent, or that these lands were acquired otherwise than under "an agreement to sell as well as to buy."

II.

2. *Under the circumstances of this case the survivor had the power to administer the real estate and dispose of it to pay debts, as he did do.*

The able arguments for appellant have certainly presented all that can be said in opposition to this view, but we do not think they will satisfy the court that the uniform current of judicial opinion on this subject should be reversed, especially, as little attempt is made to point out the fallacies which are supposed to exist in the reasoning of the adjudged cases.

It will be observed that the whole course of reasoning against the rightful dominion of the surviving partner over the real estate of the firm is built upon considerations which relate to matters of *form* rather than of substance. So far as *substantial rights* are concerned, the real beneficial property interest, as separated from the mere question of title—or rather of the evidences by which title is established—there is no consideration which can be urged against the power of the survivor to administer the real estate where it is necessary for the purposes of the partnership, that does not apply, with equal force, against his right to administer the personalty. If we keep this fact in view, and bear in mind, also, that the surviving partner has rights arising out of the co-partnership relation, and the burdens imposed by it, which the law regards with at least as much favor as it does the rights of the heir, who takes up his inheritance under no conditions which impose any personal obligations upon him, we shall the better understand the growing disposition of equity to place the real and personal estate of a partnership upon the same footing, as respects their administration for partnership purposes.

It would be interesting to trace the gradual development

of the doctrines of equity on this subject, and to note the expedients to which it has resorted to escape from the technical difficulties which encumber it at law (all proceeding, as we think, from an unnecessary assumption in the earliest English cases that a co-partnership, as such, could not hold real estate); but it could not be done within convenient limits. Its history in England is stated by opposing counsel not with entire accuracy. The equity doctrine of conversion of realty to personalty did not take its rise from cases in which such a conversion was provided for by express agreement of the parties, but from purely equitable considerations growing out of the nature of the partnership relation and the rights of creditors; but afterwards, when cases arose in which this element of an agreement for conversion existed, it was laid hold of for the purpose of *extending* the doctrine so as to work a conversion not only *sub modo*, for the purposes of the partnership, but "out and out," so as to give the surplus to the personal representatives instead of the heir. The doctrine gradually came to be extended to all cases except such as contained some restriction upon it by express agreement of the parties; and we think it is to be regretted that the courts of this country, in adopting it, did not do so to its full extent, and thus practically abolish all distinction between realty and personalty held in partnership, and free the former from the technicalities which fetter it to no useful purpose.

"There are two reasons," says PARSONS, in his work on partnership, "why we might have expected an improvement in the American law on this subject over that of England. One is our less rigid conservatism, or, in other words, the weaker influence of precedent and prescription, and the greater facility of change. This reason, however, applies to the whole body of our law. The other applies peculiarly to this topic. It is that land is with us vastly

more a matter of merchandise than in England. It is every day's practice for individuals and partnerships to engage in business of which the principal, and sometimes the only element is trade or speculation in land. * * * Questions to which such business as this gives rise not only come before our courts with great frequency and demand, for their settlement, well considered and well established principles, but they come in such a form *as to compel important modifications of the technical law of real estate.*"

In the case of *Sumner* vs. *Hampson*, decided in the Supreme Court of Ohio in 1838, LANE, J., after alluding to the fact that the Roman law—from which equity derives so many of its principles—made no distinction between real and personal estate, and that the efforts of centuries had been directed to the emancipation of the former from the restrictions of feudal principles, says:

"In the earlier stages of the common law, no partnership in lands could exist; but as social arrangements became more complex, land was necessarily used in partnership purposes—firstly, as auxiliary to the general objects of the association, or received for debts, *and more lately as direct capital stock.* Numerous cases upon this subject are cited in the argument. They show that the same rules which affect chattels have gradually been extended to lands held for partnership purposes; *that wherever partners manifest their intention to hold lands as partnership stock, either by express convention or by their course of dealing, it will be treated as such, in all respects, by courts of equity.*"

8 Ohio Rep., 364.

The argument advanced by appellant's counsel against the right of the surviving partner to administer the partnership realty is, in the main, an argument against the *policy of partnerships*, and the propriety of giving to the

survivor the *jus disponendi* in any case, rather than against the propriety of extending the *jus disponendi*, which is admitted to exist in the case of personalty, to partnership realty. The considerations stated have, for the most part, been repeatedly urged upon the courts, only to be denied, upon the ground that equity pushes aside forms and technicalities and deals with the substance of things. The argument, on this point, is resolvable into two propositions:

1. The survivor has not the power to dispose of the realty, because he has not the complete legal title.

2. He ought not to have it because he may use it to the prejudice of the heirs of the deceased partner.

With reference to the first proposition it may be at once said that, in so far as the argument rests upon that, it is a clear case of *petitio principii*. The very question is, should the fact that the surviving partner has not the full legal title to the real estate, deprive him of that right to dispose of it which is conceded to him with reference to the personalty? It is, therefore, nothing to the point to say that he has not that right *because* he has not the legal title.

The survivor's actual interest is the same in the one kind of property as the other. He has no greater *beneficial* interest in the personalty than he has in the realty. He holds the legal title to the personalty in trust for the partnership, just as the heir holds the legal title to the realty in trust for the partnership. In both cases the *equitable estate* in the property is in the partnership—and of that the survivor is the representative and only authorized administrator. Is there any just principle which can give him the right to dispose of this beneficial interest or estate in the one case and deny it in the other?

The doctrine invoked by counsel that a grantor cannot convey a greater estate than he himself possesses, has no

rule with reference to real estate. An examination of the cases in which this exception has been maintained will show them to be nearly all of one character—*i. e.*, cases in which an investment of a part or the whole of the partnership funds has been made in real estate, to be used in furtherance of the objects of the association, and as merely incidental to it, or where it was obvious that the investment was intended to continue so long as the partnership itself continued, or until it should be changed by mutual consent of all the partners. We are not now speaking of those cases which deny the power of one partner to convey the *legal title* of all, but of those which deny his power to make *any* contract binding upon all respecting the realty. We say that whether he can do this is not a question of law determinable from admitted principles, but that it is a question of *intention*—of contract—of agreement between the partners themselves.

This brings us to a proposition, which we wish to state with some emphasis, and to which we ask the court's especial attention. It is that—

In cases like the present, in which a co-partnership is formed for, or engages in, the business of buying and selling land on speculation, as a commodity or subject of merchandise, it necessarily results from the very objects and character of the association that each partner has the power to make valid sales of the land for all the purposes of the co-partnership; that this is a power coupled with an interest and necessarily survives to the survivor to enable him to wind up the affairs of the concern.

In *Winship* vs. *Bank of U. S.*, 5 Pet. 561, Chief Justice *Marshall* declared:

"A partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transac-

tions as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself *a grant of power* to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys for the company, and every person with whom he trades in the way of its business has a right to consider him as the company, whoever may compose it."

The same principle is stated with equal force by Chancellor Kent in his Commentaries.

3 Kent, 44.

Does this principle apply to co-partnersnips for dealing in lands so as to secure to each partner the power of disposition as respects the estate, or beneficial interest, as distinguished from the title? We maintain that it does, both upon principle and authority.

There exists no more lucid or rational statement of the principles which underlie a co-partnership of this character than that given by Vice Chancellor Kindersley in the comparatively modern case of *Darby* vs. *Darby*, 3 Drewry.

After reviewing all the English decisions down to that time (1856) including those of Lord *Thurlow*, Lord *Eldon*, Sir *W. Grant*, and Sir *J. Leach*, and stating that "looking at the matter with reference to principles clearly established in this court, if partners purchase land merely for the purpose of their trade and *pay* for it out of the *partnership* property, that transaction makes the property personality and effects a conversion out and out." He says:

"What is the clear principle of this court as to the law of partnership? It is that on the dissolution of the partnership, all the property belonging to the partnership shall

be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners, according to their respective shares in the capital. This is the general rule; it requires no special stipulation—it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie. This principle is clearly laid down by Lord Eldon in *Crawshay* v. *Collins*, and Sir W. Grant, in *Featherston* vs. *Fenwick*; and the right of each partner to insist upon a sale of all the partnership property which arises from *what is implied in the contract of partnership* is just as stringent as a *special contract* would be. If, then, this rule applies to ordinary stock in trade, why should it not apply to *all* kinds of partnership property?"

He then proceeds to show that it applies to leasehold estates in realty, and says:

"If, then, the rule applies not only to ordinary stock in trade, but also to a lease for years, suppose next that the partnership, instead of purchasing a term of years, were—whether from necessity or choice—to purchase real estate in fee; if the land is necessary for the partnership business and bought with the partnership assets, what difference can it make whether the real estate bought is leasehold or in fee? Let it be once established that the property is partnership property, and it then comes under the operation of those principles which arise out of the partnership contract; and there seems to be no reason why the operation of those principles is to be restricted to any particular species of partnership property. The observations of Lord

Eldon in *Crayshaw* vs. *Maule*, before referred to, show that, in his opinion, the right to a sale on a dissolution of partnership does not, in any degree, depend on the nature of the property; nor could it be material in this case any more than on the purchase of a leasehold interest, in whom the legal estate was vested."

After stating his concurrence in this opinion of the right to a sale regardless of the nature of the property, and then considering the doctrine of conversion in equity (which we are not now discussing), he says further—and it is to this part of the opinion that we ask particular attention:

"Now, this case is not the ordinary case where persons carrying on the ordinary business of a commercial or manufacturing partnership have found it necessary to purchase real estate for partnership purposes. That is not the case; here they bought land, as the stock in trade, by the sale of which they were to make their profits; the land was not in the nature of plant, but was the very subject-matter of their trade. Does that make any difference? If it does, I think it is in favor of treating it as converted, *because the real estate is here clearly put in the same position as ordinary stock in trade*, and it appears to me that if I entertained more doubt than I do on the general question, that doubt would, in this case, be very much diminished by the circumstance that *here the real estate is bought for the very purpose of selling it again. The very intention of the partnership was to buy land to resell it.* That is their very contract, *and without selling the land again, there would be no partnership business*—the partnership was for the purpose of buying land to parcel it out in plots, and to sell them again. And each partner had a right to say he would have that contract carried out. We have here what Lord *Thurlow* wanted in *Thorton* v. *Dixon*, an actual contract that the land shall be sold."

Similar principles had been declared by the Supreme Court of Ohio, in a similar case, two years before the decision of *Darby* v. *Darby*. In *Ludlow* v. *Cooper*, 4 Ohio St., KENNON, J., taking the distinction between real estate bought *for the accommodation of an existing partnership* and that bought as *stock in trade*, says (see pages 7 to 10):

"The cases are numerous in which it has been held that real estate purchased with partnership funds and used as partnership property, descends to the heir subject to the partnership debts. Indeed in all the cases cited, the property was so purchased, and was either incident to, or necessary in, carrying on the partnership concern, and there was no express agreement that the real estate should be considered personal property and disposed of accordingly. In the case now under consideration, however, the entries were not made with partnership funds, nor were the lands to be used as a *means* of carrying on any partnership business *other than the purchase and sale of real estate*."

But, "it is very clear," he says, "that the property was to be considered partnership property; * * that it was by the agreement to be sold and converted into money, and each to share alike in the profits, and, of course, to share in the losses. It is the very case put in *Story*, in which he says that such real estate will, to *all* intents and purposes, be deemed personal property, &c."

There is much more in this case to the point under consideration, but we refrain from further extracts, as the court will doubtless examine the original.

This court has said (in *Thompson* vs. *Bowman*, 3 Wall., 316) that "there is no doubt that a partnership may exist in the purchase and sale of real property equally as in any other lawful business. *Nor is there any doubt that each member of such co-partnership possesses full authority to contract for the sale or other disposition of its entire property*

though, for technical reasons, the legal title vested in all the co-partners can only be transferred by their joint act," and (in *Clagette* vs. *Kilboun*, 1 Black, 346) that "the real property belonging to a partnership is treated in equity as part of the partnership fund, and disposed of and distributed the same as personal assets."

In the recent case of *Chester* vs. *Dickerson*, 54 N. Y., 1, the precise question of the power of one partner of a firm dealing in real estate, is thus stated and decided:

"In all partnerships one partner is the general agent of all the partners for the transaction of all the partnership business, and I can perceive no reason for not applying the same rule of agency to partnerships in real estate. In fact, all the powers, duties and rights which usually appertain to partnerships must appertain to partnerships in real estate, except as they are modified by the character of the property, and the only difference grows out of the rules of law in reference to the *conveyance* and *transmission* of real estate. One partner cannot convey the whole title to real estate unless the whole title is vested in him. (*Van Brunt* vs. *Applegate*, 44 N. Y.) But he can enter into an executory contract to convey which a court of equity will enforce. While a contract for the sale of land must be in writing, yet an agent to execute the contract may be appointed by parol. (Willard on Real Estate, 376.) And hence, when the partnership business is to deal in real estate, one partner has ample power, as general agent of the firm, to enter into an executory contract for the sale of real estate."

This case is approved in *Fairchild* vs. *Fairchild*, 64 N. Y., 471, in an opinion by Chief-Justice CHURCH, in which the modern law on the subject of co-partnership real estate is ably stated.

In the case of *Pierce* vs. *Trigg*, 10 Leigh, 423, which has

long been a leading one on this subject, TUCKER, J., speaking of partnership real estate, says: "To whomsoever the legal title may be conveyed, he becomes trustee, not for himself and his co-partner as individuals, but for the partnership itself considered as a separate and distinct person, invested with rights separate and distinct from each of the partners. This artificial person then, being the *cestui que trust*, has all the rights of a *cestui que trust*. The complete ownership is in it. It can sell this portion of the partnership stock at pleasure, but neither partner can sell his moiety. * * Thus we see that in the individual partners there is but a naked legal title, and, of course, upon the death of one a mere legal title passes to his heirs, while the *whole beneficial interest* passes to the survivor. * * Until the concern is wound up the whole control of the partnership stock is in the survivor, unless for adequate cause his powers are restrained or superseded by a court of equity."

Here we get a clear view of the subject. Although each partner is seized of the legal title to one half of the property, neither can transfer his title to one with notice so as to affect the interests of the joint concern. Why? Because by implication of law each has come into a convention with the other to the effect that he will hold that legal title in trust for both. Suppose one were to covenant to stand seized of a piece of real estate to the use of a co-partnership for co-partnership purposes. The partnership, as *such*, would have a full *trust* estate in the premises—that is to say, a complete equitable title. Can it, upon any ground which will be considered reasonable or tenable in a court of equity, be contended that all the incidents of partnership, including the *jus disponendi*, do not attach to this estate? It has been decided that the share of each co-partner in a joint stock company, in which the title to the

lands are invested in trustees, is in every sense personal estate.

Clayette vs. *Kilburn*, 1 Black.

Now, is not the status of the estate in land exactly the same, in the view of equity, in the case of co-partnership land the legal title to which is held by the partners, as in the case of the covenant to stand seized, or of joint stock lands held by trustees? The only difference at all is that in the one case the trust results, or is raised, by implication of law, and in the other it is created by express agreement.

In the case at bar, however, we are not left to maintain this view of the power of each partner simply upon the ground that it is *implied* in the nature of the contract of partnership. There is evidence that it existed between these partners by actual or *express* understanding and agreement.

Brown is asked (cross-int. 59) "What disposition was made of about 20,000 acres of land in the State of Arkansas owned by yourself and Johnston?" and answers, (r. p. 55) "I can't answer, for most of the lands were bought since (after?) I left Vicksburg, and I exercised no control over them. Mr. Arthur can answer better than I."

Why can Arthur answer better? Because he was at Vicksburg with Johnston, and knew what the latter had done in the way of making sales. But this is not all.

ARTHUR is asked (Cross-Int. 17) to examine a certain printed list of lands, and state whether it is a correct list of the lands belonging to Shepherd Brown and Joseph H. Johnston at the time of the dissolution of Brown & Johnston, and answers (R., p. 80):

"I have examined the lands of Brown & Johnston referred to, and cannot say it is a correct list of lands belonging to the firm at the date of the dissolution of the firm. It was made out by me, from the books, at the request of the

parties and sent to them in New Orleans before the war; *that the partners in New Orleans might effect sales, if an opportunity offered, and I think they did sell some of it in New Orleans, and some of it was sold in Vicksburg before the dissolution of the firm. Mr. Johnston came up to Vicksburg after the fall of New Orleans and sold several pieces of real estate for Confederate and Cotton money, against my advice and judgment and against that of Mr. Brown of New Orleans.*"

Here, then, the witnesses on interrogation, not as to the character of the co-partnership, but on a collateral and incidental matter, state facts which show, beyond all doubt and all possibility of doubt, that its character was precisely that which we contend it was; that the several partners not only exercised the power of disposition, but that each considered himself bound by what the other did, even though done against his judgment and without his consent. They understood themselves as holding their lands as stock in trade, subject to all the rules and regulations which appertained to other branches of their business. Their agreement was that each should have the power to dispose of the beneficial estate, and that by every such disposition the other became bound to join in conveying the title.

When we once get clearly fixed in mind, the fact that the legal title and the beneficial estate in partnership realty, thus held, are two entirely distinct things, we see no difficulty, but, on the contrary, great propriety, in applying to this beneficial estate all the ordinary principles of partnership, including the *jus disponendi* in the survivor.

If the power to make a sale, entitling the purchaser to call for the legal title, exists in cases like the present—during the life of the partnership—as is declared by the foregoing authorities—then it cannot be consistently denied that

it continues to exist in the survivor, after the death of one of the partners, just as it does with reference to personalty.

If this is not the case, then by the death of one partner every such estate is left in a state of complete paralysis. The legal title is not available to either the survivor, or to the heirs of the decedent, for in either case it is held in trust only. The consequence is, that every such estate, including not only the interest of the decedent, but of the survivor as well, must lie lifeless and valueless until a court of chancery shall gather it up for conservation, ascertainment and distribution. To hold this is to deny to men the right to dispose, in life, of at least a portion of their estates so as to exempt them from the necessarily slow and expensive processes of administration by law, and is to deny to him who may be the survivor in such cases the right to engage in a joint enterprise with his neighbor, without the certainty of having *his* affairs drawn into the labyrinth of courts, regardless of his competency to manage his own, or his fidelity to the trust confided to him by his neighbor.

And just here we may say that if survivorship in the property is the test by which it is to be determined whether the *jus disponendi* exists, it would seem to be conclusively settled by the law of Mississippi that it does. By Art. 18, of the Code of 1857, quoted on the last page of *Mr. George's* brief, it is provided: "All conveyances or devises of lands made to two or more persons shall be construed to be estates in common, unless, &c. * * *Provided*, This provision shall not apply to mortgagees or devisees or conveyances *made in trust*." A conveyance of partnership property made to one or more partners is "a conveyance made in trust" for the copartnership—as is declared by all the authorities—and is, therefore, within both the terms and the equity of this statute, which has been

construed to be an affirmative enactment that trust estates conveyed to two or more shall survive to the survivor.

McAllister vs. *Plant*, 54 Miss., 106.

Every presumption as to the intention and expectations of the parties themselves is in favor of the view we are contending for.

Take the facts of the present case. Here was a vast enterprise for the acquisition, development and resale of lands requiring a large outlay of capital, and (as the sequel shows) the contracting of extensive liabilities. To meet the latter as they mature, the proceeds of future sales is looked to, and it is necessary that they should proceed without interruption.* It is the policy of our law to encourage such enterprises, but what prudent man would enter into one with the understanding that death might any day arrest the whole scheme; leave him with the liabilities to meet; while, at the same time, depriving him of all power to apply, as the exigenciee of the case might require, the partnership estate to that purpose? To say nothing of debts, what prudent man would take upon himself the risk of being permanently saddled with an estate in common with a lot of heirs, some of them, perhaps, minors, others non-resident, and others unknown, and between whom and himself it would be impracticable to secure that concent of action necessary to the proper management of such property? To impose consequences of this character would be to effectually prevent men from engaging in such enterprises.

It remains now to consider the second ground of objection to the surviving partner's right .to administer the partnership realty, which is that *he may abuse the trust*. This is an objection which will lie, for what it is worth, against every trust; and nothing has been said to show that it has more weight in this case than any other. It applies,

*The creditor is under no duty to wait for his debt, or for the deceased partner's share of it, until the survivor can convert the realty into money by legal proceedings. The latter must pay to the day, and if the view we are combatting be right, must pay out of his own estate alone, a debt for which the partnership estate is primarily bound.

as said before, with just as much force to his power over the personal estate—yea with more, for owing to the convertible and transitory nature of that kind of property it affords many more opportunities and facilities for fraud and imposition. Moreover, the very fact that the heir holds the legal title to the realty is a guaranty to him against fraudulent practices which is not secured to him in reference to the personalty. That the heir must be called on to relinquish his title, is a circumstance calculated to put both the seller and the buyer on guard against even the appearance of evil in any transaction about the real estate, so that the fact that the heir holds in his own hands this security for fair dealing, is a consideration in favor of extending the *jus disponeudi* to this species of property, instead of an argument against it. It is said that if he has this right, his powers are greater than that of any court, either of law or equity—for he proceeds without notice to the heir. The answer is, his powers are no greater than those of any agent who is vested with discrestion, responsibility, and *an interest* in the subject of his agency. Such agencies are not revoked by the death of the principal, and may be exercised after his death without appeal to any court. There are many trustees, too, who perform their duties and divest estates and make titles without the aid or assistance of the courts. Take the case of an executor to whom no estate is given by the will, but only a power of disposition. He proceeds without application to the court or notice to the heirs. He sells and makes title. His opportunities to do wrong are just as great as those of the surviving partner, and the means of arresting his wrong doing are no more effectual. Indeed the analogies between an executor with power of disposition (especially if he have an interest) and the surviving partner are of the strongest character. They both derive their powers primarily from the same source. The principal difference is that in the

one case the *will* or act which confers the power takes effect in the lifetime of the decedent, and in the other only at his death.

In either case, however, there is an appointment by him, in his lifetime, of a person to administer his estate after his death. The difference is not in the thing done, but merely in the instrumentality by which it is done. In the one case, it is by an agreement which secures to him rights of the same character, in case he is the survivor; in the other, it is by an instrument in the nature of an agreement, called an executory devise.

In the one case, however, the heirs have a security for the due execution of this trust, which they may not, and, most generally, do not, have in the other—and that is in the equal interest which the surviving partner has to make the estate turn out as much as possible in order to liquidate liabilities and swell the surplus for division.

The reconstruction of the text-books, which, it is suggested by counsel, should be the result of the views we are contending for, if established, would, ramify, therefore, not only through the law of partnership, but the law of agency, and of executorship as well.

In this connection, it may be as well to allude to the analogy which is supposed by counsel to exist between the surviving partner and an administrator. It is said the latter must pay the debts of his intestate, and for this purpose may subject his interest in realty—yet that it was never pretended he could convey an equitable title to the realty. The differences between the two are manifest. An administrator is under no personal obligation to pay the debts. He does not pay beyond assets. He has no interest in, or concern with, the real estate, except in certain specified cases fixed by statute, and in which his rights and duties are declared by arbitrary enactment. He is, in no sense,

the agent, donee, or appointee of the intestate. He derives none of his powers or interests from him. He is a mere agent or instrumentality of the court which appoints him. The very first principle laid down by STORY in his work on partnership is that: "A partner virtually embraces the character of both principal and agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deem. ed a principal; and so far as he acts for his partners he may as properly be deemed an agent. The principle distinction between him and a mere agent is that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent as such has no interest in either. Pothier considers partnership as but a species of mandate—saying: *Contractus, societatus, non secus ac contractus mandati.*"

It is argued by counsel, also, that the rights of a surviving partner are analogous to, and no greater than, those of a vendor holding a lien for purchase money. The differences, we submit, are very material. The vendor has no estate in the land independent of, or disconnected with, his debt. That is the measure of his right, and when the courts say the vendee is a trustee for him, they simply say he must either pay the debt or submit to have it taken out of the land. The vendor is not, and never was, the vendee's agent or representative, or associate in any sense. Their relations are, and have always been, adversary in character, and there are no considerations of private right, or of personal contract, or of public policy, upon which to allow the vendor to do more than to appeal to the court to compel the vendee to perform his agreement or restore the land. At the same time, if the vendors debt is more than the value of the land, and he transfers it so as to carry the lien

with it, then he practically transfers an equitable title to the land; and, certainly in any case, if he should *assume* to be the owner of the land by reason of his claim upon it, and the vendee should acquiesce in such ownership, and he (the vendor), should attempt to transfer the land itself, that transfer would pass his interest as represented by his debt; and the vendee thus consenting to, or acquiescing in such a transfer and claim of right on the part of the vendor, would be ever afterwards estopped to assert any claim to the land. There is, however, a strong analogy between the case of a surviving partner who is in advance to the partnership, either for an excess in contribution to the capital stock, or by reason of having the partnership indebtedness thrown on him alone, and the ordinary case of a *resulting trust.* Where A pays money for land, the title to which is taken to B, a trust results which gives to A a complete equitable title to that land. It will not be disputed that A can transfer that equitable title to another, and that his transferee can call on B to convey to him the legal title.

The principles which underlie the right of a surviving partner to transfer the real estate of the firm, where insolvency or other co-partnership necessities require it, are very analagous to, if not identical with, those which govern the transaction just stated.

When we consider to what absurdities the distinction insisted on between partnership realty and personalty must lead, if it really exists, we are strongly persuaded that it must be without foundation.

According to the views of those who maintain it, a surviving partner cannot transfer a house and lot owned by the firm; but if they own a mortgage on it to its full value, he may transfer that. He cannot transfer an acre of ground, but he may a ship load of cotton, or the ship itself. He cannot sell a town lot, but he may railroad stocks, or mining

shares, or government bonds, or real estate mortgages, worth ten or a hundred times its value.

If the firm has sold real estate for which the purchase money is due and unpaid, he, and he alone, is authorized to collect it and give a valid acquittance to the purchaser.

The very statement of such anomalous results seems to refute the argument in favor of the distinction, contended for and against the *policy* of allowing to the survivor the *jus disponendi* in realty.

Moreover, the principal reason urged in favor of it is founded *in fundamental error*—namely, that the legal title to the personalty vests in the survivor. Misled by a statement to this effect in the brief of counsel and a *dictum* of the Supreme Court of Mississippi, in 49 Miss, 760, we fell into the error, in the earlier part of this argument, of admitting this to be true. It is only the right of disposition which survives as to the personalty, not the title.

Story on Part., 346;
Collyer, § 111 and 118, and Ch. 28;
Pars. on Part, side p. 440.

In what has been said, however, we are not to be understood as denying the right of the surviving partner to come to the court for assistance, or that it would be his duty to do so, in some circumstances; but to say that it is necessary in every case would be, not only to hinder and delay the administration, and thus deprive him of the means of meeting promptly the partnership obligations, but would be to load the estate with an intolerable burden which would, in many cases, lessen it to onehalf its value.

Collyer says that the executors of a deceased partner "have the *power*, by instituting a suit in chancery to have the affairs of the partnership wound up in a manner which generally results in the ruin of the other partners. (See § 683.)

In the present case, for instance, if Johnston had died before the war, when the wild lands and other property of this partnership, situated in four or five different States had value, to have required an administration in equity would have destroyed at once one-half of that value. The fallacy of this view is fully exposed in the case of *Tillinghast* vs. *Chamlin*, 4 Rh. I., Rep. 209–13; a case which the learned editor of Story on Part. 6, says, "the great ability of Ames, J., who deliv ered the opinion, makes a leading one on this whole subject."

It is there said:

"Holding, as we do, that this real estate was co-partnership property, the legal title to the undivided half was held by the surviving partner, according to every authority on this subject, English or American, cited on either side, in trust for the payment of the debts of the firm, and of any balance that might be due to the estate of the co-partner upon the settlement of the partnership accounts. For the purpose of executing this trust, though but half the *legal* title was vested in him, the surviving partner had the right in equity *to sell the whole beneficial interest* in the estate; and a court of e quity would assist the purchaser by contract to get in the legal title to the other half from the heirs at law of the deceased co-partner, even though they were infants. * * * * * * We agree with counsel for the respondent, that it will not do to say, as taking the language of the courts away from the connection in which it is used in some of the cases that have been cited, and especially in the case of *Hoxie* vs. *Carr*, it has been said before us. that under all circumstances, he who purchases the real estate of a co-partnership from the surviving partner, knowing it to be such, and knowing that there are partnership debts, will take the estate subject to those debts. Much less is it true, as has been contended, that such an estate can be administered and a title to it given, only through the intervention of a court of equity. Such a partner, certainly, and each partner of a dissolved firm, unless deprived of it by contract, has, in equity, precisely the same powers to deal with the partnership property as during the continuance of the partnership, though liable in

proper cases to be deprived of that power by the appointment of a receiver. Per TURNER, Lord Justice, *Butchart* vs. *Dresser*, 31 Eng. L. and Eq., R. 121. If the legal title in partnership lands be in him he may dispose of and convey the whole beneficial interest in those lands for the purpose of realizing the proceeds of sale, and of applying them to the payment of the debts of the firm and of the final balance that may be due to him as co-partner, and a court of equity will not interfere most surely with this exercise, which duty imposes, or his said claims justify, of his *jus disponendi*. So far from it, it will, as we have seen if the legal title be in part only vested in him, or be wholly vested in another, assist him in the exercise of his right by compelling the conveyance of the legal title to himself, or to a purchaser from him, when such a conveyance is needed to enable him to perform his duty to others, or to satisfy even the demands that *he* may have as co-partner upon such property of the firm."

But, it is said for appellant, if the survivor has the power contended for, then he is the judge in his own cause, and the executor of his own judgment. The answer is that so far as this is true at all it is confessedly applicable to the personalty; is any *reason* shown why it should not be applicable to the realty? The fact is that the proposition is not true at all. Nothing that the survivor does is absolutely conclusive on the representatives or heirs of the deceased partner, for they may have their day in court, if they demand it, both for the settlement of the account and on the question of divestiture of title.

The whole philosophy of the law on this subject is simple, comprehensible and just, and may be stated in a nutshell. The powers of surviving partners are not the result of legal enactment but spring from the agreement of the partners. As to the real estate owned by partnerships, equity holds it incontrovertible that, wherever the legal title may rest, the beneficial estate is in the partnership, and that by the very act of bringing such property into the

joint stock, the partners have evinced their intention that this *beneficial estate* shall become subject to the operation of all the principles and law of partnership.

Whatever doubt may be raised by adjudications that have been made on this point with respect to real estate held as subsidiary to, or for the accommodation of, the business of a commercial or manufacturing copartnership, it is certainly established, both on principle and authority, as respects real estate which is the stock in trade—the very basis and business of a partnership.

An examination of the cases of *Anderson* vs. *Tompkins*, 1 Brock., and *Ruffner* vs. *McConnell*, 17 Ill., which are mainly relied on by *Mr. George*, in support of his views as to the power of one partner over the real estate of the firm, will not be calculated to convince the court of their soundness.

As to the former—we think he is mistaken in saying that Ch. J. *Marshall* annulled a sale of realty in that case on the ground of the want of power in one partner to make it. The contention was between creditors of the firm claiming under separate deeds from the partners respectively. After stating how the title stood at law—a moiety in each partner—he said: "I do not think the superior equity of either party is such as to control the legal estate or the disposition made by law of the subject." And he allowed each party to take what he had got by his deed. He took occasion, however, to express his dissatisfaction with the doctrine that one partner cannot bind another by deed, saying: "I am not and never have been satisfied with the extent to which this doctrine has been carried."

This case was decided in 1820, and the reporter cites, in a foot note, other cases to show that a sealed contract executed by one partner will be *binding in equity upon both*—a distinction not taken by the learned judge in his opinion.

Ruffer vs. *McConnell*, *supra*, is hardly an authority on this point. The case was a bill brought upon an allegation of mistake, to reform a deed executed by one partner in the name of the firm, so as to have it include a covenant of warranty. The decision is placed as much upon the special circumstances of the case, as upon the view taken of the law of partnerships, and we think would have been well decided upon the ground that the power to transfer the title or interest which the firm actually has, does not include the power to bind the several members by a personal covenant to warrant and defend against all comers.

By the passage from Parsons, on p. 12 of *Mr. Pittman's* brief, to the effect that no partner, or proportion of partners, can transfer the real estate of the firm outright for money, or by way of mortgage, or to assignees in trust to secure debts, without the consent and authority of the other partners, the author means *for the individual debt or purposes of the partners*, as will clearly appear by reference to the context, and to the cases cited in the foot note, which are:

Huff vs. *Howard*, 3 Jones Eq., 440;
Baldwin vs. *Johnson*, Saxt. Ch., 441;
Forde vs. *Herron*, 4 Munf., 316;
Buchan vs. *Sumner*, 2 Barb. Ch., 175;

all of which were cases of that character.

The Bank of Port Gibson vs. *Baugh*, 9 S. & M. cited by *Mr. Pittman*, to same point, was a case in which the surviving partner attempted to mortgage firm property for a new debt contracted by him alone.

It is no answer to the views above presented to say that the vendee of a surviving partner gets a title which he can only make available in a court of equity. That is conceded—but it is nothing in its disparagement. It

cannot make any difference in the real value of a title, that it must be asserted in one court and not in another; and if it does, then one which can only be asserted in a court of equity is preferable to one which can only be asserted in a court of law. A purchaser in good faith, from a surviving partner, and having possession, has a perfectly valid and available title against all the world. He can defend at law against everybody but the heir, and in equity against him. A bill in equity in such case, is but one form of an answer to the action at law; and when the heir comes with his action he is simply answered by such a bill instead of by a plea of not guilty.

The Doctrine of Equitable Conversion. Thus far we have proceeded in argument almost entirely upon legal principles as distinguished from equitable, and think we have shown that the power of one partner to make a binding contract for the sale of partnership lands is maintainable upon these alone. The legal title follows upon such a contract by the aid of undisputed equity powers. Invoking, then, no other principle of equity than that which separates the legal from the trust estate in partnership lands, and which is maintained by all the authorities of every shade of opinion, we have shown that it logically and necessarily results from the law of partnership, as well as from every just presumption as to the intention of the parties, that the right to dispose of this trust estate survives to the survivor; and that if there be a doubt as to whether this is true in all cases, it is certainly true in that class of cases into which this one falls, in which lands are the stock in trade of the partnership, held for barter and sale, just as so much personal property would be.

The conclusions thus reached find a most substantial support in that doctrine of equity which looks upon the real estate of a partnership as being, for all the purposes of

the partnership, virtually personalty, particularly where the partners, themselves, have given any indication of their purpose to eventually convert it into money, or to have it considered as ordinary partnership assets. It is said by counsel that the doctrine is a useless and unnecessary fiction. We do not think so. It is no more a fiction than the doctrine of resulting trust; or that by which an absolute deed is converted into a mortgage; or any other of the salutary principles upon which equity overturns, or disregards, mere legal technicalities, in order to give effect to the real intentions and just rights of parties who have not expressed their intentions, or secured their rights by the observance of such forms as the more rigid rules of the law require.

By means of the doctrine in question, a court of equity endeavors to do what? To indulge in a mere fiction, to no useful purpose? No; it endeavors to get at the real, substantial rights of the parties, and to do justice between them. It says that, by bringing real estate into their partnership dealings, they have evinced an intention that it shall become subject to the rules and incidents of partnership property; that this cannot be done if it is viewed in *equity* as it is at *law*, and therefore equity will consider it as being what the parties have, in fact, made it—a part of the partnership *fund*.

If we duly comprehend the argument of *Mr. George* on this point, it is this:

"The (English) rule extends to the treating of the realty as personalty for all purposes, and gives the personal representatives of a deceased partner the land as personalty, to the exclusion of the heir. In America this rule of conversion has not obtained general recognition. * * * But (in America) courts of equity will treat the realty as personal estate so far, and only so far, as is necessary to protect the rights of creditors of the firm, and adjust the rights of the partners *inter sese*."

Then stating his views of what is meant by the doctrine as thus qualified, and that it is not necessary here, as in England "to consider the conversion *as having been made* in order that the realty should be partnership stock," and that the American courts "give the partners a lien on the partnership realty; * * * and it is through this lien * * * that their rights are secured," he reaches the conclusion that: "This liability (of the realty) depends, therefore, not on the *conversion* of the real estate into personalty, but upon its *convertibility* through the agency of a court of equity"—adding, subsequently, that the lien spoken of "results from principles strictly applicable to real estate."

This then is, in another form, a fair statement of his position: In England realty in partnership is personalty in partnership; in America realty in partnership is partnership in realty. In England the conversion is considered as *having been made by the parties*; in America it can only be made *by the court*, and does not take place *until* made by the court. Therefore, in America the real estate is not *converted* at all, to any extent, or for any purpose, but simply *subjected* to the partnership demands, which "are in America made good on doctrines applicable to realty."

If this be intended as a statement of what the law is in America, then we say it has not been so decided. To state such a conclusion is to refute it; for whenever and wherever the courts have had occasion to deal with the subject, they have, in America, as in England, declared with uniform voice that partnership realty *is converted* into personalty, as between the partners themselves and their creditors, *by the act of the parties* in bringing it into the partnership.

For the enforcement of rights which spring out of this conversion, thus made, an appeal to the court may become necessary, but its decree declaring and enforcing those rights is no more the origin of them than the judgment of a court of law in favor of an heir held out of possession, would be the origin of his title.

If, on the other hand, the statement be intended as an argument that the law as adjudicated in America is wrong, and that the same reasons do not exist for maintaining the doctrine of conversion in this country as in England, then we are again obliged to dispute it. It is true *all* the identical reasons do not exist, but there are just as many and just as cogent ones, and very much of the same character. It is not necessary to hold to this doctrine to make the lands liable to the simple contract debts of the partners, but it is necessary in order to make them *first* liable for the partnership debts. It is not necessary, in order to defeat primogeniture, but it is necessary in order to defeat homestead and dower—interests in realty which are just as marked, and more favored, in our law than primogeniture in England. Otherwise these interests would become vested rights in the property while it is realty, only to become divested by an *ex post facto* decree transmuting it into personalty.* And, finally, the great reason which impelled the English courts remains to ours, viz.: to give effect to the obvious *intention* of the parties.

It is manifest that if this doctrine which rests upon, or is evolved from, the idea of a *lien*, is to be given all the incidents of conversion, it is simply that doctrine by another name.

But we understand counsel to say this lien results from principles strictly applicable to real estate—and he likens it to a vendor's lien. Aside from the differences already pointed out, none of the conditions exist out of which a vendor's lien arises. The vendor's lien is the merest equity, peculiar and restricted in its nature, and purely personal to the vendor.

The vendee has the right to pay off the lien and retain the land. It is claimed that this is true of the heir. The law is well settled the other way.

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*And the heirs of the deceased partner would be entitled to the rents of his moiety, from the time of his death until the property *should be* converted by a decree.

Burnside v. *Merrick*, 4 Met., at 544;
Trotter v. *Trotter*, 40 Miss., 704.

Story on Part., § 350;
Sigourney v. *Munn*, 7 Conn., 11;
Lyman v. *Lyman*, 2 Paine, 11;
Darby v. *Darby*, 3 Drew.

Why then should the American courts adopt this new and less flexible doctrine in preference to the old?

"Real and personal property are distinct," says counsel. This is a physical truth, but it is not more a truth in this country than in England. On the contrary, all the tendencies in this country are to make the legal distinctions between the two kinds of property less marked; and so far from there being any occasion for the American courts to adopt a more rigid and restricted doctrine than prevails in England, there is every consideration why they should pursue the opposite course.

But the views of counsel, as stated by himself, concede sufficient to cover the present case. Notwithstanding realty and personalty are distinct, he says: "If the one be directed to be converted into the other, then a court of equity, in carrying out the intention of the owner, may, and *should* treat the conversion which was directed *as having been accomplished.*" Wherever a case can be brought within this qualification, then, it comes clearly up to the English rule which attempts, not only to provide for creditors, but to give effect to the intentions of the partners *inter sese*—which rule should then be enforced here, as counsel admits. That rule is thus stated by the Vice Chancellor in *Darby* v. *Darby*, *supra*.

"Now if it be established that by the contract of partnership all the partnership property is to be sold at the dissolution of the partnership, then any real property which has become the property of the partnership becomes, *by force of the partnership contract, converted* into personalty, and that not merely as between the partners to the extent

of discharging the partnership debts, but as between the real and personal representatives of any deceased partner." And again, "I can have no difficulty in coming to the conclusion that whenever a partnership purchase real estate *for the partnership purposes* and with the partnership funds, it is as between the real and personal representatives of the partners personal estate."

The facts in this case are almost identical with those at bar.

Two brothers engaged in joint speculation, as partners, in real estate. The arrangement was to buy lands, convert them into building sites, in plots, and resell them at a profit. Portions of them were so built upon and the ground and buildings sold; but at the death of one of the partners, in whom the legal title was, a large part remained unsold. There were no written articles of partnership. It is from this state of facts and the course of dealing of the parties that the Vice Chancellor deduces the conclusion: "We have here what Lord Thurlow wanted in *Thornton* v. *Dixon*, an actual contract that the land shall be sold."

In some of the American courts, probably a majority of them, this doctrine is limited to this extent—that after all purposes of the partnership, *i. e.* the rights of creditors and of the partners, themselves, have been satisfied, it will not ordinarily be applied as between the executor and heir. The learned editor of Story thinks it doubtful whether this limitation may be considered as settled law, and after stating a number of difficulties which attend its practical enforcement, says: "The avoidance of these and other similar difficult questions, seems to be a practical reason for adopting the doctrine of absolute conversion."

Gray's ed. of Story on Part., p. 164, note.

Even in America, however, this limitation will yield to the manifest intention of the partners. Thus Story states:

"Indeed so far as the partners and their creditors are concerned, real estate belonging to the partnership is in equity treated as mere personalty and governed by the general doctrines of the latter. And so it will be deemed in equity *to all other intents and purposes* if the partners themselves have by their agreement, or otherwise, purposely impressed upon it the character of personalty." Sec., 93.

See also:

Goodburn vs. *Stevens*, 5 Gill, 1;
Hale vs. *Plummer*, 5 Ind., 121;
Kramer vs. *Arthur*, 7 Barr, 165;
Cornwall vs. *Cornwall*, 6 Bush, 369.

This doctrine that, for all the purposes of the partnership in all cases, and for all purposes whatsoever, where such appears to be the intention of the partners, equity regards partnership realty as personalty merely, being too well established to admit of any serious question, it follows as a logical result that *equity*, at least, will consider it as subject to all the incidents of partnership, including the *jus disponendi* in each partner, and in the survivor, when one of them dies.

Accordinglyit has been held in a number of well-considered cases (and denied in but one that we are aware of) that the survivor can exercise this power so as to pass a good equitable title; and by these cases the principles we have been contending for down to this point are fully sustained. We have already cited some but not all of them, and will here cite them all together. They are:

Delmonico v. *Guillaume*, 2 Sand. Ch.; 365;
Andrews v. *Brown*, 21 Ala., 437;
Murphy v. *Abrams*, 50 Ala., 293;
Dupuy v. *Leavenworth*, 17 Cal., 263;
Baldwin v. *Richardson*, 33 Tex., 16;

Solomon v. *Fitzgerald*, 7 Heisk., 552;
Moran v. *Palmer*, 13 Mich., 367;
Rossum v. *Sinker*, (Sup. Ct. of Ind. in Cent. Law J., vol. 12 (*currente*) p. 202.

See, also, the following cases in which the same doctrine is either decided or recognized:

Burnside v. *Merrick*, 4 Met., 537;
Howard v. *Priest*, Ib., 582;
Smith v. *Jackson*, 2 Edw. Ch., 28;
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Dyer v. *Clark*, 5 Met., 562;
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Whitney vs. *Cotton*, 53 Miss., was a bill filed by a surviving partner, to have partnership lands sold to pay partnership debts Objection was made to the jurisdiction, and the court simply holds that a court of equity alone, and not a court of law, is competent to give relief, when judicial relief is sought.

McGrath vs. *Sinclair*, 55 Miss., is decided upon the *fact*

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Galbraith v. Gedge 16 B. Mon. 631

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found that the property in question, was not partnership property.

These are all the cases supposed by counsel to have any material bearing upon this part of the case, and in neither of them is the power of the surviving partner involved or discussed. On the other hand we may add that in *Robertshaw* vs. *Hanway*, 52 Miss., 713, a decree foreclosing a mortgage executed by a survivor upon firm real estate, was affirmed,—though, as no question was made as to his power to execute the mortgage, we do not claim that this is an express adjudication of the question.

Besides, the decisions cited by counsel are not upon rules of property, but upon general equity principles and procedure, and are therefore not such as this court would feel bound to follow, if contrary to its judgment.

It is not a legitimate objection to any principle or doctrine of equity that we can go back to a time when it did not exist or can trace it back to its origin. If it has been afterwards received and accepted as salutary and sound by courts and judges of ability and character, it thus becomes incorporated into the general body of equity jurisprudence, and entitled to the same respect as if it could be referred to a time "whereof the memory of man runneth not to the contrary." If the doctrine which recognizes the power of the surviving partner to dispose of the realty be of comparatively modern growth, it is because partnerships to deal in lands are of comparatively recent origin; and in the establishment of this doctrine, equity has simply kept pace with the advancing interests of society.

We may add, before leaving this branch of the case, that it is settled that equity will compel the heirs of the deceased partner to convey their title to the survivor if the property is required for the purposes of the partnership.

This is held in some of the cases already referred to and also in—

Buffum vs. *Buffum*, 49 Maine.
Galbraith vs. *Gedge*, 16 B. Mon.

Brunside v. Merree

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equity would decree the heir to convey him the title, the survivor undertakes to sell the land without actually obtaining such a conveyance, equity will not allow the heir to lie off until the debts for which the land is sold are barred, and the purchasers have ordered their affairs for years with reference to their ownership of the property, and then come in and assert his title. This is the case presented here, with the additional circumstance that the heir (devisee) acquiesced in the power and right of the survivor to make the sale and afterwards ratified and approved it.

If it be true, as insisted that a court of equity is the agency, and the only agency, by which realty can be converted into personalty, then will the court say to the appellant, we will convert it in this case *nunc pro tunc*, by approving the conversion of it made by Sheppard Brown and acquiesced in, and ratified by you, as executor and devisee of Johnston.

On an application to set aside a sale made under a decree against infants, a question similar to this was decided by the Supreme Court of Virginia in the case of *Pierce* v. *Trigg*, 10 Leigh., already cited. By their answer and cross-bill, showing cause against the decree, the infants (now of age) stated a fact which did not appear in the original proceedings, and which, if it had appeared, would have justified the decree—namely, that the real estate in question was held by their ancestor and the original complainant in partnership. Holding that, although there are no debts of the partnership, the survivor in such cases is entitled to a sale for division, the court says:

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"In this case, had the heirs been adults and answered, they must have answered shewing the facts now stated by them; and if so, the sale must have been decreed. And even now, if, upon the case as it now stands, a sale ought to have been decreed, *cui bono* set aside the former decree, and then decree the same thing over again? There can be no difference except the unjust effect of setting aside a fair judicial sale (made under the faith of the decree) against purchasers, against whom no unfairness can be alleged."

With equal reason, may we ask, if it be admitted that, at the time this sale was made, the facts existed which would have authorized a judicial sale, and that the property was fairly sold and for its full value (than which no more could have been done under a decree); why should not the court now confirm that sale, instead of decreeing that it be made over again, especially when by so doing it will protect innocent purchasers who have bought and improved the property on the faith of the validity of that sale and the appellant's concurrence therein?

III.

The third and fourth heads of our reply we will consider together, being in substance:

That appellant consented to the assignment to Klein and the sales by him; that he ratified the transaction after it was made; and that upon equitable principles he is estopped to assert anything against the validity of the titles of these appellees.

Before going further it may be well to recur to the will of Johnston, making appellant his devisee and executor, and to say that appellant has no other title to the property in controversy than such as he derives through that will as devisee of Johnston, the deceased member of the copartnership to which this property belonged.

The will is on page 17 of the record, and is unusual in respect to the extent of power and discretion conferred upon the executor. It devises to him all the testator's estate remaining after payment of his debts, one-fourth to his own use, and the balance for distribution to certain named devisees. It is directed: "That he take charge of the same without administration; that he will carry on or wind up the present business in New Orleans and Vicksburg as he may think best. He is authorized to buy, sell, or exchange, or do anything which he may think most to the interest of the estate, as I have the most explicit confidence in him and do not wish him restricted." * * * * "As the business is a very large one and will take time to wind it up, I do not wish D. C. Shanks to be restricted in any way. Any one or more of the heirs complaining, he shall not receive any portion of the estate," and if required to administer, he shall do so without giving bond.

The date of the will is June, 1863, a time when it was not known how the war would end or, what the estate would be.

The first thing that strikes one, on reading this will, is that the person named as executor must be a man of more than ordinary business sagacity and integrity. One to whom a testator would confide so large an estate, as this testator then supposed his to be, with such extraordinary powers and absolute discretion, could hardly have been a man likely to neglect the interests entrusted to his care, or to act upon them on the mere statements or representations of others, or to be overreached by even "so astute an able a business man as the surviving partner," who had been known to the testator all his life. Hence we are not surprised to find in the testimony in the record, including this person's own letters, proof of the most satisfactory character that such was the case. Very soon after the close of hostilities, we find this executor in New Orleans and Vicks-

burg, looking after the wreck of the estate confided to his keeping. We find him interviewing the surviving partner, Brown, in New Orleans; Mr. Rainey, the receiver of the Louisiana estates, and Mr. McKay, his attorney, at the same place; and next, at Vicksburg, interviewing Mr. Arthur. the cashier and confidential clerk of the firm, and a participant in its profits and to that extent a partner at the time of its dissolution, and also Mr. Marshall, an eminent lawyer, who had been the firm's legal adviser. We find him investigating for himself and satisfying himself fully as to the condition of the estate—stimulated, not only by a sense of duty, but by the fact that he is to have one-fourth of all that can be saved from the wreck, besides compensation for his trouble. That he was in any respect faithless to his trust, or even remiss in the discharge of his duty, is nowhere affirmed in this record, except in his own answer to the bill of the appellees. That answer it is impossible to peruse without being struck with its ingenious argumentation and evasions—its legal dialectics. Although it is sworn to by him, the facts stated in it are not stated by David C. Shanks. We have his statement of them in another place ,in very different form and color. In a letter to Brown, dated November 13, 1875, (R. p. 64,) after alluding to the fact of his acting under compulsion in suing for this property—a fact which he has particularly explained in previous letters—he says:

"You are acquainted with all the facts: 1st. That I went South in 1865, and after looking into the condition of my uncle's estate and finding that his liabilities far exceeded assets that were available, and having consulted Maj. Kay in New Orleans and Mr. Marshall in Vicksburg, and believing that nothing could be received by me either as legatee or executor, I declined to qualify as executor, and as from Marshall's advice it was not considered necessary that I should, as you as surviving partner were qualified to transfer all the real estate to a trustee, to be sold by him for the

discharge of the liabilities of Brown & Johnston. This, in brief, constitutes the facts connected with this real estate."

The pretence set up in the answer that he, Shanks, was in any way misled, deceived, imposed upon or misadvised by Brown, or by Mr. Marshall (who was as much Shanks' attorney as Brown's) is the merest pretence, not sustained by a single word of testimony on his behalf, but entirely disproved by the testimony for complainants. We are at a loss to perceive why it was set up, until we understand that it offers the only hope of escaping from the doctrine of estoppel, so dangerous to him who wishes to assert what his previous conduct has denied, notwithstanding, on the faith of that conduct, others have acted.

Under the provisions of this will, Shanks stood in the testator's shoes. His powers over this property, except as restricted by the rights of Brown as surviving partner, were as ample and unlimited as those of the testator himself, in his life. It is fair then to assume that whatever would have been binding on the testator, if it had been done by him, would be binding on Shanks if done by him, and would be equally effective to fix the rights of parties dealing with him or with the property of the estate. The ample powers given to him were not merely for him, but for the business public who should deal with him, and to whom he was thereby held out as the *alter ego* of the testator.

Now what are the facts?

The deed, or assignment, to Klein is by Sheppard Brown "as surviving partner of the firm of Brown & Johnston," and is for the whole interest in the property of said firm. It purports on its face to be a disposition of the whole property by the survivor in virtue of his powers as such, and directs, in terms, that Klein, the assignee, "shall make to all purchasers at such sales good and sufficient deeds

conveying the whole interest of both Brown and Johnston in the whole property purchased by them respectively."

Did Shanks know of and consent to this deed before it was executed, or did he ratify and confirm it after it was executed?

The evidence on this point by deposition is not exact—the memories of the witnesses, after the lapse of ten years, naturally not serving them except as to general impressions.

Klein says (answers 11 and 12, R. 72): "I had no particular conversation with him on the subject, though he never made any objection. * * * I remember he said the whole thing was a hopeless ruin. * * * I considered that we had his whole approval and that he desired the debts should be paid."

Arthur says: (answers 16 and 17, R. 76.) "In all my conversation with him about the business of the firm he seemed to be satisfied with what Mr. Brown had done, and was doing to settle up the business. * * * The impressions left on my mind in conversation with Col. Shanks and with Joel H. Willis, a large creditor, and who was intimate with Col. Shanks when he visited Vicksburg, was that Col. Shanks *was satisfied with the prices of the property sold at Vicksburg and with the sale.*"

Besides his testimony already quoted on page 21 of this brief, Brown testifies: (Ans. 21, R. 51.) "Mr. Shanks always told me he would have signed the trust deed as executor if I had asked him to have done it, but I did not ask him, because Mr. Marshall, my attorney at Vicksburg, didn't think it necessary."

Even in his answer in this case, Shanks admits that he made no objection to the assignment, (folio 102,) and in answer to an interrogatory in the bill, says: (folio 114), "Respondent does not recollect *exactly* what passed between them, but knows that *if* he gave any approval of the mat-

ter, it was with the understanding that respondent had no legal or equitable title to the property, and upon representations of Brown as to facts, which representations respondent *is now informed* were not correct and true."

It is perfectly evident that nobody ever advised Shanks that he had no *legal* title to the property; that he was simply advised, as Brown was, that the latter, as survivor, had power to sell it; and it is proved that all other representations made to him were not only verified by him, at the time, but were absolutely true. All this pretence then about deception being practiced on him is a transparent fraud.

But this is Shanks, as respondent; how does he speak when he is, unknowingly, a witness? What do his letters in this record prove?

By the letter already quoted, it is shown that on his first visit to Vicksburg, he consulted Mr. Marshall as to whether Brown, "as surviving partner, was qualified to transfer all the real estate to a trustee to be sold by him for the discharge of the liabilities of Brown and Johnston." In another letter written to Brown from Vicksburg, Jan. 21st, 1867, (Rec. 57,) we find this:

"He (Arthur), says that Willis has brought what he terms a friendly suit to get possession of the balance of the proceeds in the hands of Mr. Klein *from the sale of the real estate*. As there are several parties who have not applied for their *pro rata*, it is a rascally trick; but he can do those things, I believe. He is over anxious for me to take charge of the business, but he cannot catch me with his bait."

Again, in another letter to Brown, dated Jannary 23d, 1876, (R. 62,) he says:

"*Now if you and myself erred by the advice of Mr. Marshall in making a trustee and transferring the real estate to*

him, who is to be the sufferer? Not you or myself, but the purchaser of that property. This is what Koiner wishes as understood from him and Mr. Pittman. It is, as you see, a technical point of law on which depends their success."

And in a previous letter of October 12, 1875, (R. p. 60.) he says:

"Mr. Pittman has been here and has made an impression on the minds of some of the heirs, and expressed himself as being confident of obtaining some $80,000 or $100,000 that could be secured by bringing this suit. The heirs seem to censure me for not being willing to go on with the suit. I have made them the proposition to satisfy them in the last emergency, if they persist in bringing a suit, to furnish me as executor with the means, and I will bring the suit if they indemnify me from all costs; but as to participating in a suit and setting aside sales *that were made by a responsible trustee with my knowledge and consent*, and for a just and equitable consideration at the time, to innocent purchasers, to pay debts justly due by my uncle, I did not believe that my uncle's, will, nor if he were alive and could speak for himself would (he) for a moment counsel or advise a course so derogatory to the position he had occupied in the community he formerly lived in, and among that class of people with whom he had associated, and if there is a discretion left with me I trust to be able to appreciate the same, and if, as they say, they must sue me for dereliction of duty, they must go ahead. I will try and meet them."

In the letter of January 23d, following, however, we find that importunities and his own greed of gain have overcome his sense of justice, and he has consented "to permit him (Koiner) to sue in my name as executor, so I can lose nothing, and, should there be anything made, I receive my full proportion under the will."

We ask the Court to read carefully all these letters of Shanks, as they cannot fail to convince that he knew of and consented to the assignment to Klein, that he ratified and

confirmed it after it was made; that he held himself out to all interested as affirming both its propriety and legality, and was conscious it would be a gross breach of faith in him to attempt to disturb the purchasers, or those holding under them.

On the question of consent and ratification, it is argued here that one man may not, in such mode, make the deed of another his own; that because this deed was not executed in the name of Shanks, nothing that he could say or do could make it binding on him. As a *legal* principle this may be granted; but in equity and conscience it is the ratification of *the thing done*, and not of the *instrumentality* by which it is done, that makes the transaction binding. Besides, it will not be doubted that if A reciting himself to be the agent of B, with power to convey an estate, should undertake to convey it by saying, "Now, therefore, I, *as agent of B, as aforesaid*, do hereby convey," &c., and this should be done with the present consent or subsequent ratification of B that this would be binding upon B in equity. In the present case Brown recites in the deed, as already shown, his authority and right as survivor to convey the whole interest of Brown & Johnston and requires the assignee in making sales to do the same.

The principle of ratification by previous consent or subsequent approval has peculiar force as between partners and those standing in the relation of partners.

The previous consent need not be to do the very act or thing done; it is sufficient if it be an authorization of or consent to the doing of an act of that nature. Thus, the evidence of the witnesses in this record is directed to the question whether Shanks consented to the making of *the* deed to *Klein*, trustee; whereas his letter of Nov. 13th, 1875, shows that he acquiesced in the proposed *method* of providing for the Mississippi creditors by transferring the Mississippi lands to *a* trustee for their benefit. This was

a sufficient consent to the deed which was afterwards made.

Gram vs. *Seton*, 1 Hall, (N. Y.) 293.
Cady vs. *Shepherd*, 11 Pick., 400.
Swan vs. *Stedman*, 4 Met., 548.

There is no end of authority to the effect that either a previous parol authority, or a subsequent parol ratification will make a sealed instrument signed by one partner binding on all, and this rule applies to deeds of the partnership real estate.

Gibson vs. *Warden*, 14 Wall, 244;
Lawrence vs. *Taylor*, 5 Hill, 107;
Moran vs. *Palmer*, 13 Mich, 367;
Herbert vs. *Merrick*, 16 Ala., 581;
Gunther vs. *Williams*, 40 Ala., 561;
Wilson vs. *Hunter*, 14 Wis., 744;
Hanes vs. *Seachrist*, 13 Iowa, 455;
Lowry vs. *Drew*, 18 Tex., 786.

The Appellant is Estopped in this case upon two distinct grounds. He is estopped to question the validity of the deed to Klein by reason of his concurrence in it at the time it was made; his failure to object to it after it was made, and his general attitude of approval of it towards the assignee, the creditors and all concerned. He is estopped to question the title of the appellees, because, after the assignment was made and he had full knowledge of it, he suffered the sales under it to proceed, and these appellees, or others under whom they claim, to become purchasers of the property, not only without objection on his part, but with conduct indicating his approval and well calculated to encourage them to believe that they would get unquestionable titles; and because, also, for nine years afterwards he "stood by" seeing these purchasers and their vendees treat this property as their own, selling it, improving it, paying taxes on it,

exercising over it all the acts of indubitable ownership, without making known his claim; and because, also, in the discharge of the debts of the firm of Brown & Johnston, for which this property was bound, appellant, in his character of executor and devisee, has received the benefit of the proceeds of that sale.

The deed to Klein was made in Sept. 1865, and was known to appellant "shortly after." He made no dissent to Brown, or to Klein, or to any one else but by his subsequent, as he had done by his previous course, gave all warrant to believe that it met his approval. It is folly to argue that his attitude and action were not the basis of anybody else's conduct. He is shown to have been in Vicksburg, and to have consulted with Mr. Marshall as to the legality of such a course with reference to the Mississippi property and creditors. He was in communication with the creditors of the estate, and with the business men of Vicksburg, ascertaining the number and temper of the former, and consulting with the latter as to the value and extent of the assets. We find him satisfying himself that "nothing could be received by himself as legatee or executor;" "the liabilities far exceeded the assets;" that "all was a hopeless ruin;" and evincing to all with whom he came in contact his approval of all that was being done by Brown to wind up the estate, and his anxiety that the creditors should be satisfied with what was being done. So far from disapproving of what had been done toward providing for the creditors, we find him declaring in a letter to Brown, written from Vicksburg, that an effort of one of the creditors to get more than his share of the proceeds of the real estate in the hands of Mr. Klein was "a rascally trick."

One word of objection from him at that time, or at any other, would have sent the whole covey of creditors and purchasers to cover. It was not spoken, and now he says

held any communication with the person whom he afterwards sued for possession, but it was held that his general course of conduct, which had been public in its character, was sufficient to estop him from asserting his title.

In *Moran* vs. *Palmer*, 13 Mich., 367, one partner had made a deed of exchange *in the name of himself alone*, to a lot held in the names of the firm. The lot received in exchange was sold by him and the proceeds applied to partnership purposes. The heirs of the other partner were held estopped to assert his title to a half interest in the lot conveyed. The court, COOLEY, J., said: 'F. Palmer, (the partner who did not join in the deed), having neglected to repudiate the arrangements at the time, a purchaser by his silence, has been induced to buy on the supposition that he was acquiring a good title, and the lot has been largely increased in value since by the improvements which he, or those deriving title from him, have made upon it. To hold his heirs estopped to assert their legal title at this time, it does not become necessary to apply the maxim that 'when one of two innocent persons must suffer, he shall suffer who, by his own act occasioned the loss,' for F. Palmer's heirs suffer no loss, and the equitable estoppel only prevents loss to the other party."

In *Morford* vs. *Bliss*, 12 B. Mon., 255, certain persons who were sureties for another, were secured against loss by a mortgage on a house and lot, which was also conditioned *to pay the debt*. At their instance, the creditor obtained judgment at law against them and their principal, and had the mortgage property sold on execution,—which sale was illegal, as the mortgage premises could not be sold on an execution for the mortgage debt. The latter not being fully satisfied, the surities paid the balance, and afterwards, (the property having enhanced in value), filed a bill to charge the property with the balance they had paid.

They were held estopped to deny the validity of the execution sale, in language so apposite to the present case that we quote the following extracts:

"In the case before us the mortgagees virtually directed the sale, and not only sanctioned it afterwards by taking the benefit of a credit for the proceeds on the execution against them, and by failing to quash it, or in any manner to object, afterwards in reasonable time, but one of them, the present complainant, being actually present encouraged one bidder at least, and by his silence authorized all, to believe that he concurred in the sale. He says he did not know he had a right to object. But the facts prove that he desired the sale, and probably because it was an expeditious and cheap mode of subjecting the property to his indemnity * * * But there is no evidence nor ground to believe that if he had known the law, he would have objected to the sale. He wanted the property sold for the debt; * * it was sold under favorable circumstances publicly and fairly, and for as much as there was any reason to suppose it would bring under a decree. And no objection is heard, nor any relief sought, until by a change of times, the property has appreciated, and until it is expected that by charging the purchaser with rents exceeding the interest on that portion of the debt left unpaid by the execution sale, their claim of re-imbursement may be satisfied or reduced to insignificance, thus leaving the property in its enhanced condition for the full indemnity of the complainant. So far as the complainant may rest his case upon his former ignorance of the law, he would have come into court with a better grace soon after the sale; and even now, if there had been no appreciation of the property. For as he has found out the rule of law when its application would be obviously advantageous to him, the inference naturally suggests itself, that he would have discovered it much earlier had it promised substantial advantage; and that if the sale had not been fair, as well in the price as in its circumstances, he would not long have remained ignorant of its illegality, unless, indeed, he might have been deterred from any movement on the subject by the consciousness that his own conduct in inducing it, should preclude him from disturbing it. * * * A court of equity does not allow a party thus to speculate on events to the injury of others."

There is much more of the same import in this valuable opinion, but we forbear to quote further.

See also *Woods* v. *Wilson*, 37 Penn. St., 379.
Gatling v. *Rodman*, 6 Ind., 289.
Wendell v. *Van Ranselier*, 1 John Ch., 354.
Gregg v. *Von Phul*, 1 Wall., 274.

With the exception of a single case, no court has applied the doctrine of estoppel more liberally than the Supreme Court of Mississippi.

In *Dixon* v. *Green*, 24 Miss., 612, the heirs of one tenant in common were estopped from asserting his title to the joint estate, because it was shown that he had, by his conduct, given color to an assumption of right, on the part of his co-tenant, to sell the whole.

In *Nixon* v. *Carco*, 28 Miss., 414, an invalid conveyance was made by an ancestor of land to which he had no right or title except that of occupancy under circumstances entitling him to receive a patent from the Government. This patent afterwards issued to him, and his heirs, after standing by for some years and allowing the purchaser to make improvements, brought ejectment for the property. They were held estopped, the court saying:

"It is admitted that the instrument was intended and believed by the parties to be a valid and sufficient conveyance, and that this was a mistaken opinion as to its legal effect. The rule in such cases is well settled to be that equity will give effect to the real intentions of the parties as gathered from the objects of the instrument and the circumstances of the case," &c.

The plea of ignorance of their rights was held unavailing to escape the estoppel which, as to them, was predicated on their recognition of complainant's right to the land, and on their failure to assert their claim within a reasonable time.

In *Railroad Co*, v. *Ragsdale*, 54 Miss., 215, the railroad

had acquired lands by donation from Ragsdale for depot purposes, but afterwards, on a change of plans, abandoned to him the greater portion of them, and the President made a renunciation of them, informally, in conversation and in letters. Against an estoppel pleaded, the Company insisted it could not relinquish the lands by parol, and also that the President (Smedes) acted without authority. But the court said:

"One who stands by and sees another assert title to his property and sell it, will not be heard to dispute the title of the purchaser if he remained silent and did not, when good morals and honesty required it, disclose his right. Though it (the railroad) may deny the authority of Smedes, it stood by year after year and saw Ragsdale asserting ownership over part of the land which he had donated, and his vendees enjoying their several premises, yet never once protested that Ragsdale was a usurper and his vendees were improving property not their own."

In the case of *Staton* vs. *Bryant*, 55 Miss., cited by the other side, the estoppel insisted on was not applied. The transaction was of comparatively recent date; the purchaser had not made any improvements on the land, but had simply paid off an encumbrance. The acts of the party sought to be estopped had been wholly of a passive character, and the court found itself able to put the parties in *statu quo* and to do justice between them without declaring an estoppel. This it did by a decree the terms of which show that it was strongly impressed with the inequitable character of the defendant's conduct, and would have decreed an estoppel if it had been necessary to accomplish justice. *Chalmers J.*, specially concurring, said he thought the facts would have warranted such a decree. The court found that Bryant (the purchaser) knew of, and was not deceived or misled as to the true state of the title; and upon the subject of the defendants conduct, said:

"There is a wide difference between encouragement and

silence. It is only when silence becomes a fraud that it operates as an estoppel."

It is further said that the doctrine has had active growth in modern times, and is being gradually extended in its sphere of usefulness to prevent wrong, and that the safest way is to leave each case in which it is invoked to be determined by its own peculiar circumstances.

The brief of Messrs. Harris and George in this case, contains such an admirable statement of what is meant by "standing by," as applied to cases like the present, that we adopt it as our concluding observation on this subject:

"The 'standing by' in the language of the Court of Chancery, is often employed as a figure of speech and does not necessarily import an actual presence *dum feret opus*. It means the omission to act or speak when an occasion arises where to speak or act is a legal duty. The duty is as imperative to arrest the consummation of a contract after it has been entered into as it is to avert the contract. To arrest the execution of the contract while there is time to prevent injury, and when it would be practicable to place the parties in *statu quo* is a duty of as stringent obligation as is the duty to prevent the parties from contracting; and we find it recognized as having the same footing. The case of *The State* v. *Halloway*, 8 Blackf., 45, and *Nicholson* v. *Cooper*, 4 Myl. & Cr., 179, (18 Cond. Eng. Ch. Rep. 178,) are cases which present pointed illustrations of fraudulent silence and of the cases in which there arises a legal duty to communicate information or dissent."

The court will note that in none of the cases which we have cited, except that in 28 Miss., was the recognition of, and acquiescence in, the purchaser's rights of longer duration than that in the case at bar.

Aside from his plenary powers under the will, the appellant, as the representative of the deceased, had the right to agree with the survivor as to what disposition should be made of the realty towards paying the partnership debts.

An administrator would have had the same power; and any such agreement, if *bona fide* and fair, is binding on the heirs.

Ludlow v. *Cooper*, 4 Ohio St.

Coster v. *Clarke*, 3 Edw. Ch.

The last part of the argument of *Mr. George* is founded on an error of fact. The deed to Klein appears in two places in the record, first at p. 18, and again at p. 43. In the former, the expression is (see folio 77), "for some of them (the debts), *may* have been paid," and in the latter "may," is left out—evidently by clerical misprision. It would have been absurd to make an assignment to pay debts which had already been paid.

As to Arthur's connection with the firm—he was simply a sharer in the profits, and had no interest in the partnership property or stock. *See his answer to 12th Cross-int., R. p. 79.* He states, (*Ans. to chief-int. 11, R. p. 75*), that all the debts provided for in the trust deed, were debts of Brown & Johnston, except one of $73.00, which was paid by him individually. Besides, Brown & Johnston were each bound for the full amount of debts due by Brown, Johnston & Arthur,—making the case materially different from that of *Buckley* vs. *Barber*, 1 Eng. L. and Eq., which was at law, and where the holding goes no further than this, that the survivors cannot mortgage the partnership property, "for a debt *principally* due from the surviving partners, and *in part* only from the deceased, and in order to enable them to carry on the partnership business."

The ruling in *Barcroft* vs. *Snodgrass*, 1 Cold., that a surviving partner cannot assign property of the firm to a trustee for creditors, is against the accepted doctrine on this point. And in *Solomon* v. *Fitzgerald*, 7 Heisk., *supra*, it is stated that this case had been "reviewed" in an unreported opinion, from which an extract is given, indicating

that it must have been virtually overruled. A number of the cases above cited hold that such assignments are a legitimate exercise of power by the survivor in winding up the partnership affairs.

Collyer on Part., §§ 345, 623 n.
Pars. on Part., p. *163.

It cannot be doubted that he may employ agents generally to assist in winding up the concern, such as brokers, factors, auctioneers and others. Why not an agent to sell real estate? In Mississippi even a naked trustee in a deed in trust may employ an agent to make the sale.

Johns v. *Sargent*, 45 Miss., 332.

Besides, the appellant having consented to and afterwards approved of the assignment, it does not lie in his mouth to make this objection to it.

The appellant, himself, has aptly characterized this case: "It is as you see," says he, in his letter of Jany, 23, 1876, "a technical point of law on which their success depends. If you and myself erred by the advice of Mr. Marshall in making a trustee and transfering the real estate to him, who is to be the sufferer. Not *you*, or *I*, but *the purchaser of that property*."

In *Dupuy* vs. *Leavenworth*, 17 Cal., one partner having absconded with the money of the firm, and to escape its liabilities afterwards sold to another his legal title to a moiety of the partnership real estate, which had meantime been appropriated by the other partner, by sale, to the payment of the partnership debts. His vendee was not allowed to recover because it was held that the sale made by the other partner was valid in equity.

In the present case the appellant did not abscond to escape the debts of Brown & Johnston, for he had no occasion to; but after looking far enough to see that he "could not receive anything either as legatee or executor," he would lend no hand to help the surviving partner, or the creditors. He would employ no active efforts to

make the assets available, but contented himself with approving all that was done, including these "sales that were made by a reponsible trustee with my knowledge and consent, and for a just and equitable consideration at the time to innocent purchasers to pay debts justly due by my uncle."

The appellant has not transferred his pretended title by formal deed; but, protecting himself against most probable costs by a bond of indemnity, has lent the use of his name and office to "a young man, Mr. Koiner," who appropriately hails "from Fisherville," and who advertises himself as the conductor of a heavy "law-suit" in which there is at least "one million."

Of *Dupuy* v. *Leavenworth*, counsel says: "I do not pretend to say that in the California case the court did not make a correct decision, and one justified by the soundest principles of equity; for the result attained in that case fully satisfies the natural sense of justice which belongs to every educated conscience, and I hope, therefore, is not inconsistent with the principles of equity as administered under our jurisprudence"—"Under the circumstances of that case, a court of equity would be most diligent and astute in its search for some principle by which it could prevent these fraudulent conspirators from enjoying the fruits of their rascally scheme and protect the innocent purchaser. If there be no precedent the court would be apt to make one; if there were a precedent the court would not be dis posed to criticise too closely the reasoning by which the much desired conclusion had been reached."

We could ask no more (eliminating the epithets) than that this court should apply to this client's cause his own counsel's ideas of right and justice, as applied to the causes of other people.

EDWARD D. CLARK.

Counsel for Appellees.

Addenda.

At the conclusion of *Mr. Pittman's* argument *in reply* to the foregoing, attempt is for the first time made to show that the surviving partner, Brown, was debtor to the firm in a sum sufficient (or nearly so) to have paid off the debts for which the property in controversy was sold. To prove this, counsel quotes from the testimony of Arthur, who says:

"The books show that the *amounts charged* to Shepperd Brown, at the date of the dissolution of the firm of Brown & Johnston, was $58,525.04; and the bookkeeper calculated interest on it up to August 1, 1862, and added $5,870.33—making the indebtedness, up to August 1, 1862, $64,395 $\frac{37}{100}$.

But counsel does not add what the witness does that "*this seems to be a running account including petty expenses, charities, and everything which was charged to Mr. Brown's private account from the commencement of the firm—say 25 years previous.*"

A partner cannot be debtor to the firm unless he has withdrawn from it an amount in excess of his share of the profits, if there are profits, or, if there are no profits, an amount in excess of his share of the capital.

Story says:

"If any partner has made advances to the firm, and others have received advances from it, these do not constitute debts, strictly speaking, until the concern is wound up, but only items in the account between the partners."

Story on Partnership, § 348 *a*.

This testimony does not show that the account referred to contains any credits whatever; and it is evident that it could not have shown any credits on account of profits, for there was never any division of profits between the partners.

Brown is asked, (cross interrogatory, 3, Record, page 40,) "What was done with accumulations? Were they drawn out of the business as dividends by the individual partners, or did they remain as a surplus in the banking business?"

And answers, record p. 52.

"They always remained in the business—parties only drew enough for their individual wants."

And, on page 54, he says, speaking of the organization of the New Orleans houses—see ans. 43:

"Neither one of us contributed separately out of individual funds; in fact we had no individual funds."

This account, therefore, is nothing more than a memorandum of the amounts drawn out by Mr. Brown for his individual wants during the existence of the firm. *Non constat*, Mr. Johnston may have drawn out much more.

The statement that "there is no evidence that they owed more than the debts provided for in the deed in trust less than $70,000," is equally wide of the mark.

Brown testifies that they owed $150,000, or more, *in Mississippi* alone; and the creditors secured by the trust deed were only the depositors in their bank, to whom they properly felt a higher moral obligation than to any others.

Again he says: "There were judgments against me and the firms before I reached New Orleans of $500,000 and upwards; and knowing that all these firms were insolvent, I determined to give to the Mississippi creditors and depositors of Brown & Johnston all that said firm possessed in the State of Mississippi." (Record, pages 49 and 50.)

We think the court will agree with us that this record discloses not only no proof, but no reasonable ground upon which to base a charge, of bad faith, or misrepresentation, or any kind of misconduct on the part of Mr. Brown. But in so far as the appellant seeks by pretenses of this sort to escape the consequences of his own conduct, we have only to say, it is not Mr. Brown who is setting up this estoppel against him, predicated upon that conduct, but innocent purchasers who had the right to assume that he was acting with all due intelligence, as well as fidelity, in the relations which he assumed to Mr. Brown, to the creditors, and to this property.

We have already shown, by extracts from Shank's own letters, that he concurred *in the proposed method* of transferring this property to a trustee; and that he did not know of the particular deed to Klein until after it was executed, is, therefore, unimportant—especially as he ratified and approved it after he did know of it.

We will not enter again into the question of estoppel. It is easy to assert that the cases we have cited contained all the elements which Mr. Bigelow lays down as necessary to an estoppel, and that this case does not. The law of estoppel cannot be stated in a few general terms. Each case must rest upon its own circumstances, and the court will apply the doctrine wherever "it accomplishes that which ought to be done between man and man." "It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked."

Dickerson vs. *Colgrove*, 100 U. S.

There was not in this case, nor in *Baker* vs. *Humphrey*, 101 U. S., nor in either of the cases from the State reports cited by us, any element which is not present in more pronounced form in the case at bar; nor were the parties in-

voking the estoppel more closely connected with the conduct out of which it arose than are the appellees here. In this particular *Dickerson* vs. *Colgrove* is on all fours with the case at bar. The appellees are permitted to rely, not only upon conduct of which they had personal knowledge or by which they have been themselves affected, but upon conduct towards Klein,or Brown, under both of whom they claim. As established by the case just mentioned, the vendee may assert an estoppel predicated upon conduct towards a remote vendor.

E. D. CLARK,
For Appellees.

14-20-Miller

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~313.~~ ~~565~~ 10

ELIJAH SMITH, RECEIVER OF THE BURLINGTON & SOUTH-WESTERN RAILWAY COMPANY, APPELLANT,

vs.

WARREN McCULLOUGH ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED OCTOBER 17, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 313.

ELIJAH SMITH, RECEIVER OF THE BURLINGTON & SOUTH-WESTERN RAILWAY COMPANY, APPELLANT,

vs.

WARREN McCULLOUGH ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA,
Western District of Missouri, set:

Pleas begun and held at Jefferson City, in said district, before the honorable judges of the circuit court of the United States in and for said district, in a certain cause in said court pending, wherein the Farmers' Loan and Trust Company is complainant and the Burlington and Southwestern Railway Company, John W. Brooks, Alpheus Hardy, James F. Jay, and Ellen B. Ward are defendants.

Be it remembered that heretofore, to wit, on the eighth day of August, A. D. 1874, the following proceedings were had and entered of record in said cause, to wit:

FARMERS' LOAN AND TRUST CO.
vs.
BURLINGTON & SOUTHWESTERN RAILWAY Co. et als. } No. 297

This day come Grant and Smith, solicitors for complainants, and file their bill of complaint against the defendants herein, and on motion of said solicitors it is ordered that a subpœna in chancery be issued against said defendants, returnable to rules the first Monday, the 5th day of October, 1874. The said bill of complaint so filed as aforesaid
2 is in words and figures following, to wit:

Circuit court of the United States for the western district of Missouri.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON & SOUTHWESTERN RAILway Company, John W. Brooks, Alpheus Hardy, and James F. Jay. } Bill in equity.

To the judges of the circuit court of the United States for the western district of Missouri:

The Farmers' Loan and Trust Company, a corporation for pecuniary profit, created by and a citizen of the State of New York, brings this bill in equity against the Burlington and Southwestern Railway Company, a corporation for pecuniary profit, created by and a citizen of the States of Missouri and Iowa, John W. Brooks and Alpheus Hardy, citizens of the State of Massachusetts, and James F. Joy and Eber B. Ward, citizens of the State of Michigan. And the said plaintiffs complain that the said Burlington and Southwestern Railway Company, owning a line of railroad partly constructed, extending from Burlington, in the State of Iowa, to or north of St. Joseph, in the State of
3 Missouri, and being desirous of building a branch of said road called the Linneus Branch of the Burlington and Southwestern Railway Company, did, on the first day of April, A. D. 1872, execute and deliver to the said plaintiffs, the Farmers' Loan and Trust Company, of the city of New York, a deed of trust or mortgage, which the plaintiffs are ready to show to the court, and a copy of which is annexed to this bill, to secure bonds which it thereafter executed and delivered to the extent of twenty thousand dollars per mile of road built, principal and interest payable in gold. And said deed of trust did grant, bargain, sell, and convey to the said plaintiffs all the present and in fu-

ture to be acquired property of or in any manner pertaining to the said Linneus Branch of the Burlington and Southwestern Railway Company, and all the right, title, interest and equity of redemption therein, whether of said company or the stockholders of said branch included, the premises leased of the Lexington, Lake and Gulf Railroad Company, now made and to be constructed, extending from the main line of said Burlington and Southwestern Railway at or near Unionville, in the
4 county of Putnam, in the State of Missouri, by the way of Linneus and Lexington to Kansas City, and by way of said line of leased premises from Lexington to Butler, in Bates County, Missouri, and to such other point in Southwestern Missouri as may be determined upon by the board of directors, or however said branch line of road including such leased premises may be described or built, including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station-houses, depots, viaducts, bridges, timber and materials, and property purchased and to be purchased, or otherwise acquired for the construction and maintainance of said branch railroad, and all engines, tenders, cars, and machinery, and all kinds of rolling stock, now owned or to be hereafter purchased by said party of the first part for and on account of said branch railroad, all the revenue and income of said Linneus branch, and all the rights, privileges, and franchises relating thereto, and property acquired by virtue thereof, now in possession or thereafter to be acquired, including machine-shops, tools, implements, and personal
5 property of every kind acquired by Burlington and Southwestern Railway Company by virtue of its said lease of said Lexington, Lake and Gulf Railroad, and which branch line of road and leased premises extending from the said town of Unionville by the way of Linneus and Lexington to Kansas City and Southwestern Missouri, as before set forth, was and is known and designated as the Linneus Branch of the Burlington and Southwestern Railway Company: To have and to hold said premises, and every part thereof and appurtenances, to said Farmers' Loan and Trust Company, of the city of New York, and its successors in trust or assignees, upon the following express trust, that if said Bur Burlington and Southwestern Railway Company should fail to pay or cause to be paid the principal or any part thereof, or any of the interest, or any of the bonds secured or intended to be secured thereby, at any time when and where the same might become due and payable according to the terms thereof, and for sixty days thereafter, all of said bonds, both principal and interest, should become due and payable at the option of the holder, and at the request of the holders of one-tenth
6 of said bonds then unpaid and outstanding, said trustee and its successors or assigns might enter and take possession of all the mortgaged property, and as attorneys in fact or agents of the grantors, have, use, and employ the same, making needful repairs and additions, and after deducting expenses pay the balance of the proceeds pro rata among the bondholders, or the said trustees at their discretion might, and on the within request of one-tenth of the holders of said bonds unpaid should, cause said premises to be sold at public auction, at the city of St. Louis, in said State of Missouri, giving sixty days' notice thereof by publishing the same at least once a week for eight successive weeks in two of the principal newspapers published in Boston and New York and one in St. Louis, Missouri, and one in Burlington, Iowa, and upon such sale to execute and deliver a deed sufficient to convey the title to said property and bar the equity of redemption of the defendants; and after deducting expenses and costs and a reasonable compensation to the trustee,

and indemnity for liability as trustee, to apply the proceeds of the sale in payment of interest and principal of the bonds, and any overplus to the grantors. The said trust mortgage was duly
7 recorded in the various counties of Missouri through which said branch road ran. About ten miles of said branch is completed and a large amount of work is done on the same; that one million five hundred thousand dollars of said bonds, payable on the 1st April, 1897, in sums of one thousand dollars each, numbered from one to fifteen hundred, have been issued, payable to bearer, with interest payable in gold coin of the United States at 7 per cent., free of Government tax, with coupons for said interest payable free of Government tax or duty, at the company's agency in New York or London, on presentation of the coupons, interest payable on the first day of April and October in each year. And said defendants neglected to pay the interest due on said bonds to the amount of one million five hundred thousand dollars on the first day of April, 1873, and each installment of interest since that date, and at least one-tenth of the holders have elected to hold the principal and interest of said bonds, due and payable, and, by the terms of said bonds and said deed of trust, the whole of said principal and interest has become due and payable and remains unpaid for more than sixty days.

2. The said plaintiffs aver that the said Brooks, Hardy, and Joy
8 claim some interest in the premises mortgaged, or some part thereof, by reason of a prior mortgage on the main line of said road; that the whole of said branch, finished and unfinished, is within the said circuit; that only about ten miles of said branch is completed and in operation, and a large amount of work has been done on the unfinished portion thereof; that said Eber B. Ward is in the actual possession of said branch, running and operating the same under some claim of title subsequent to the title of the plaintiffs. That said corporation has become involved and unable to pay its debts; that there is now due to the plaintiffs, as trustees under said mortgage, the sum of one and a half million of dollars, with interest at seven per cent., all in gold coin, from the 1st April, 1873. That said defendants' ought to pay said sum, which is due under said deed of trust or mortgage for principal and interest, or release the equity of redemption in the premises, which they refuse to do, all which is contrary to equity.

To the end therefore that said defendants may, if they can, show why your petitioners should not have the relief prayed, and may full answer make to all the allegations of this bill, but not under oath, which
9 is waived, your petitioners pray for a writ of subpœna in chancery, to be issued out of this court, directed to said defendants, commanding them to appear and answer this bill on a day named in said subpœna; that an account may be taken of what is due and owing to the plaintiffs as trustees for said bondholders, under said mortgage or trust deed for both principal and interest; that the defendants may be decreed to pay the same in gold, together with costs, by a short day to be appointed by the court for that purpose, your petitioner being ready and willing on such payment to release and reconvey said property by proper deed; and in default of payment of said debt, interest and costs, by said day, that the defendants and all others claiming under them be barred and foreclosed of their equity of redemption, and said mortgaged premises may be sold by a special master to be appointed by this court,

and the proceeds applied to payment of said debt, and such other relief as the plaintiff's case may require.

(Signed) GRANT AND SMITH,
Solicitors.
J. F. TRACEY,
Of Counsel for P'f.

10 The said copy of deed of trust, annexed to said bill, is in words and figures following, to wit:

This indenture, made on this first day of April, one thousand eight hundred and seventy-two, between the Burlington and Southwestern Railway Company, a corporation organized, formed and existing under and by virtue of the laws of the States of Iowa and Missouri, and successor to the St. Joseph and Iowa Railroad Company, a corporation duly organized and existing under the laws of the State of Missouri, party of the first part; and the Farmers' Loan and Trust Company, of the city of New York, party of the second part, witnesseth:

That whereas the branch railroad, hereinafter mentioned, was duly projected and established on the twenty-fifth day of March, eighteen hundred and seventy-one, by the said St. Joseph and Iowa Railroad Company, as the Central North Missouri Branch of the said St. Joseph and Iowa Railroad Company, and thereafter said St. Joseph and Iowa Railroad Company sold and conveyed all their property, rights, and privileges, and franchises to the Burlington and Southwestern Railroad Company,
a corporation existing under the laws of Iowa; and whereas said
11 Burlington and Southwestern Railroad Company, by virtue of said purchase and the laws of said State of Missouri, is duly authorized to construct said branch railroad; and whereas the name of such branch railroad has been legally and duly changed, and it is now known as the Linneus Branch of the Burlington and Southwestern Railway Company; and whereas the first party has leased, for the term of one thousand years, the railroad, franchises and property of the Lexington, Lake and Gulf Railroad, extending from Lexington, Missouri, southwardly, for the use and in behalf of said branch line, and, as a part of the same, with the rights to mortgage the same as herein set forth; and whereas the said first party is authorized, by the laws aforesaid, to borrow any sums of money which may be necessary to construct, equip, and maintain its said branch railroad, and to secure the payment thereof, by mortgage or deed of trust of its corporated property and franchises, which it now has or may hereafter acquire in and connected with the said branch line of road and the leased premises herein referred to; and whereas the said party of the first part, by a resolution of its
board of directors, and in pursuance of the instructions and
12 requests of the stockholders of said branch at a meeting duly called for that purpose, and the consent of the stockholders of the said Lexington, Lake and Gulf Railroad, leased as aforesaid and set forth in the deed of lease to said first party, has duly authorized its president and secretary to execute in the name and under the corporate seal of said company to issue bonds, to be designated as first mortgage bonds upon the said Linneus Branch, and numbered in a regular series from one to the highest numbered issued, and to be secured by such deed of trust or mortgage on the whole line of said branch railroad, extending from Unionville, in Putnam County, Missouri, to Kansas City, by the way of Lexington, and such other point in Southwest Missouri as may be hereafter determined upon, and from Lexington, Missouri,

over said leased premises to Butler, in Bates County, in Missouri, and to such other point at or near the Arkansas line as may be hereafter determined upon by the board of directors, in such form and upon such conditions as the said president may deem most advantageous to aid in procuring the necessary means to build and equip the said branch railroad, including such leased premises, to any amount not ex-
13 ceeding twenty thousand dollars ($20,000) per mile of the whole line of said branch, it being understood that for the purpose of these presents, and as set forth in the deed of lease, that said Lexington, Lake and Gulf Railroad is a part and parcel of said branch line; and whereas by said resolution and the consent and authority aforesaid the said president is authorized to incorporate in said deed of trust or mortgage such terms, conditions, and rate of interest not exceeding eight per cent. (8%) per annum, payable semi-annually, as he might determine; and whereas said president has determined to make said bonds payable at the agency of said company in the city of New York, or in the city of London, England, twenty-five years from the first day of April, in the year one thousand eight hundred and seventy-two (1872), bearing interest at the rate of seven per cent. (7%) per annum, payable semi-annually, in gold coin, at the agency of said company in New York, or London, England, as aforesaid, free of United States Government tax, said bonds to be convertable into the capital stock of the said branch road at the option of the holder thereof, on any first day of April or October, for twenty years
14 from this date, the holder receiving therefor at the rate of ten shares of said capital stock for each one thousand dollar bond, and to have said bonds duly prepared and deposited with said parties of the second part to be delivered over to the treasurer of said railroad company upon the order of said president, to be used exclusively in the construction and equipment of said Linneus Branch as hereinbefore stated, with the necessary sidings, stations, and other appurtenances, said bonds to be of the denomination of one thousand dollars ($1,000) or two hundred pounds (£200) sterling each, and are in the form following, to wit:

UNITED STATES OF AMERICA.

STATES OF IOWA AND MISSOURI.

£200 sterling. No. . $1,000.00.

Burlington and Southwestern Railroad Company, Linneus Branch, Lexington and Kansas City Division.

First mortgage sinking fund convertible bonds on the Linneus Branch road, seven per cent. (7%) gold, free of U. S. Government tax.

Know all men by these presents that the Burlington and Southwestern Railway Company, for and in the name of the Linneus Branch of said railway, which said branch was duly projected and established by the St. Joseph and Iowa Railroad Company, which said St. Joseph
15 and Iowa Company sold its property and franchises to the said Burlington and Southwestern Railway Company, a corporation organized and existing under the laws of the State of Iowa, is indebted unto the Farmers' Loan and Trust Company, of the city of New York, or bearer, in the sum of one thousand dollars, ($1,000) in United States

gold coin at par, to be paid at the agency of said railway company in the city of New York, or the sum of two hundred pounds (£200) sterling, to be paid at the agency of the said railway company, in the city of London, England, at the option of the holder thereof, on the first day of April, A. D. one thousand eight hundred and ninety-seven, with interest on the said principal from and after the date hereof at the rate of seven per cent. (7%) per annum in gold coin, as aforesaid, free of all United States Government tax, or duty at such agency in the city of New York or in the city of London, on the first day of April and October of each year, on the presentation and surrender of the annexed coupons as they severally become due, in accordance with their provisions. This bond shall pass by delivery or by transfer on the books of the company, kept for that purpose at its agency in New York, and such other
16 places as the board of directors may hereafter legally appoint. After a registration of ownership certified hereon by the transfer agent of said company, no transfer except on the books of the company shall be valid unless the last transfer shall have been to bearer, the bond to be subject to successive registrations and transfers *on* bearer at option of any lawful holder. This bond is one of a series issued by said Burlington and Southwestern Railway Company by virtue of the provisions of a lease of the Lexington, Lake and Gulf Railroad to said first party, in the name and for the use of said Linneus Branch, and by virtue of the authority of an act of the general assembly of the State of Missouri, entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March 21, 1868, and in pursuance of the authority of the stockholders in said branch, and to aid in the construction and equipment of the said Linneus Branch of the Burlington and Southwestern Railway to said leased premises extending from the main line of said first party at or near Unionville, in Putnam County, in the State of Missouri, and in a southwesterly direction, by the way of Linneus, in Linn County, and Lexington, in Lafayette
17 County to Kansas City and such other points as may hereafter be legally determined upon, and also upon the line of road leased from the Lexington, Lake and Gulf Railroad of Missouri for the use of said branch, extending from Lexington aforesaid to Butler, in Bates County, and such other point as may hereafter be legally determined upon, limited to twenty thousand dollars of bonds to a mile of road, secured by a first mortgage and trust deed to said Farmers' Loan and Trust Company of the road, rolling stock, and franchises of the said Linneus Branch and pertaining thereto, including the said leased premises, entitled to the benefit of a sinking fund provided for in the mortgage and convertable into the capital stock of said branch line on any first day of April or October during a period of twenty years from date. This bond is to be valid only when authenticated by a certificate endorsed thereon, signed by the trustee named in the mortgage and bond.

In witness whereof the said company has caused its corporate seal to hereto affixed and the same to be subscribed by its president and countersigned by its secretary in conformity to said mortgage, under date of April 1st, A. D. 1871.

President.

Secretary.

18 To each of said bonds there are attached fifty interest coupons numbering, respectively, from one to fifty, both inclusive, in the following form:

$35. £7.

On the first October, 1872, the Burlington and Southwestern Railway Company, for and in behalf of the Linneus Branch thereof, will pay thirty-five dollars in U. S. gold coin at its agency in New York, or seven pounds sterling at its agency in London, on the surrender of this coupon to bearer, or if registered, to the registered holder thereof or order, for six months' interest due that day on bond No. , issued for and secured by and upon said Linneus Branch of said road.

N. P. SUNDERLAND,
Secretary.

Now, therefore, this indenture witnesseth that the said Burlington and Southwestern Railway Company, in order to secure the payment of said bonds, and *in* the interest thereon, and in consideration of five dollars to it in hand paid by the said party of the second part at the execution and delivery of these presents, the receipt of which is hereby acknowledged, and by virtue of the power and authority in it vested as hereinbefore stated to issue said bonds and make this conveyance upon the said branch line of road, has granted, bargained, sold, transferred, and conveyed, and by these presents
19 doth grant, bargain, sell, transfer and convey *upon* the said party of the second part, their successors in said trusts and assigns, all the following and all the above described property, to wit: All the present and in future to be acquired property of or in any manner pertaining to the said Linneus Branch of the Burlington and Southwestern Railway Company, and all the right, title and interest and equity of redemption therein, whether of said company or the stockholders in said branch or leased premises, that is to say, all the branch railroad including the premises leased as aforesaid of the Lexington, Lake and Gulf Railroad Company now made and to be constructed, extending from the main line of said Burlington and Southwestern Railway at or near Unionville, in the county of Putnam in the State of Missouri, by the way of Linneus and Lexington to Kansas City, and by the line of said leased premises from Lexington to Butler, in Bates County, Missouri, and to such other points in Southwestern Missouri as may be determined upon by the board of directors, or however said branch line of road including said leased premises may be described or built, including the right of way therefor, road-bed, superstructure, iron, ties,
20 chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station-houses, depots, viaducts, bridges, timber and materials and property purchased and to be purchased or otherwise acquired for the construction and maintenance of said branch railroad, and all the engines, tenders, cars and machinery, and all kinds of rolling stock now owned or hereafter purchased by said party of the first part for and on account of said branch railroad, all the revenue and income of said Linneus Branch, and all the rights, privileges, and franchises relating thereto, and property acquired by virtue thereof, now in possession or hereafter to be acquired, including machine shops, tools, implements and personal property used therein or along the line of said branch railroad, together with all the property of every kind acquired by said first party by virtue of said lease of said Lexington, Lake and Gulf Railroad, and which branch line of road and leased

premises extending from said town of Unionville by the way of Linneus and Lexington to Kansas City and Southwestern Missouri, as hereinbefore set forth, is known and designated as the Linneus Branch of the Burlington and Southwestern Railway: To have and to hold the said branch line of railway, including said leased premises and property, and all and singular the said premises and every part thereof with the appurtenances unto the said party of the second part, its successors in said trust or assigns, but for the following purpose and upon the following express trust, that is to say, in case the said party of the first part for its said branch line shall fail to pay or cause to be paid the principal or any part thereof, or any of the interest, or any of the bonds secured, or intended to be secured hereby, at any time when and where the same may become due and payable according to the terms thereof, and for sixty days thereafter, or if default shall be made in payment of moneys required to be paid into the sinking fund as herein provided, and such default shall continue for six months, then and in either case all of such bonds both principal and interest shall thereupon at the option of the holder become due and payable, and at the request of the holders of one-tenth ($\frac{1}{10}$) of said bonds then unpaid and outstanding, the said parties of the second part, their successors in said trust or assigns, may enter in and take possession of all and singular the railroad premises and property hereby conveyed or intended to be conveyed, or as the attorneys in fact or agents of said first party by themselves or their agents duly constituted, have, use and employ the same, making from time to time all needful repairs, alterations and additions thereto, and after deducting the expenses of such use, repairs, alterations and additions, apply the proceeds of said premises to the payment pro rata of the principal and interest of all such bonds remaining unpaid; or said parties of the second part, their successors in said trust or assigns at their discretion may, and on the written request of the holders of one-tenth ($\frac{1}{10}$) of said bonds then unpaid, shall cause the said premises, or so much thereof as may be necessary to discharge the principal and interest of all such of said bonds as may be unpaid, together with the expense of sale, to be sold at public auction at the city of St. Louis, in said State of Missouri, after giving sixty days' notice of the time and place and terms of such sale by publishing the same at least once in each week for eight successive weeks next previous to the sale in two of the principal newspapers for the time being, published in each of the cities of New York and Boston, and in one of the principal newspapers for the time being in the cities of St. Louis, in the State of Missouri, and Burlington, in the State of Iowa; and upon such sale to execute to the purchaser or purchasers thereof good and sufficient deed or deeds of conveyance in fee simple for the same, which shall be a bar against the said Burlington and Southwestern Railway Company, and the said Lexington, Lake and Gulf Railroad Company, and the stockholders of the said branch railway, each and all of their successors and assigns, and all persons claiming under them of all right, interest or claims in or to said premises or any part thereof.

And the said trustee shall, after deducting from the proceeds of said sale the costs and expenses thereof and of managing the said property, including their own reasonable compensation and enough to indemnify and save themselves harmless from and against all liabilities arising from this trust, apply so much of the proceeds of said property as may be necessary to the payment pro rata, first of the interest and then of the principal of said bonds remaining unpaid, whether the same may

be then due and payable or otherwise; and shall restore the residue thereof, if there be any, to said party of the first part, its successors or assigns, for its said branch, it being expressly understood and agreed that in no case shall any claim be made or advantage taken of valuation, appraisement, redemption or extention laws by said party of the first part, its successors or assigns, nor any injunction or stay of proceedings be had, or any process be obtained for by it or them to prevent such entry, sale and conveyance as aforesaid; and at any
24 sale of the aforesaid property or any property thereof, whether made under the power herein granted or any judicial authority, the parties of the second part, their successors or assigns, may, by the written request of a majority in interest of the holder' of said bonds, bid for and purchase the property so sold or any part thereof in behalf of the holders of the bonds secured by this instrument, and then outstanding, in proportion to the respective interest of such bondholders.

It is also hereby agreed and understood that it shall be lawful for the said railroad company, party of the first part, in the name and for its said branch as aforesaid, or its assigns, to dispose of the current net revenues of said road and premises hereby conveyed as it or they shall elect until default shall be made in the payment of the principal or interest of said bonds, or some of them, or until default shall be made by said first party, its successors or assigns, in the payment of monies required to be paid into the sinking fund or in the performance or fulfillment of the covenants or some of them herein created to be kept and performed by the said first party, its successors and assigns, in and about said branch line of road as herein set forth.

And the said party of first part, for itself and successors,
25 and for said branch line and said leased premises, hereby covenants and agrees to execute and deliver any further and reasonable and necessary conveyance of said premises, or any part thereof, to the said party of the second part, its successors in said trust and assigns, which counsel may advise, for the more fully conveying said premises and carrying into effect the objects and purposes of these presents, and of making them embrace the property and effects conveyed or intended to be conveyed. At the end of every six months, commencing on the first day of January, in the year one thousand eight hundred and eighty-three (1883), the sum of twenty thousand dollars shall be reserved out of the net earnings of said branch railroad by the said party of the first part, and within sixty days thereafter be paid over to said trustees, their successors in trust, and assigns, as a sinking-fund for the redemption of the bonds secured by these presents; said trustees shall at once deposit the said sum so paid over in some safe and responsible depository in the city of New York, and the said money, with all accumulations of interest thereon, shall be invested by said trustees in the purchase of the bonds secured by these presents, provided the same can be obtained at not above par and accrued interest; and the bonds so purchased shall be deposited with such responsible depos'tory as said trustee may from time to time decide upon, and be immedi-
26 ately registered, stamped, or endorsed as belonging to said sinking-fund, but shall remain in force, and the interest thereon shall continue to be paid by the said party of the first part, acting for and in the name of said branch, its successors or assigns, and the amount of such interest shall be added and applied as a part of the capital of the sinking-fund hereby established, and be invested in the purchase of other bonds in the same manner as the semi-annual payments of twenty thousand dollars hereinbefore provided for and pre-

paratory to such respective purchases of bonds; and said trustee shall give twenty days' notice thereof in one or more of the daily papers published in the city of New York and Boston at least once a week, and shall make the said purchases at the lowest price or prices at which the bonds may be offered pursuant to such notice, but not exceeding ten per cent. premium and accrued interest, and in case the bonds cannot be purchased at such rate within three months after the expiration of the notice aforesaid, then the said money shall be invested in these bonds at a higher rate, or in State or United States securities, at the discretion of said trustee.

It is hereby mutually agreed that upon the payment of the principal and interest of said bonds, the estate hereby granted to the parties of the second part shall be void, and the right to the premises and
27 property hereby conveyed shall revert, to revest in the said party of the first part, its successors and assigns, for its said branch line as aforesaid, without any acknowledgment of satisfaction, reconveyance, re-entry, or other act. The party of the first part further agree at all times to keep an office or agency in the city of New York where the principal and interest of the bonds hereby secured shall be payable as the same shall become due, and will provide for the transfer and registration of said bonds at the said agency, and also for the transfer of the stock of said Linneus Branch at such agency.

It is also hereby mutually agreed that the said parties of the second part, its successors in said trust and assigns, shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the acts of any agent employed by them, when such agent shall have been employed with reasonable discretion, and the said party of the second part and their successors in said trust and assigns shall be entitled to reasonable compensation for their labor and services in the management of said trust.

It is further agreed and understood, that in case of incapacity, resignation, neglect, or refusal to act on the part of said trustees, which in-
28 capacity, neglect or refusal shall be conclusively determined by the unanimous vote of the board of directors of the said first party, all its rights, estate, interest, power and control in the premises shall be divested, cease, and determine; and the said board of directors may, by a like vote, supply the said vacancy, or failing to take proceedings therefor within thirty days, the holders of one ($\frac{1}{10}$) of said bonds may apply to any court in the State of Missouri, having jurisdiction of the premises, to appoint a new trustee or trustees to supply the said vacancy, and such new trustees, appointed in the manner aforesaid, shall became vested, for the purpose aforesaid, with all the rights and interests requisite to enable him or them to execute the purposes of this trust without any further assurance or conveyance of the same. But should it be desirable or necessary, the said parties hereto shall all execute and deliver such releases and conveyances as counsel shall advise.

It is also expressly understood and agreed that said bonds shall have each affixed thereto the proper stamp required by the laws of the United States, and that they shall stand equally secured by this mort-
29 gage, though made, issued, and sold at different times, and that no bonds shall be deemed to be secured by or issued under this mortgage, unless the same is certified by the trustees herein named or their successors in said trust, and that the proceeds of the above-mentioned bonds of said first party shall be applied to the construction, completion, and equipment of the aforesaid Linneus Branch of the Burlington and Southwestern Railway, including the leased premises, in the

manner herein provided, and for no other purpose whatsoever; and the said parties of the second part hereby accept the trust created by these presents.

This mortgage and trust-deed is made and entered on the part of said first party under and pursuant to the laws of the States of Iowa and Missouri, and by virtue of an act of the general assembly of the said State of Missouri, entitled, "An act to aid in the building of branch railroads in the State of Missouri," approved March 21, 1868, as well as under and pursuant to resolutions of the board of directors of said party of the first part, and also of the stockholders of said Linnens Branch of the Burlington and Southwestern Railway, and the authority contained in said lease made by the said Lexington, Lake, and Gulf
30 Railroad Company, and duly made and entered on the minutes of the proceedings of said parties in interest, for the purpose and with the intent to secure the payment of said bonds, as aforesaid.

In witness whereof the Burlington and Southwestern Railway Company has caused its corporate seal to be hereto affixed, and these presents to be attested by the signatures of its president and secretary, and the parties of the second part have hereunto subscribed their names to testify their acceptance of the said trust on the day and year first above written.

THE BURLINGTON AND SOUTHWESTERN RAILWAY CO.,
By

THE FARMERS' LOAN AND TRUST COMPANY,
By

STATE OF NEW YORK,
County of New York:

Be it remembered that on this day of , 1872, before me, a commissioner residing in the city of New York, county of New York, and State of New York, duly commissioned by the gove'nor of the State of Iowa, to take acknowledgments and proofs of deeds, and other instruments in writing under seal, to be used or recorded in said State of Iowa, personally came James Putnam, president of the Burlington and Southwestern Railroad
31 Company, who is personally known to me to be the identical person whose name is signed to the foregoing deed of conveyance, who being by me duly sworn, deposes and says, that he resides in the city of Burlington, in the county of Des Moines, and State of Iowa; that he is president of the Burlington and Southwestern Railway Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing conveyance is the corporate seal of said company; that it was affixed by order of said *said* company, and that he signed his name to said conveyance, by like order, as president of said company and acknowledged that he executed and delivered the said deed as his free and voluntary act for the uses and purposes therein set forth, and that the said company also executed said conveyance as its free and voluntary act for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and affixed seal this day of , 1872.

In pursuance of said order for the issuance of a subpœna in chancery against said defendants, there was issued from the office of the clerk of said court on the said 8th day of August, A. D. 1874, a subpœna in chancery in the words and figures following, to wit:

32 WESTERN DISTRICT OF MISSOURI, *sct:*

The President of the United States to the Burlington and Southwestern Railway Company, John W. Brooks, Alpheus Hardy, James F. Joy, and Eber B. Ward, greeting:

You are hereby commanded to be and appear at rules to be held at the office of the clerk of the circuit court of the United States for the western district of Missouri, on the first Monday of October next, at the city of Jefferson, then and there to answer the bill of complaint of The Farmers' Loan and Trust Company of New York, citizen of the State of New York, filed against you on the 8th day of August, 1874.

Hereof fail not.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, the eighth day of August, 1874. Issued at office in the city of Jefferson, under the seal of said court, the day and year last aforesaid.

[L. S.] (Signed) M. M. PRICE, *Clerk*,
By C. M. WARD, *D. C.*

MEM.—The defendants to enter their appearance in this suit in the clerk's office on or before the day at which the writ is returnable, otherwise the bill may be taken "pro confesso."

(Signed) M. M. PRICE, *Clerk*,
By C. M. WARD, *D. C.*

33 And on said last-mentioned day there was also issued from the said clerk's office in pursuance of said order a subpœna in chancery, in the words and figures following, to wit:

WESTERN DISTRICT OF MISSOURI, *sct:*

The President of the United States to the Burlington and Southwestern Railway Company, John W. Brooks, Alpheus Hardy, James F. Joy, and Eber B. Ward, greeting:

You are hereby commanded to be and appear at rules to be held at the office of the clerk of the circuit court of the United States for the western district of Missouri on the first Monday of October next, at the city of Jefferson, then and there to answer the bill of complaint of The Farmers' Loan and Trust Company of New York, citizen of the State of New York, filed against you on the eighth day of August, 1874.

Hereof fail not.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, the eighth day of August, 1874. Issued at office in the city of Jefferson, under the seal of said court, the day and year last aforesaid.

[SEAL.] (Signed) M. M. PRICE, *Clerk*,
By C. M. WARD, *D. C.*

34 MEM.—The defendants to enter their appearance in this suit in the clerk's office on or before the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

(Signed) M. M. PRICE, *Clerk*,
By C. M. WARD, *D. C.*

And afterwards, to wit, on the 24th day of August, A. D. 1874, said subpœna in chancery first above set forth was returned into the clerk's office and filed with the following return endorsed thereon, to wit:

I hereby certify that I executed the within subpœna in chancery by delivering a copy of the same to W. J. Barickson, agent of the Burlington and Southwestern Railroad Company, at Unionville, western district of Missouri, he being the highest officer of said company to be found in said western district of Missouri.

Done at the county of Putnam, western district of Missouri, on the 20th day of August, 1874. Other parties herein named could not be found in the western district of Missouri.

(Signed) GEO. SMITH,
U. S. Marshal,
By T. K. SMITH,
Deputy.

And afterwards, to wit, on the 26th day of August, A. D. 1874,
35 said subpœna in chancery last set forth was returned into the clerk's office and filed, with the following return and acknowledgments of service endorsed thereon, to wit:

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on the fifteenth day of August, A. D. 1874, I served the within writ on Eber B. Ward, the defendant within named, at Detroit, in said district, by delivering to W. N. Bronson, ag't of said E. B. Ward, at his office, a true copy thereof with like memorandum appended thereto as is hereto appended.

(Signed) JAMES R. BENNETT,
U. S. Marshal.
I. D. K. SULLIVAN,
Deputy Marshal.

I accept service of this summons Aug. 10, 1874.
(Signed) J. F. JOY.

I hereby accept service of this summons Aug. 18th, 1874.
(Signed) J. W. BROOKS.

I hereby accept service of this summons Aug. 19, 1874.
(Signed) ALPHEUS HARDY.

At a regular term of said circuit court of the United States in and for the western district of Missouri, begun and held at Jefferson City, in said district, on Monday, the 20th day of April, A. D. 1874, and on the 7th day of September, in said year, it being an adjourned day of
36 said term, the following, among other proceedings, were had and entered of record, to wit:

THE FARMERS' LOAN AND TRUST CO.
vs.
THE BURLINGTON AND SOUTHWESTERN RAILway Co., John W. Brooks, Alpheus Hardy, James F. Joy, and Eber B. Ward. } 297.

Now come the plaintiffs, by Grant and Smith, solicitors, and show to this court that John W. Brooks, Alpheus Hardy, James F. Joy, and Eber B. Ward are now residents of the State of Missouri, and on their motion it is ordered that said defendants be ordered to appear and plead, answer, or demur to the bill filed in this court by the October rule day,

and that a copy of this order be served on said defendants wherever they be found.

And afterwards, to wit, on the 19th day of September, A. D. 1874, a certified copy of the above order was returned into the clerk's office and filed with the following return endorsed thereon, to wit:

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on the 14th day of September,
37 A. D. 1874, I served the within order on Eber B. Ward, one of the defendants within named, by delivering to him, personally, at Detroit, in said district, a certified copy thereof, and at the same time showing him the seal of the court impressed thereon.

(Signed) JOSEPH R. BENNETT, *U. S. M.*,
By D. D. MARSHALL, *Dep'ty.*

At a regular term of said circuit court of the United States in an' for the western district of Missouri, begun and held at Jefferson City, in said district, on Monday, the 17th day of November, A. D. 1874, and on the 18th day of said month, the following, among other proceedings, were had and entered of record, to wit:

THE FARMERS' LOAN AND TRUST COMPANY *vs.* BURLINGTON AND SOUTHWESTERN RAILWAY et al. } 297.

In this cause, Grant and Smith appearing for the plaintiffs, in their bill filed for that purpose, it is ordered that N. B. Baker be appointed a receiver to take possession of, protect and preserve, and operate if the same can be done, the Linneus Branch of the Burlington and Southwestern Railway Company, and all the machinery, cars, locomo-
38 tives and personal property of every kind which belongs to said branch railroad, and if the said receiver shall find or obtain possession of machinery and cars belonging to said branch sufficient to operate said branch for public use, but before he begins to operate and use the same he shall file a bond to be approved by one of the judges thereof, in the sum of ten thousand dollars; and it is further ordered that the defendants have leave for ten days to apply to set aside or qualify this order, giving notice to the plaintiff's attorney of the intended application.

(Signed) JOHN F. DILLON,
Judge.

Afterwards, to wit, in vacetion of said court and on the 6th day of May, A. D. 1875, the following was entered of record, to wit:

THE FARMERS' LOAN AND TRUST COMPANY *vs.* THE BURLINGTON AND SOUTHWESTERN RAILroad Co. et al. } 297.

The bond of N. B. Baker as receiver of the Linneus Branch of the Burlington and Southwestern Railway Company, this day approved by the honorable Arnold Brekle, one of the judges of this court, at chambers, and ordered to be filed, which is accordingly done. (Said

39 bond having been lawfully withdrawn from the file of this court, is omitted from this transcript.)

Afterwards, to wit, in vacation of said court, and on the 5th day of June, A. D. 1875, the following proceedings were entered of record, to wit:

THE FARMERS' LOAN AND TRUST COMPANY
vs.
BURLINGTON AND SOUTHWESTERN RAILROAD Co. et al. } 297.

This day comes N. B. Baker, the receiver heretofore appointed in this cause, and files herein his report as such receiver, together with thirteen exhibits.

Said report is in words and figures as follows, to wit:

DES MOINES, IOWA, *May 20th*, 1875.

To the honorable the circuit court of the United States for the western district of Missouri:

In the matters of Farmers Loan and Trust Company et al. vs. The Burlington and Southwestern Railway, I have the honor to report as receiver of said railway in Missouri, as follows: I attach hereto a copy of the order of said circuit court marked A. I proceeded first to
40 Brookfield, Missouri, on line of Hanibal and St. Jo R. R. Co. I there found that J. J. A. Quealy and F. J. Quealy, or J. J. A. Quealy and Co., of Hanibal, Mo., under a lease which had been assigned by Hatch and Van Every, of Chillicothe, Livingstone Co., Mo., to said Quealys, had made arrangements with Hanibal and St. J. Railroad for running from Brookfield, in Linn Co., Mo., to Laclede in Linn Co., Mo., where the Linneus Branch of Burlington and Southwestern Railway crosses said Hanibal and St. Jo Railroad; and thence with rolling stock of said last-named railroad, running the trains on to the end of track at a station known as Acornville, in Sullivan County, about 27 miles from Laclede aforesaid. Under the two appointments from U. S. circuit court as aforesaid, one as receiver of the Burlington and Southwestern Railway in Missouri, and one as receiver of the Linneus Branch of the Burlington and Southwestern Railway in Missouri; and they being continuous line it was almost impossible for me to find out satisfactorily to whom some of the property along the line belonged. I therefore make the same report upon both orders for receiver. I deemed it best to allow the Queallys to continue to operate the Linneus Branch from
41 Laclede to Acornville, and made an agreement in writing with them, a copy of which is hereto annexed marked B. I took possession of all the ties I could find between Laclede aforesaid and Unionville, in Putnam County. I found that the Atchison, Topeka and St. Fe Railroad had a few cars at Acornville, 14 cars at Linneus in Linn County, 7 at Laclede, and from 15 to 20 at Brookfield, for the purpose of taking out ties belonging, as it is alleged, to the Linneus Branch aforesaid. It appears that certain parties had under some sort of judgments and sales laid claim to a large portion if not all the ties on said Linneus Branch, and Messrs. W. McCullough, E. Ash and J. Q. Boner, of Sullivan County, had contracted either with said Atchison, Topeka and St. Fe R. R. or with some agent of said railroad, or some tie contractor, to deliver at Acornville, or near there, the ties which are sup-

posed to belong to said Linneus Branch, and I have no doubt from 1,200 to 3,000 of the ties have been removed to Kansas. I found about 4 miles of railroad iron between Linneus and Acornville piled near the road. I took possession of this, but it is claimed either by Joseph Combes and Joel Wilkinson, or by Joel Wilkinson alone, all of Linneus. They
42 pretend to hold the same on some judicial proceedings of some court in Missouri. I found between the same points the timbers (framed) for two bridges with the irons, &c.; I took possession of the whole. I have no doubt some of the timbers and irons are now missing. I do not know who owns the bridge materials. As near as I could estimate there are on the line of railway (Linneus Branch) from 1,000,000 to 120,000 ties. There are some away from the line, in relation to which it is asserted there has been no delivery. It is a question for parties interested to decide whether some of the ties belonging to the railroad should not be sold and the proceeds deposited in some bank to abide in its distribution the result of the waived litigation in relation to this railway. If litigation continues six months or a year longer, in my opinion as many of the ties as are in the vicinity of Acornville and towards Laclede should be sold. The bark is on most of them, and they are fast approaching decay. The ties that went to Kansas were all peeled of the bark before shipping. From Laclede to Acornville it is about 27 miles, with track laid about ½ mile further north. From Acornville to the end of the iron stretching down towards a union, it is about 20 miles. The grading
43 is done on the 20 miles, and the ties distributed on most of the line. Some piles of ties have been burned, as I am informed. From Milan, in Sullivan County, I proceeded, to Unionville, in Putnam County, and took possession of the Burlington and Southwestern Railway in Missouri, and of the Linneus Branch of the Burlington and Southwestern Railway in Missouri. I also took possession of a large number of casks of spikes and bolts, but to which railway they belonged I am unable to state. I presume they belong to the Linneus Branch. There are about 11 miles of the Burlington and Southwestern Railway completed in Missouri, which I understand is now being run by the State receiver, E. McKittrick, with no objection on my part. There are about 11 miles more completed of the Linneus Branch southerly, but no regular trains run on the same. I have thought it best as a matter of policy to allow the running of the B. and S. W. Railway as far as Unionville, and of the Linneus Branch from Laclede up to Acornville. The road and their properties would be better protected and the withdrawal of the trains would produce great dissatisfaction among many people who have contributed to the construction of the road so far.

44 Attached hereto (marked C) is the notice for possession of railways and all property of said railways. Service was made on the Quealleys, heretofore named, William McCullough, E. Ash, J. P. Butler, J. Q. Boner, W. L. Thompson and D. L. Miller, of Sullivan Co., Pierce, Brownlee & Co., Brookfield, Mo., Geo. Van Every, of Chillicothe, Hatch and Van Every, of Chillicothe, Mo. I also made demand of Joseph Combs and Joel Wilkenson, of Linn County, for any moneys and credits in their hands belonging to said Linneus Branch. See copy marked D. I made the same demand of Pierce, Brownlee & Co., bankers at Brookfield, Mo. See copy marked E. Also a similar demand on A. W. Mullins, of Linneus, Mo. See paper marked F. I attach hereto copies marked G and H of my demand for possession of both railways at Unionville. W. J. Earickson is the railroad agent at Unionville, and was the only proper person on whom I could make service there. On the bridge timbers aforesaid, on the piles of ties and on the railroad iron,

and on the casks of spikes and bolts and iron, I tacked or attached a notice of which a copy is hereto attached marked I. I also attach hereto a copy of a letter addressed to L. F. Hatfield, esq., att'y for Farmers' Loan and Trust Co. et al., Milan, in Sullivan Co., Mo., marked J, which will explain itself. I also employed J. W. Smith to watch the ties, &c.; a copy of my instructions to him are annexed marked K. I also attach the first notice I served on W. McCullough, marked L. I think it is covered, however, by my subsequent notice, but as it was a part of my proceedings I have attached the copy thereof. The railways (both B. and S. W. Railway, and the Linneus Branch) are in bad condition and should be repaired, ballasted, and the side ditches should be improved if they continue to be operated.

N. B. BAKER,
Receiver.

(The said exhibit marked A being a copy of the order appointing said receiver heretofore copied on page 37 of this transcript is now omitted.)

The said exhibit marked B is in words and figures following, to wit:

STATE OF MISSOURI:

BROOKFIELD, *May 5th*, 1875.

I hereby agree to lease to J. J. A. Queally and F. J. Queally, of Hanibal, Mo., the Linneus Branch of the Burlington and Southwestern Railway, so long as the said road shall be held by the undersigned as receiver, and I place the said J. J. A. Queally and F. J. Queally in possession of said branch for the purpose of operating the same. In consideration thereof the said J. J. A. Queally and F. J. Queally agree:

1st. To recognize N. B. Baker as receiver and controller of said Linneus Branch according to the orders of the United States circuit court of Missouri.

2nd. The said J. J. A. Queally and F. J. Queally agree to pay to the said N. B. Baker, receiver, 5 per cent. of the gross earnings of said branch road, payments to be made on or before the 10th day of each month for the month proceeding, said monies to be placed to the credit of said receiver at the banking house of Price, Brownlee & Co., Brookfield, Mo.

3rd. The said J. J. A. Queally and F. J. Qually agree to return to said N. B. Baker, receiver, at the end of each month for the month previous and deposit the same with the above named banking-house a correct and full statement of the earnings and expenditures of said operations and running expenses of said branch railroad, with copies of vouchers for same where originals cannot be furnished, but originals, when they can be properly delivered.

4th. The said J. J. A. Queally and F. J. Queally agree to furnish all the rolling stock necessary to carry on the business of said branch railroad.

5th. This agreement may be abrogated at any time by either party.

In witness whereof we have set our hands and seals the date above mentioned.

[SEAL.] J. J. A. QUEALLY.
[SEAL.] F. J. QUEALLY.
[SEAL.] N. B. BAKER,
Receiver of Linneus Branch, under orders of Circuit Court of United States, in and for Missouri.

Said exhibit marked C is in words and figures following, to wit:

STATE OF MISSOURI,
County:

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I demand of you and each of you full possession of the so called Linneus Branch of the Burlington and Southwestern Railway Company, wheresoever any of the same may be located in the State of Missouri, including all completed or uncompleted portions of said branch railroad, together with all its property, road-beds, tracks, bridges, viaducts, culverts, fences, freight-houses, wood-houses, machine or other shops,
48 and all other structures or buildings, material or other property, whereverer placed on said railway, or any part thereof or acquired for the use of the same, wherever situated, and howsoever described on the line of the said railway or otherwise, and of all locomotives, tenders, passenger-cars, freight-cars, cattle or other cars, and all rolling-stock whatever, belonging to said Linneus Branch, or in your possession or control; and also of all machinery, tools, implements, fuel or material now or heretofore owned by said Linneus Branch, which has come into your possession, under any pretended judgments, executions, or leases, and of all appurtenances of said Linneus Branch, and of all rights, property, purchases, privileges, or immunities whatsoever, acquired by you under any lease, pretended lease, or conveyance whatever. I demand the immediate return to the line of the said railway of any and all iron, ties or other property, removed from the right of way, or from any place where any of said property was deposited by said railway. And I forbid each and all of you from attempting to operate any portion of said Linneus Branch Railway without my full consent and agreement, and proper returns to me of all
49 receipts and expenditures as may be agreed upon. And I further forbid you from paying to any lessor, purchaser or pretended purchaser of any portion of said Linneus Branch Railway, any earnings, receipts or balances for transportation of any and all kinds, or any other work or labor done on said Linneus Branch Railway without my full consent and agreement. And I expressly forbid you transporting over said Linneus Branch Railway any ties or timber purchased of said Linneus Branch Railway or the Burlington and Southwestern Railway Company, unless with my consent. All sale of ties or pretended sales of ties belonging to said railway company are believed to be void, and pretended judgments, levies, and sales under execution will avail nothing in these cases. I shall hold you responsible for any unnecessary expenditures on said Linneus Branch Railway, and for all damages done to said railway by neglect in running trains over said branch without proper repair and attention and care.

N. B. BAKER,
Receiver under orders of the U. S. Circuit Court in and for the State of Missouri.

The said exhibit marked D is in words and figures following, to wit:

50 STATE OF MISSOURI,
Linn County:

LINNEUS, *May 6th*, 1875.

Joseph Combs and Joel Wilkinson, or to Combs and Wilkinson, Linneus, Mo.:

I demand of you any checks or drafts, payments or deposits, in way or manner made for the benefit of the Linneus Branch Railway or any

of its lessors or lessees. I demand of you and each of you full possession of the so-called Linneus Branch of the Burlington and Southwestern Railway Company wheresoever any of the same may be located in the State of Missouri, including all completed or uncompleted portions of said branch railroad, together with all its property, road bed, tracks, bridges, viaducts, culverts, fences, freight-houses, wood-houses, machine or other shops, and all other structures or buildings, material or other property, wherever placed on said railway or any part thereof, or acquired for the use of the same wherever situated and howsoever described on the line of said railway or otherwise, and of all locomotives, tenders, passenger cars, freight cars, cattle or other cars, and all other rolling stock whatever belonging to said Linneus Branch or in your possession or control, and also of all machinery, tools, implements, fuel or material now or heretofore owned by said Linneus Branch
51 which has come into your possession under any pretended judgments, executions or leases, and of all appurtenances of said Linneus Branch, and of all rights, property, franchises, privileges, or immunities whatsoever acquired by you under any lease, pretended lease, or conveyance whatever. I demand the immediate return to the line of said railway of any and all iron, ties or other property removed from the right of way or from any place where any of said property was deposited by said railway. And I forbid each and all of you from attempting to operate any portion of said Linneus Branch Railway without my full consent and agreement, and proper returns to me of all receipts and expenditures as may be agreed upon. And I further forbid you from paying to any lessor, purchaser or pretended purchaser of any portion of said Linneus Branch Railway any earnings, receipts or balances for transportation of any and all kinds, or any other work and labor done on said Linneus Branch Railway, without my full consent and agreement. And I expressly forbid you transporting over said Linneus Branch Railway any ties or timber purchased of said Linneus Branch Railway, or the Burlington and Southwestern Railway
52 Company unless with my consent. All sales of ties or pretended sales of ties belonging to said railway company are believed to be void, and pretended judgments, levies, and sales under execution will avail nothing in these cases. I shall hold you responsible for any unnecessary expenditures on said Linneus Branch Railway and for all damages done to said railway by neglect in running trains over said branch without proper repair and attention and care.

N. B. BAKER,
Receiver under orders of the U. S. Circuit Court in and for the State of Missouri.

The said exhibit marked E is in words and figures following, to wit

STATE OF MISSOURI,
Linn County:

BROOKFIELD, *May 5th*, 1875.

Price, Brownley and Co., bankers, Brookfield, Mo.:

I demand of you any drafts, checks, payments or deposits in any way or manner for the benefit of the Linneus Branch Railway or any of its lessors or lessees. I demand of you and each of you full possession of the so-called Linneus Branch of the Burlington and Southwestern Railway Company, wheresoever the same may be located in the State of Missouri, including all completed or uncompleted por-

53 tions of said branch railroad, together with all its property, road bed, tracks, bridges, viaducts, culverts, fences, freight-houses, wood-houses, machine or other shops, and all structures or buildings, material or other property wherever placed on said railway, or any part thereof, or acquired for the use of the same wherever situated and however described on the line of said railway or otherwise, and of all locomotives, tenders, passenger cars, freight cars, cattle or other cars, and all other rolling stock whatever belonging to said Linneus Branch or in your possession or control; and also of all machinery, tools, implements, fuel or material now or heretofore owned by said Linneus Branch which has come into your possession under any pretended judgments, executions or lease, and of all appurtenances of said Linneus Branch, and of all rights, property, purchases, privileges or immunities whatsoever acquired by you, under any lease pretended or conveyance whatsoever. I demand the immediate return to the line of said railway of any and all iron, ties or other property removed from the right of way or from any place where any of said property was deposited by said railway. And I forbid each and all of you from attempting to operate any portion of said Linneus Branch Railway,
54 without my full consent and agreement and proper returns to me of all receipts and expenditures as may be agreed upon. And I further forbid you from paying to any lessor, purchaser or pretended purchaser of any portion of said Linneus Branch Railway any earnings, receipts, or balances for transportation of any and all kinds or any other work and labor done on said Linneus Branch Railway, without my full consent and agreement. I forbid the payment of any checks or money in your hands for any such purpose. And I expressly forbid you transporting over said Linneus Branch Railway any ties or timber purchased of said Linneus Branch Railway or the Burlington and Southwestern Railway Company unless with my consent. All sales of ties or pretended sales of ties belonging to said railway company are believed to be void, and pretended judgments levied and sales under execution will avail nothing in these cases. I shall hold you responsible for any unnecessary expenditures on said Linneus Branch Railway, and for all damages done to said railway by neglect in running trains over said branch
55 without proper repair and attention and care.

N. B. BAKER,
Receiver under orders of the U. S. Circuit Court in and for the State of Missouri.

And said exhibit marked F is in words and figures following, to wit:

STATE OF MISSOURI,
Linn County:

MAY 6*th*, 1875.

To A. W. Mullins, att'y, trustee, &', Linneus, Mo., and all men acting under you:

I demand of you any drafts, checks, payments, or deposits in any way or manner made for the benefit of the Linneus Branch Railway, or any of its lessors or lessees. I demand of you and each of you, full possession of the so-called Linneus Branch of the Burlington and Southwestern Railway Company, wheresoever any of the same may be located in the State of Missouri, including all completed or uncompleted portions of said branch railroad, together with all its property, road-bed, tracks,

bridges, viaducts, culverts, fences, freight-houses, wood-houses, machine or other shops, and all other structures or buildings, material or other property, wherever placed on said railway, or any part thereof,
56 or acquired for the use of the same, wherever situtated and howsoever described on the line of said railway or otherwise; and of all locomotives, tenders, passenger cars, freight cars, cattle or other cars, and all other rolling-stock whatever, belonging to said Linneus Branch or in your possession or control; and also of all machinery, tools, implements, fuel, or material now or heretofore owned by said Linneus Branch, which has come into your possession, under any pretended judgments, executions, or leases, and of all appurtenances of said Linneus Branch; and of all rights, property, purchases, privileges, or immunities whatsoever, acquired by you under any lease, pretended lease, or conveyance whatever. I demand the immediate return to the line of said railway of any and all iron, ties, or other property removed from the right of way, or from any place where any of said property was deposited by said railway. And I forbid each and all of you from attempting to operate any portion of said Linneus Branch Railway without my full consent and agreement, and proper returns to me of all receipts and expenditures as may be agreed upon. And I further
57 forbid you from paying to any lessor, purchaser, or pretended purchaser of any portion of said Linneus Branch Railway, any earnings, receipts, or balances for transportation of any and all kinds, or any other work or labor done on said Linneus Branch Railway, without my full consent and agreement. I forbid the payment to any person of any monies, checks, or any drafts which you have received for J. J. A. Queally and F. J. Queally, money, and I demand immediate payment of same to me. And I expressly forbid you transporting over said Linneus Branch Railway any ties or timbers purchased of said Linneus Branch Railway, or the Burlington and Southwestern Railway Company, unless with my consent. All sales of ties or pretended sales of ties belonging to said railway company are believed to be void, and pretended judgments, levies, and sales under execution, will avail nothing in these cases. I shall hold you responsible for any unnecessary expenditures on said Linneus Branch Railway, and for all damages done to said railway by neglect in running trains over said branch without proper repair and attention and care.

N. B. BAKER,
Receiver under orders of the U. S. Circuit Court in and for the State of Missouri.

58 The said exhibit marked G is in words and figures following, to wit:

STATE OF MISSOURI,
Putnam County:

MAY 7*th*, 1875.

To Wm. J. Erickson, of Unionville, in said county:

I demand of you and each of you full possession of the so-called Linneus Branch of the Burlington and Southwestern Railway Company, wheresoever any of the same may be located in the State of Missouri, including all completed and uncompleted portions of said branch railroad, together with all its property, road-bed, tracks, bridges, viaducts, culverts, fences, freight-houses, wood-houses, machine or other shops, and all other structures or buildings, material or other property, wherever

placed on said railway, or any part thereof, or acquired for the use of the same, wherever situated, and howsoever described on the line of said railway or otherwise, and of all locomotives, tenders, engines, passenger cars, freight cars, cattle or other cars, and all other rolling-stock whatever, belonging to said Linneus Branch, or in your possession or control; and also of all machinery, tools, implements, fuel, or material now or heretofore owned by said Linneus Branch, which has come into your
59 possession, under any pretended judgments, executions, or lease, and of all appurtenances of said Linneus Branch, and of all rights, property, purchases, privileges, or immunities whatsoever, acquired by you under any lease, pretended lease, or conveyance whatever. I demand the immediate return to the line of said railway of any and all iron, ties, or other property removed from the right of way, or from any place where any of said property was deposited by said railway. And I forbid each and all of you from attempting to operate any portion of said Linneus Branch Railway without my full consent and agreement, and proper return to me of all receipts and expenditures as may be agreed upon. And I further forbid you from paying to any lessor, purchaser, or pretended purchaser of any portion of said Linneus Branch Railway, any earnings, receipts, or balances for transportation of any and all kinds, or any other work or labor done on said Linneus Branch Railway, without my full consent and agreement. And I expressly forbid you transporting over said Linneus Branch Railway any ties or timbers purchased of said Linneus Branch Railway, or the Burling-
60 ton or Southwestern Railway Company, unless with my consent. All sales of ties or pretended sales of ties belonging to said railway company are believed to be void, and pretended judgments, levies, and sales under executions will avail nothing in these cases; I shall hold you responsible for any unnecessary expenditures on said Linneus Branch Railway, and for all damages done to said railway by neglect in running trains over said branch without proper repair and attention and care.

N. B. BAKER,
Receiver, under orders of the U. S. Circuit Court in and for the State of Missouri.

And the said exhibit marked H is in words and figures following, to wit:

STATE OF MISSOURI,
Putnam County:

MAY 7*th*, 1875.

To Wm. J. Earickson, of Unionville, Missouri:

I demand of you and each of you full possession of the so-called Linneus Branch of the Burlington and Southwestern Railway, wheresoever any of the same may be located in the State of Missouri, including all completed or uncompleted portions of said branch railroad, together with all its property, road-bed, tracks, bridges, viaducts, culverts,
61 fences, freight houses, wood houses, machine or other shops, and all other structures or buildings, material or other property, wherever placed on said railway, or on any part thereof, or acquired for the use of the same wherever situated and howsoever described, on the line of said railway or otherwise, and of all locomotives, tenders, passenger cars, freight cars, cattle or other cars, and all other rolling stock whatever belonging to said railway or in your possession or control, and

also of all machinery, tools, implements, fuel or material now or heretofore owned by said railway which has come into your possession, under any pretended judgments, executions, or leases, and of all appurtenances of said railway and of all rights, property, purchases, privileges or immunities whatsoever acquired by you under any lease, pretended lease, or conveyance whatever. I demand the immediate return to the line of said railway of any and all iron, ties or other property removed from the right of way or from any place where any of said property was deposited by said railway. And I forbid each and all of you from attempting to operate any portion of said Linneus Branch Railway without my full consent and agreement and proper return to me of all receipts
62 and expenditures as may be agreed upon. And I further forbid you from paying to any lessor, purchaser, or pretended purchaser of any portion of said railway, any earnings, receipts, or balances for transportation of any and all kinds or any other work or labor done on said railway without my full consent and agreement. And I expressly forbid you transporting over said railway any ties or timber purchased of said railway unless with my consent. All sales of ties, or pretended sales of ties, belonging to said railway company are believed to be void, and pretended judgments, levies and sales under execution will avail nothing in these cases. I shall hold you responsible for any unnecessary expenditures on said railway, and for all damages done to said railway by neglect in running trains over said branch without proper repair and attention and care.

N. B. BAKER,
Receiver under orders of the U. S. Circuit Court in and for the State of Missouri.

The said exhibit, marked I, is in words and figures, following to wit:

Notice.

I forbid any person from interfering, meddling, moving, or selling or in any way disposing of this property. And I notify all parties not
63 to meddle or interfere with this notice, or to tear down or deface the same under the pains and penalties of the laws of Missouri.

N. B. BAKER,
Receiver of the Linneus Branch of the Burlington & Southwestern Railway, and of said Burlington and Southwestern Railway under order of the U. S. Circuit Court in and for the State of Missouri.

The said exhibit, marked J, is in words and figures following, to wit:

BURLINGTON, IOWA, *May 10th*, 1875.

L. T. HATFIELD, Esq.,
Attorney &c., Milan, Sullivan County, Missouri:

SIR: I furnish you with a copy of agreement with J. J. A. Queally and F. J. Queally for running the Linneus Branch Railroad from Laclede to the end of said branch of the Burlington and Southwestern Railway in Missouri. I authorize you to require a bond, with good and sufficient sureties in amount of fifteen thousand dollars, to compel said Queallys to keep said railway in good and proper repair, provided there is any neglect in these matters. And in said bond I require another provision secured in same amount none that of the old ties or any
64 material of said Linneus Branch shall be transported over the

line of said railroad without my consent. And upon any attempt of any person to remove any of the old ties or materials as aforesaid of the said B. & S. W. Railway or the Linneus Branch of the Burlington and Southwestern Railway Co., you are hereby authorized to institute such proceedings as the law requires for the protection of the property named, and all other property between Unionville and Laclede, in the State of Missouri and belonging to said Burlington and Southwestern Railway Company or the Linneus Branch of said Burlington and Southwestern Railway Company. If in your opinion the Queallys are carrying out their agreement in good faith, you will notify me. I shall depend on your judgment to see that all the property is protected.

Truly yours,

N. B. BAKER,

Rec'r of Burlington and Southwestern Railway & Linneus Branch B. & S. W. R'y Co. in Missouri, under orders of U. S. Circuit Court for Missouri, &c.

The said exhibit, marked K, is in words and figures following, to wit:

DES MOISNES, *May 12th*, 1875.

JOHN W. SMITH, Esq.,
Burlington, Iowa:

65 SIR: You will proceed to Unionville and thence to Milan, and there consult with T. J. Hatfield, esq., att'y at law, who knows about many matters of the Burlington and Southwestern Railway Co. I wish you particularly to see that no ties are taken from the Linneus Branch of the Burlington and Southwestern Railway line. You will proceed from Milan to Laclede along the line, and can post yourself at Laclede or Brookfield, but go up every day from Brookfield, if you remain there (as your post), and see that no ties are being prepared for shipment, and that no cars are put in there for shipping old ties. Let the shipment of new green ties for Hannibal & St. Jo. R. R. continue, but look out for all shipments between Laclede and Acornville of old ties. Take care of all property, iron, bridge timbers, &c., of said Linneus Branch of said Burlington & Southwestern Railroad wherever found on the line.

Truly yours,

N. B. BAKER,

Receiver of the Burlington and Southwestern Railway in Missouri and of the Linneus Branch of the Burlington and Southwestern Railway in Missouri, under orders of U. S. Circuit Court of Missouri.

66 The said exhibit, marked L, is in words and figures following, to wit:

STATE OF MISSOURI,
Sullivan County:

MAY *5th*, 1877.

To Warren McCullough, near Acornville, in said county:

You are hereby notified not to molest, interfere with, sell, dispose of, move, or in any way to meddle with the ties of Linneus Branch Railway or Burlington and Southwestern Railway at Acornville, or at any point on line of said railway or railways in the State of Missouri, or at any

point whatever in said State. This includes all ties bought by you under any pretended judgments, executions, or sales in this State.

N. B. BAKER,
Receiver of Linneus Branch Railway, so called, & of all Burlington and Southwestern Railway in Missouri by orders of the U. S. Circuit Court held in Missouri.

And afterwards, to wit, in vacation of said court, and on the 19th day of October, A. D. 1875, the following proceeding was entered of record in said cause, to wit:

67 THE FARMERS' LOAN AND TRUST CO. *vs.* BURLINGTON AND SOUTHWESTERN R'Y CO. et al. } 297.

This day comes N. B. Baker, receiver, &c., and files herein his resignation as receiver of the Burlington and Southwestern Railway Company, in the above cause, and also comes the complainants, by their solicitors, Grant & Smith, and file herein their petition asking the appointment of some other person in the place of N. B. Baker, resigned, and further, that said receiver be authorized to issue receiver's certificates or debentures not to exceed two hundred thousand dollars in amount, and to bear interest at eight per cent.

The said resignation of N. B. Baker, as receiver, etc., is in words and figures following, to wit:

DES MOINES, IOWA, *Aug. 4th*, 1875.

To the honorable the circuit court of the United States in and for the western dist. of Mo.:

I hereby resign all appointments given to me by your honorable court as receiver of the Burlington and Southwestern Railway and the Linneus Branch of the said B. & S. W. Railway in Mo.

With great respect, I have the honor to be, truly, yours,

N. B. BAKER,
A Receiver, &c., as appointed by said Court.

68 And on the same day the following other proceedings were had and entered of record, to wit:

THE FARMERS' LOAN AND TRUST CO. *vs.* THE BURLINGTON & SOUTHWESTERN RAILway Co. } 297.

Now come the plaintiffs, by their attorneys, Grant & Smith, and the defendants, the Burlington and Southwestern Railway Company, Orrin W. Potter, George H. Wymon, T. C. Owen, and Samuel R. Mumford, executors of the estate of Eber B. Ward, deceased, J. W. Bomes, J. N. Martin, S. and J. C. Atlee, and John O. Smythe, by Owen Smythe, Hall, Blake, and Hedge, their attorneys, and by consent of said parties, the following decree is made in vacation as of the last term, and in term time:

Gen. N. B. Baker, a receiver appointed by the Federal court, having

resigned by the consent and approval of the parties plaintiffs and defendants, Elijah Smith is appointed receiver of all the property of the Burlington and Southwestern Railway Company, which is situated within the western district of Missouri, and of all real and personal property, books, papers, vouchers, moneys, and accounts of said corporation, and said Elijah Smith presents his bond as such receiver, which is approved by the judge signing this order, and said receiver Baker, and all persons having possession or control of any of the property of said corporation in Missouri or elsewhere, under the control of this court, are required to deliver the same to said Elijah Smith. It is ordered and adjudged that Elijah Smith, the aforesaid receiver, is authorized and empowered to borrow any sum of money not exceeding two hundred thousand dollars, to be a preferred lien on all the property of said railway in Missouri, over all other creditors by judgment or mortgage lien, which sum of money, or so much of it as may be required to be expended by said receiver under the direction of this court, or a master to be appointed by one of said judges, in building, completing, and equipping the unfinished portion of said railway between Unionville and Laclede, or Stanly City, in Missouri. And said receiver is authorized to issue receiver's certificates of indebtedness, or bonds, with interest payable semi-annually, and running for a time not exceeding ten years, which said receiver's certificates or bonds may hereafter, by consent of the holders thereof, be exchanged for bonds or other securities of any corporation which may become the purchaser of said railway property *or* any sale thereof which may hereafter take place by order of this court. And the said receiver shall, within forty days from his appointment, prepare and file in this court a complete inventory of all the real and personal property of said railway corporation, and of all the debts and obligations of said corporation in the order of liens or preferences. And said receiver is required to protect, preserve, and use and operate said railway property for the benefit of the owners thereof, and for public use. And it is ordered that he make to this court on the 15th day of each month, or as soon thereafter as the accounts can be prepared, an account current of the receipts and operating expenses of said road, and file the said account with the clerk thereof. And he is also directed to make monthly reports of the expenditures in building, completing, and equipping the said unfinished part of the road, and to keep the monies borrowed by virtue hereof separate from money received from other sources.

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71 And the said receiver is hereby authorized to pay all due and unpaid taxes now existing against said railway company, and to prosecute and defend all suits in law or in equity, in which the interests of the property or parties are involved.

The certificates of indebtedness hereby authorized to be created are the certificates authorized to be issued by the circuit court of the United States for the district of Iowa, and there only to be two hundred thousand dollars issued by the joint authority of both courts, and all of them are to be countersigned by the clerk of the circuit court of the United States for the district of Iowa, who is required to keep a registry of the same. And the court also reserves to itself the right to adjust the equities of the application of the prior lien of two hundred thousand dollars hereby created between the main line and the branch of said railway should any difficulties hereafter arise, without, however, diminishing the security of the certificates hereby created. And the rights of Wells, French & Co., claiming a mechanic's lien in the State of Missouri,

are reserved and not to be effected by the lien herein created by reason of said certificates.

(Signed) JOHN F. DILLON,
Judge.

72 And afterwards, on the same day, the following other proceedings were entered of record, to wit:

THE FARMERS' LOAN & TRUST CO.
vs.
THE BURLINGTON AND SOUTHWESTERN RAILway Co. et al. } 297.

This day come' Elijah Smith, the receiver appointed herein, and files in the clerk's office the oath required to be taken by him as such receiver, also his bond as such receiver *also his bond as such receiver* of the Burlington and Southwestern Railway Company and the Linneus Branch thereof; said bond having been presented to the honorable John F. Dillon, judge of the circuit court of the United States for the 8th circuit, and by him approved and ordered filed.

The said bond of Elijah Smith, receiver of the Burlington and Southwestern Railway and the Linneus Branch thereof, is in words and figures following, to wit:

73 Know all men by these presents that we, Elijah Smith, principal, and Jas. F. Joy, D. L. Quirk, Wm. H. Crapo, E. D. Maudell, Wm. J. Rotch, E. C. Jones, J. Bourne, jr., O. Prescott, H. Sayler, J. R. Brewer, sureties, are held and firmly bound to the clerk of the circuit court of the United States for the western district of Missouri, and his successors in office, for whomsoever it may concern, in the penal sum of fifty thousand dollars, to which payment we bind ourselves and each of us. Given under our hands this first day of October, 1875.

The condition of this obligation is this: Whereas said Elijah Smith is about to be appointed by said circuit court receiver of so much of the main line of the Burlington and Southwestern Railway Company and the Linneus Branch of the same as is situated in the State of Missouri and included in two suits now pending in said circuit court, wherein John W. Brooks and Alpheus Hardy are plaintiffs in one suit and The Farmers' Loan and Trust Company are plaintiffs in the other suit, and the said Burlington and Southwestern R'y Company and others are defendants: Now, if the said Elijah Smith, when so appointed, shall discharge all the duties required of him as such receiver, shall duly account for and pay over all monies received by him as such receiver, and
74 do and perform every other act in each of said cases as he may be required to do by the court or any judge thereof, then this obligation is to be void, otherwise to remain in full force and effect.

ELIJAH SMITH.	[SEAL.]
JAMES F. JOY.	[SEAL.]
D. L. QUIRK.	[SEAL.]
WM. W. CRAPO.	[SEAL.]
EDWARD D. MAUDELL.	[SEAL.]
WM. J. ROTCH.	[SEAL.]
EDWARD C. JONES.	[SEAL.]
JNO. BOURNE, JR.	[SEAL.]
OLIVER PRESCOTT.	[SEAL.]
HENRY SAYLER.	[SEAL.]
JOHN R. BREWER.	[SEAL.]

This bond approved.
(Signed) JOHN F. DILLON, *Judge.*

And afterwards, to wit, in vacation of said court, and on the 25th day of September, A. D. 1876, the following proceedings were entered of record in said cause, to wit:

FARMERS' LOAN AND TRUST COMPANY
vs.
BURLINGTON & SOUTHWESTERN RAILWAY Co. et al. } 297.

This day there is received by mail from Elijah Smith, receiver, and filed herein, the following papers, to wit:

1. Inventory of the property and effects of said railway.
2. Proposition of said receiver to the Sullivan court in relation to the issue of bonds; and
3. The order of said court upon the said proposition.

75 The said inventory is in words and figures following, to wit:

Inventory of property, material, tools, &c., &c., of Burlington & South western R'y Co., October 16th, 1875.

Main line.

78 miles of track in Iowa.
12 " " " " Missouri.
1 station and grounds, Franklin.
1 " " Farmington.
1 " " Milton.
1 " " Bloomfield.
1 " " Unionville.
Grounds at Donaldson.
" " Warren.
" " Mt. Sterling.
" " Pulaski.
" " Contril.
1 turn-table at Farmington.
1 " " " Unionville.
1 water-tank, Farmington.
2 " " Milton.
1 " " Chariton River.
1 " " Unionville.

Rolling stock.

5 locomotives.
3 1st class passenger cars.
2 mail & express "
2 2nd class smoking "
76 53 flat-cars.
24 grain "
25 stock "
17 hand "
11 ditching "
3 iron cars "for track laying.

Material.

90 bars iron, 30 f't long, 50 lbs. per yard, "along line."
828 " " " " " at Ft. Madison.
26 kegs bolts, at Unionville.
476 " spikes "
640 splice bars "

Stationary at hands at gen'l office, val	$734	83
" "	215	45
Supplies, Farmington storehouse	1,277	86

Tools in blacksmith-shop, Farmington.

1 bellows.
1 anvil.
3 sledges.
16 " vise.
18 p'r tongs.
7 heading tools.
1 cast-iron block.
12 p'r swedges.
3 screw-plates.
10 wrenches for taps.
1 monkey wrench.
1 hand drill.
77 1 rocket.
12 chisels & punches.
10 files.
1 side lamp.

Tools in carpenter-shop, Farmington.

2 lining bars.
1 cross-cut saw.
1 set small blocks.
1 " large "
1 boreing machine.
2 small jacks.
3 large "
2 setts 2 " falls.
50 wrenches.
1 hand-car.
8 pair old wheels.
8 " " axles.
4 " new wheels.
4 trucks complete.
4,000 old scrap.

Furniture gen'l office, Burlington.

1 stationary desk & counter.
6 desks.
1 sett drawers & pigeon-holes.
4 tables.
1 sett drawers.
2 office stools.
1 bookcase.

78 3 letter presses.
1 pair shears.
17 chairs.
1 pair letter scales.
2 stoves & pipes.

Tools and materials in hands of section men.

13 axes.
4 " helves.
16 " adzes.
5 " handles.
22 crowbars.
18 clawbars.
30 cold chisels.
6 dippers.
90 fish-plates.
274 bolts.
2 hand trucks.
12 lanterns.
19 oil cans.
27 picks.
10 " handles.
15 padlocks.
26 switch locks.
13 switch keys.
77 shovels.
33 spike mauls.
7 scythes.
7 " snaths.
79 4 straightening machines.
16 tool boxes.
1 tamping pick.
5 track jacks.
1 " lever.
19 track guage'.
8 " levels.
20 " flags.
1 tape line.
27 wrenches.
2 water kegs.
11 " pails.

Linneus Branch.

33 miles track in Missouri.
22 " graded, not tied or ironed.
90,000 cross-ties.
6 kegs spike.
40 bbls. splices or 240 pairs.
768 bars iron, 30 ft., 50 lbs. per yard.
2 iron cars.
1 rubble.
1 locomotive "worn out."

There is about 5 to 7,000 ties washed out by high water and scattered along Locust Creek, a portion of which may be recovered, not included in the 90,000 above.

80 And afterwards, to wit, on the said 22nd day of November, A. D. 1877, the following other proceedings were entered of record in said cause, to wit:

FARMERS' LOAN & TRUST COMPANY
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY Co. et al. } 297.

In the matter of—

ELIJAH SMITH, RECEIVER,
vs.
WARREN MCCULLOUGH, TRUSTEE; J. Q. Boner, Joseph M. Stanley, Joel H. Wilkinson, Marion Cave, B. F. Northcutt, G. D. Burgess, William Smith, James T. Reynolds, E. W. Van Wye, John T. Heath, Joseph W. Mairs, John H. Casperson, Edmund Ashe, Joseph Combs, H. C. Prewitt, John L. Reynolds, A. W. Mullins, Ira Sears, John Holland, Lucinda Head, E. E. Frazier, Jonah D. Leaman, John Mairs, and John Bradley.

On this day came the parties in this proceeding by counsel, and the cause is submitted to the court upon the pleadings and evidence
81 on file and arguments of counsel, with leave to counsel of all the parties to file written or printed briefs within forty days from this date in the clerk's office, and with counsel of record for the parties respectively. And it is now ordered by the court that said Warren McCullough, trustee, and the several respondents herein mentioned, be restrained from in any manner interfereing with or disposing of the 40 bonds of $1,000 each of Sullivan County, mentioned in and referred to in the pleadings, or any part thereof, until further orders of this court.

JOHN F. DILLON, *Judge.*

And afterwards, to wit, in vacation of said court, on the 19th day of May, A. D. 1876, the following proceedings were entered of record in said cause, to wit:

FARMERS' LOAN & TRUST CO.
vs.
BURLINGTON & SOUTHWESTERN RAILWAY Co. et al. } 297.

This day the following decree in the above cause is received by mail and filed, to wit:

Decree of foreclosure.

In the circuit court of the United States for the western district of Missouri, at Jefferson City. April term, 1876. In equity.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
82 THE BURLINGTON & SOUTHWESTERN Railway Company, Eber B. Ward's executors, Wells, French & Co., J. W. Barnes, J. H. Martin, Joseph Combs, John H. Wilkerson, Marion Carnes, H. C. Prewitt, Casperson P. Combs, Casperson & Son, W. W. Davis, Warren McCullough, McCullough & Beebe, H. L. Thompson, John Q. Boner, Edmund Ash, Joseph Stanley, J. Bupper, E. Burkmon, Thomas Lanblad, Lewis Elley, S. A. Quailley, S. J. Boone, John S. Reynolds, B. F. Northcutt, E. D. Edwards, G. D. Bupp, John T. Heath, and others.

This cause came on now to be heard, after bill and amendments, cross-bills and amendments thereto, replications, exhibits, and report of the special master appointed at the last term of this court. Grant for the plaintiffs; Hatfield, for the B. & S. W. R'y Co., appears, withdraws answers and cross-bill, and confess allegations of bill. Smythe for Ward's executors, and withdraw answer and cross-bill, and consent to decree. Muller, Butler, Lay, Belch appear for Combs, Wilkerson, and others, claiming liens or judgments in Missouri. Hall & Baldwin appear for Wells, French & Co., and Barnes and Martin.

And thereupon the court having duly considered the master's
83 report confirms and approves the same as to the facts found by him, and upon the law arising upon said facts, finds that Warren McCullough has a mechanic's lien under the act of 21st March, 1873, for 4,912 ties furnished to said railroad company, at the price of 35 cents each, making the sum of 1,719.$\frac{20}{100}$ dollars; that Casperson and Combs have a like lien for 2,196 ties furnished to said company after the passage of said act, at 35 cents per tie, making $769.60; that H. L. Thompson and McCullough & Beebe have a like lien on 3,814 bridge ties furnished to said railroad co. at the price of 50 cents each, making the sum of $1,907.00; that on said ties McCullough & Beebe have a lien of 13 cents a tie for sawing the same, making the sum of $495, part of said $1,907, and it appearing from the answer of McCullough & Beebe that a portion of said sum of $495.00 has been paid, and that the balance thereon was due to them on the 8th of Oct., 1874, the sum of $356.76, and which sum is to be deducted out of said $1,907, or a pro rata share thereof; that said liens of Warren McCullough, H. L. Thompson, and McCullough & Beebe are a prefer'ed lien on said ties furnished by them to the lien of the plaintiffs, under their mortgage, and a
84 second lien subsequent to said mortgage on the other property included in the same, and upon the sale which is to be made of said mortgage property as hereinafter set out, the master will sell said 4,912 ties separate from the other property, and apply the proceeds of such sale in payment of said lien of Warren McCullough, and said master will sell said 2,196 ties in like manner, and apply the payment to said Casperson and Combs, and that he will sell said 3,812 bridge

ties separate from the rest of said property, and apply the proceeds of said sale to the payment of the lien thereon in favor of McCullough & Beebe and H. L. Thompson, in the proportion above set forth.

And it is further ordered and decreed that all the sales under said judgments or attachments of Cowles, Wilkerson, Cove, Prewitt, Boner, McCullough & Beebe, H. L. Thompson, Casperson & Cowles, Casperson and Son, John Q. Boner, W. W. Davis, and others of said ties, or any other property of said Burlington and Southwestern R'y Co., be set aside and annulled, and that said judgments in the State court shall stand as record liens to said mortgage, giving to said holders thereof a right to redeem said mortgage; and their cross bills except those of Warren McCullough, McCullough & Beebe, and H. L. Thompson are dis-
85 missed at their costs; and as to the costs of Warren McCullough, McCullough & Beebe, & H. L. Thompson, the same are to be paid by the Burlington and Southwestern Railway Co., or deducted, if not paid by them, out of the proceeds *out of the proceeds* of the sale of said ties.

And it is ordered that all the purchases under the sales of said judgments set out in the defendant's answers be set aside and annulled, and all the property not yet delivered to the receiver be delivered to him by the purchasers under said sales. And the court further finds, as matter of law, that the said D. L. Wells, H. L. Norton, E. C. French, and F. E. Walker, composing the firm of Wells, French and Co., and James N. Martin and J. W. Barnes are not entitled under the laws and statutes of the State of Missouri to mechanic's liens upon the property of the said railway co., situate and extending into said State as claimed by them for labor performed and material furnished by them respectively, under their respective contracts, as alleged and set forth in the construction of said railroad, and that the equity in said cause is with the complainants upon the issues of the original bill and the cross bill.

86 It is therefore ordered, adjudged, and decreed by the court here that the cross-bill of the said Wells, French & Co. and of said J. N. Martin and J. W. Barnes do stand dismissed out of this court with the costs made and accruing upon the issues of their answer and cross bills, respectively, taxed against them respectively. But it is ordered, adjudged and decreed that this decree is without prejudice to the said Wells, French & Co., and said Martin and J. W. Barnes, or either of them, to proceed in any court or courts of law or in equity to enforce their several contracts and recover thereon any sum or sums due them, and to establish mechanics' liens therefor upon any part or portion of the property of the said r'y co. situate or lying within the State of Iowa; and said decree shall be without prejudice to any right or claim of priority of such mechanics' liens claimed or asserted by said parties or either of them over the mortgage of the said complainants herein, upon the property of the said railway in Iowa. But said parties or either of them shall be at liberty to proceed in any cause now pending or hereafter brought in any court in the State of Iowa to recover the amounts due there
87 and to establish mechanics' liens for labor performed and material furnished in the construction of said railroad upon the property of said railway in the State of Iowa, and to recover and obtain such other and further relief in that respect against the complainants, the defendants, or either of them, as may be decreed necessary and proper as if this decree had not been ordered, signed, and enrolled. And the court finds that there is due the plaintiffs as trustees under said mortgage of the Linneus branch of the Burlington and Southwestern Railway Com-

pany executed on the 1st April, 1872, the principal sum of one million six hundred thousand dollars ($1,600,000), which is evidenced by 1,600 bonds of $1,000 each payable to bearer, and there is due for interest on said bonds at the rate of seven per cent. from the said first day of April, 1872, to the 20th day of May, 1876, making the sum of $454,222.00 for interest, and a total of principal and interest of $2,054,222.00, which sum bears interest at 7 per cent. per annum from the 20th of April, 1876, and the above sum with interest & costs taxed at it is ordered and decreed that the defendant, the Burlington & Southwestern
88 r'y co., pay to the plaintiffs within ten days from the 20th day of May, 1876, and in default thereof any of the other defendants creditors by judgment or mechanics' lien claims allowed by this court are permitted to redeem said mortgage in the order of priority of their liens by the payment of said sums in ten days thereafter, and upon such payment it is ordered that said plaintiffs convey by proper deed all the right, title, and interest which the plaintiffs acquired to said mortgaged property by virtue of their mortgage to the party redeeming said debt. And upon default of said payment and failure to redeem said premises it is ordered and decreed that the equity of redemption of all said defendants to the said mortgaged estate be forever barred and foreclosed, which mortgaged estate is described as follows: All the real and personal property of said Burlington and Southwestern Railway Co. in said Linneus Branch Railroad, owned at the date of said mortgage, and since acquired in any manner appertaining to said branch, and all the right, title, and equity of redemption therein whether of said company or the stockholders thereof in said branch, or any premises leased there-
89 with, all the branch railroad including the premises leased, named in said mortgage, extending from the main line of the said Burlington and Southwestern Railway Company at or near Unionville, in the county of Putnam, in the State of Missouri, by the way of Linneus and Lexington to Kansas City, and by the line of said leased premises from Lexington to Butler, in Bates County, Missouri, and to such other point in Southwestern Missouri as was determined upon by the board of directors of said company, or however said branch line of said railroad, including said leased premises, may be described or built, including the right of way therefore, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station-houses, depot viaducts, bridges, timber, and materials, and property purchased and to be purchased or otherwise acquired after the date of the mortgage for the construction and maintainance of said railroad, and all the engines, tenders, cars, and machinery, and all kinds of rolling stock owned at the date of said mortgage, or thereafter purchased for and on account of said branch, all the revenues and income of said branch, and all the rights and privileges and franchises relating
90 thereto, and property acquired in virtue thereof then in possession or thereafter acquired, including machine shops, tools, implements, personal property, and thereon along the line of said branch railroad, together with all the property acquired by said B. & S. W. R'y Co., by virtue of its lease of said Lexington, Lake and Gulf R. R., and which branch line of said leased road and premises extending from Unionville, by the way of Linneus, to Kansas City and Southwestern Missouri, is known and designated as the Linneus Branch of the B. and S. W. R'y, and the said receiver of the said property is required to render to the master herein appointed an account of the income and expenses of said branch railroad from the date of the appointment to the day of sale, and any balance in his hands is to be paid to the master and by him credited on

the amount due on the said mortgage, and the property is to be sold for the satisfaction of the residue. And the said sale is to be made subject to the lien created by order of this court for receiver's certificates or debentures to an amount not exceeding $200,000 for the purpose of completing about twenty-three miles of said branch south of Union-
91 ville; and Harry Lacy is hereby appointed a special master to sell the property above described in said mortgage as well as the ties allowed on the lien claims of Warren McCullough, H. L. Thompson and McCullough & Beebe, and he is ordered to cause said sale to be advertised, in a short form, to take place at such place as he may designate in Putnam County, near the line of Iowa, the advertisement to be made for four successive weeks before the day of sale in one newspaper published in the city of Boston and one published in said district, said papers to be selected by the master. And before entering upon the duties of said office the master shall give bond to be approved by one of the judges of this court in the sum of fifty thousand dollars ($50,000), conditioned for the faithful performance of his duties. And upon the said sale the master is authorized to receive bids payable in cash or in the bonds secured by the said mortgage, and if the highest bid shall be for cash alone, the purchaser shall pay to the master the sum of $50,000 to be by him deposited in some bank of his selection and reported forthwith to this court, and at said sale the said John W. Brooks and Alpheus Hardy, trustees, or such other agent as a majority of said
92 bondholders may appoint, are authorized to bid, at the request of a majority of said bondholders, and afterwards convey to such corporation as said majority may direct for said mortgaged property, in trust for all the holders of said mortgaged bonds, or such of them as may, in writing, assent thereto; and upon said bid to pay for the same in bonds of said corporation. And such of said bondholders as do not assent and sign the authority to make such bid and purchase are allowed six months from the day of sale to deposit their bonds with the master and assent to said sale, and shall receive their pro rata share of the property in such corporation as the bondholders may organize to own and operate the same, and upon the refusal of any bondholders to accept their share of said bid and purchase, they shall be paid by the assenting parties through the master or by deposit in court for them their pro rata share of cash on the amount of said bonds held. And all the bondholders assenting to said sale and purchase for their benefit shall be liable for the then pro rata share of receiver's certifi-
cates heretofore authorized, so far as the same may be issued
93 prior to the confirmation of the sale. And said sale shall be made by the said master without valuation and apprais'ment and without the right of redemption after sale. And said master is directed and required out of the proceeds of said sale to pay all the costs and expenses of said foreclosure and sale proper, including attorneys' fees and fees of trustees, the same to be first approved by a judge of this court. And said matter is ordered to prepare for the purchaser a deed of said property when sold by him and present the same, together with a report of his sale, to this court or a judge thereof for approval. The right to make further orders herein is reserved.

(Signed) JOHN F. DILLON.
Judge.

The said petition is in words and figures following, to wit:

Petition of Elija Smith, receiver appointed by this court.

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN AND TRUST COMPANY *against* THE BURLINGTON AND SOUTHWESTERN RAILway Company et al. } No. 297.

The said Elijah Smith, appointed by this court receiver, with
94 certain right, powers and duties as will appear by reference to the orders of appointment and decree of foreclosure, now states to the court the following facts: That prior to the commencement of the proceedings in this cause in this court, to wit, May 1, 1871, the county of Sullivan, in the State of Missouri, subscribed in proper and legal form to the capital stock of the Burlington and Southwestern Railway Company the sum of two hundred thousand dollars ($200,000), to be paid in the seven per cent. coupon bonds of said county in certain *in certain* installments of forty thousand dollars each as set forth in the contract of subscription; that the last installment was not to be paid or delivered until the road was built and trains running thereon through said county. That prior to the appointment of petitioner all of said bonds had been delivered to said company in pursuance of the agreement except forty thousand dollars, and to which the company by the contract had no right until the road was built and finished through the county; and that prior to the appointment of your petitioner the said railway company had become insolvent and was unable to complete said road and become entitled to said bonds, there then being a gap of twenty-three miles
95 in said county of Sullivan of unfinished road. That after the appointment of your petitioner, for the purpose of saving said subscription and finishing said railroad, he applied to the county court of said county (a copy of which said application is herewith filed, marked Exhibit A) to waive the question of time mentioned in the original order of subscription and to enter into an agreement with him whereby he should complete said road and the bonds be delivered to him under said contract as part of the assets of said railway company, and an arrangement was perfected and entered into (a copy of which is herewith filed, marked Exhibit B). Previous to this your petitioner was authorized to purchase the necessary material and complete said unfinished part of said road by an order of this court. Before said railway company become insolvent and before the appointment of petitioner as receiver, said county of Sullivan had issued all of said bonds and placed them in the hands of Warren McCullough as trustee for all the parties, to be delivered to said railway company on the compliance by it with the terms of said subscription. Your petitioner further shows that the mortgage to plaintiffs in this cause conveyed
96 all of the property of said Burlington and Southwestern Railway Company of every kind, real, personal, and mixed, acquired, and to be acquired, and that your petitioner by the order of this appointment was authorized to take, receive, and hold all property in any manner belonging to said company or to which it was or might be entitled, subject to the order of this court. That in the year 1874, and after the execution, delivery and recording of the mortgage

to plaintiffs in this cause, Edmund Ash, John Q. Boner and Joseph M. Stanley recovered judgments against said Burlington and Southwestern Railroad Company in the circuit court of Sullivan County, Missouri, for large sums of money; and that afterwards, to wit, in said year 1874, said several judgment creditors caused executions to be issued on said judgments and levies to be made on certain property of said company, and among other things caused garnishee process to be served on said Warren McCullough, trustee, claiming to hold said bonds by virtue of said process; that said several parties were made parties to the bill in this cause and properly brought into court and their levies set aside.

97 That your petitioner, under the orders of this court, has completed said road through said county, and by virtue of said original contract and the arrangement with the county court of said county hereinbefore referred , has become entitled to receive from said McCullough the said forty bonds of one thousand dollars each. That said judgment creditors, notwithstanding the proceedings in this court, have required said McCullough to appear and answer said garnishee process in the State court of Sullivan County, Mo., and he has appeared in said court and made answer to said process (a copy of which is hereto annexed and marked Exhibit C).

That said circuit court of Sullivan County has undertaken by its judgment to order said McCullough to hold said bonds to satisfy the judgments of that court, notwithstanding the proceedings herein, has made an order, and said several judgments creditors threaten to cause said order and judgment to be enforced, and cause said McCullough to sell and dispose of said bonds and pay over the money received from said sales on said judgments to the great injury of the plaintiffs in this cause and in contempt of this court.

98 Your petitioner therefore prays that said Warren McCullough be required to appear and show cause, if any he have, why said bonds should not be delivered to your petitioner to be disposed of as this court may adjudge proper, and that said Edmund Ash, J. M. Stanley, and John Q. Boner be required to appear at the next rule day and show cause why they should not be punished for contempt for interfering with the property in the custody of this court; and that the court here do issue an order enjoining and restraining each and every of said judgment creditors from proceeding in any manner on the order or judgment of said circuit court of said Sullivan County, and said McCullough be restrained and enjoined from delivering or selling or paying over any of said bonds or their proceeds upon any of said judgments in said State court, and that said Warren McCullough be required to surrender said bonds to petitioner, and that upon a final hearing of all of said injunctions be made perpetual.

ELIJAH SMITH,
Receiver of the Burlington and Southwestern R'y Co.,
Under the orders of the Circuit Court of the U. S.
for the West. Dist. of Mo.,
Pr. L. T. HATFIELD,
Attorney.

99 In this 11th day of October, 1876, L. T. Hatfield, on his oath, states that the matters and allegations set forth in the foregoing petition are true.

(Signed) L. T. HATFIELD.

Subscribed and sworn to before me this 11th day of October, A. D. 1876.

(Signed)

H. C. GEISBERG,
Clerk, &c.

And afterwards, to wit, in vacation of said court, on the 11th day of October, A. D. 1876, at chambers, before the honorable Arnold Krekle, judge, the following proceedings were entered of record in said cause, to wit:

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON & SOUTHWESTERN RAILway Co. et al. } 297.

This day comes Elijah Smith, the receiver heretofore appointed by this court in thie cause, by his solicitor, L. T. Hatfield, esq., and files herein a petition and affidavit for a restraining order against Warren McCullough, Edmund Ash, John Q. Boner and J. M. Stanley, and said petition and affidavit having been submitted to the honorable Arnold Krekle, judge, upon consideration thereof, and having fully advised in the premises, it is ordered that said Warren McCullough be en-
100 joined and restrained from delivering, selling or paying over any of the bonds mentioned and described in said petition, and from delivering or paying over their proceeds upon any of the judgments set out in said petition. It is further ordered that said Warren McCullough deliver said bonds to said receiver under the contract and agreement set forth in the petition aforesaid. It is further ordered that the said Edmund Ash, John Q. Boner and J. M. Stanley, and each and every of them, be enjoined and restrained from proceeding in any manner to enforce the judgment or order of the Sullivan circuit court recited in said petition or that said parties appear before the honorable Arnold Krekle, judge at chambers, in the city of Jefferson, on the 25th day of October, 1876, and show cause, if any they have, why said orders have not been obeyed. It is further ordered that a copy hereof, together with a copy of said petition, be served on the above-named parties.

101 The said proposition of the receiver to the Sullivan County court is in words and figures following, to wit:

Statement and proposition of Elijah Smith, receiver of the Burlington and Southwestern Railway Company.

In the circuit court of Sullivan County, Mo.

To said court, Elijah Smith, receiver, states and proposes as follows: That in August, 1874, a bill was filed in the circuit court of the United States for the western district of Missouri, by the Farmers' Loan & Trust Company to foreclose a mortgage made in April, 1872, covering the property, rights and franchises of said railway in Missouri, south of Unionville, Putnam County, and including that portion of the road in Sullivan County. That in said suit he was appointed by said court a receiver with the rights to take and receive all property and rights in said State, pertaining to said railway, and to complete the unfinished

portion of the road in your county, provided he should be able to raise the means necessary to do so; that he has been making effort in that direction, but so far has not been successful. To finish said road between Unionville and Laclede, will require the expenditure of a larger sum of money than he has been able to raise. Being desirous of completing the road through your county at as early a day as possible, and with a view to continued efforts and final success he how asks the
102 assistance of your county to at least the balance of the two hundred thousand dollars of county bonds heretofore subscribed by your county to aid this enterprise, one hundred and sixty thousand dollars of which has already been issued in aid thereof, believing that with such assistance and such other aid as can be obtained this object can be attained. Said receiver proposes as follows, without waiving or relinquishing any rights touching the subject matter, to wit: That your honorable court make an order that if Elijah Smith, receiver of said railway, or his successor, shall on or before the 1st day of October, 1876, complete said railway by laying the iron thereon so as to make a continuous railway track from Unionville, in Putnam Co., to Laclede, in Linn County, in said State of Missouri, that your honorable court will dismiss the cause now pending in the supreme court of Missouri entitled the State of Missouri e. rel. Sullivan County against Warren McCullough, trustee of Sullivan County, and the Burlington and Southwestern Railway Company, and that the forty bonds of one thousand dollars each of said Sullivan County in the hands of said Warren McCullough, trustee, shall be ordered to be delivered to said Elijah Smith, receiver, or his successor, by said trustee upon the terms and as mentioned
103 in the original order of subscription dated May 1, 1871, without regard to time therein specified. If said road shall not be completed from Unionville to Laclede by the time mentioned said cause in the supreme court may proceed to final adjudication.

Witness my hand this seventh day of June, 1876.

ELIJAH SMITH,
Receiver B. & S. W. R'way.

Subscribed and sworn to before me this 7th day of June, A. D. 1876.

H. B. SCOTT,
Notary Public, Des Moines Co.

Upon the petition of a majority of the legal voters of Sullivan County asking me so to do, I will make the necessary orders to comply with the above proposition.

May 15th, 1876.

SUMNER BOYNTON,
Co. Ct Jus.

I shall interpose no objection to the delivery of the within mentioned bonds on account of change of time of delivery by the county court and said receiver.

May 16th, '76.

W. McCULLOUGH,
Trustee.

The said order of subscription is in words and figures following, to wit:

STATE OF MISSOURI,
County of Sullivan :

104 In the county court of Sullivan County at the April adjourned term, 1876, held on the 24th day of June, 1876.

Whereas L. F. Hatfield has this day presented a petition to the county court of Sullivan County, Missouri, signed by more than hundred resident citizens of said county, praying said court to make the necessary orders to carry out the proposition of Elijah Smith, receiver of the Burlington and Southwestern Railway Company, heretofore on the 20th day of June, 1876, submitted to this court in relation to the completion of the Linneus Branch of said Burlington and Southwestern Railway, it is therefore ordered that if said Elijah Smith, receiver as aforesaid, or his successor in office, shall on or before the 1st day of October, 1876, finish and complete said Linneus Branch of said Burlington and Southwestern Railway in good order and condition and permanently equip the same with the necessary rolling stock for the complete accommodation of all shippers, freighters, and travellers, and shall erect a good and sufficient freight and passenger depot and station on said branch within eight hundred yards of the court-house in the town of Milan, in said Sullivan County, all according to the original order of sub-
105 scription of May 1st, 1876, and moreover shall pay all costs and charges that have accrued or that may hereafter accrue in relation to, or in any manner touching a certain suit now pending in the supreme court of the State of Missouri, style' the State of Missouri ex rel. Sullivan County against Warren McCullough, trustee of Sullivan County, and the Burlington and Southwestern Railway Company, and shall also pay all the attorneys' fees who have been or are now employed or retained by said Sullivan County in said suit, and shall file the proper vouchers with the clerk of this court, then an order shall be made and entered of record dismissing said suit, which shall be prosecuted no further, and the forty bonds, of one thousand dollars each, the subject matter of said suit, shall be left in the hands of said Warren McCullough, trustee as aforesaid, to be disposed of upon the terms and conditions and as stated in the original order of subscription of date May 1st, 1871, and as though said suit had never been instituted; that if said Elijah Smith, receiver as aforesaid, or his successor in office, shall in any manner as to time or circumstances fail or neglect to do and perform each and all of the acts, matters, and things hereinabove mentioned and specified to be
106 done by him, then this order shall be and become null and void as though it had never been made without any further action of this court or any other party whatever, and said suit shall be prosecuted to final judgment as though this order had never been made, and upon the failure of Elijah Smith, receiver of the Burlington and Southwestern Railway, to complete said road according to the time and manner herein specified or to pay the costs and attorneys' fees as above mentioned, the rights of the county under the original order subscribing stock to said railway made May 1, 1871, are to be entirely unprejudiced or in any manner affected by this order; and the court saves and reserves to itself the right to rescind this order at any time after the first day of October, 1876.

Now, at this day, comes L. T. Hatfield, as principal, and files bond, with H. T. Knight, J. M. Stanley, and W. H. Craig, as sureties, for the payment of the costs and attorneys' fees in the case of the State of Mis-

souri ex rel. Sullivan County against Warren McCullough, trustee of said county, and the Burlington and Southwestern Railway Company, which is by the court approved.

A true copy from the records of said court.

Witness my hand and the seal of said court this 24th day of June, 1876.

[SEAL.] (Signed) JAMES MORRIS, *Clerk.*

107 The following papers were read in evidence on the submission of said cause, to wit:

The original order of subscription of Sullivan County to the capital stock of the St. Joseph and Iowa Railroad Company in words and figures following, to wit:

It is ordered by the court here that the county of Sullivan subscribe, and the court does hereby for and in behalf of said county subscribe, two hundred thousand dollars to the capital stock of the St. Joseph and Iowa Railroad Company, in the name and for the use of the Central North Missouri Branch of the St. Joseph and Iowa Railroad Company, to aid in the construction of said branch railroad through the county of Sullivan; and that the subscription hereby made shall be paid by said county by issuing and delivering upon the terms and conditions hereinafter specified the bonds of said county made by its county court, and duly signed by the presiding justice of said court and attested by the clerk thereof, with the seal of said court affixed, which said bonds are to be of the denomination of one thousand dollars, and to become due and payable twenty years after the date thereof, bear-
108 ing interest at the rate of seven per cent. per annum from date, payable semi-annually, with coupons for interest to be attached or annexed to said bonds. Said bonds when issued are to be placed in the hands of Warren McCullough, as trustee for said county, and the Burlington and Southwestern Railway Company, subject to the conditions and in the manner following: That the work of constructing said branch railroad in the county of Sullivan shall be begun by said Burlington and Southwestern Railway Company within six months from the first day of May, 1871, and the construction thereof completed with the rolling-stock thereon through said county within twenty-one months from the time of commencing the work, and that as soon as the work of grading on said road shall be commenced in said county then the bonds in payment of said subscription are to be issued and placed in the hands of said trustee; and that as soon as one-fourth in cost of said work in said county is completed, as shown by the report and certificate of the engineer in charge of the work, and said work paid for by said company, then the county, through said trustee, shall deliver to the Burlington and Southwestern Railway Company forty
109 thousand dollars of said bonds; and when one-half of said work is completed and paid for by said Burlington and Southwestern Railway Company, then the county in like manner to deliver forty thousand dollars more of said bonds, and so on until the road is completed through the county, and paid for by said company, with the iron and rolling stock thereon, when the last installment of said two hundred thousand dollars in bonds are to be delivered to said company; provided, however, that said bonds are not to be delivered to said company with overdue or half due coupons attached thereto; but such coupons are to be detached from said bonds and retained by said trustee for cancellation. And it is further hereby provided that said subscrip-

tion is made upon condition that said railway shall be permanently located and constructed so as to pass within a distance not exceeding eight hundred yards from the court-house in the town of Milan, in said county, and that there shall be, within the distance aforesaid from said court-house, a general freight and passenger depot built and maintained by said company as soon as said road is ironed and operated through said county. And that in the event the said Burlington and
110 Southwestern Railway Company fail to commence said work, and prosecute the same to completion within the time herein limited, then this court shall be authorized to rescind this order and make the same null and void. It is further ordered that said county will waive its right, by reason of the stock herein subscribed, to vote for directors in said St. Joseph and Iowa Railroad Company.

STATE OF MISSOURI,
County of Sullivan, ss:

I, James Morris, clerk of the county court in and for said county, hereby certify that the above is a true copy of the original order subscribing $200,000 to the St. Joseph and Iowa R. R. Co. for use of Central North Mo. Branch of said road, as the same appears of record in my office.

Witness my hand as clerk and the seal of said court.

Done at office in Milan this 23rd day of October, 1876.

[SEAL.] JAMES MORRIS, *Clerk.*

111 And afterwards, at the same term, among other were had the following proceedings, to wit:

EDMUND ASH, PLAINTIFF,
against
THE BURLINGTON & SOUTHWESTERN RAILway Co., Warren McCullough, garnishee, defendants.

Now, to wit, October 6th, 1876, comes the said Warren McCullough, and files his answer as garnishee herein, which said answer is in words and figures following, to wit:

In the circuit court of Sullivan County, Missouri, October term, 1876.

EDMUND ASH, PLAINTIFF,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company, defendant, Warren McCullough, garnishee.

Now, at this day, comes Warren McCullough, garnishee, in the cause wherein Edmund Ash is plaintiff and the Burlington and Southwestern Railway Company defendant, and by leave of the court first had and obtained for answer to the interrogatories exhibited to him by the plaintiff, says, first, that he is not indebted to the defendant in any sum or on any account whatever now, nor was he at the time of the serv-
112 ice of the garnishment upon him in this cause, nor at any other time since said time. And for answer to plaintiff's second interrogatory, says that heretofore, to wit, on the 1st day of May, 1871,

the said county court of Sullivan County, Missouri, made and entered of record on the records of said court an order of said court in words and figures as follows, to wit:

It is ordered by the court here that the county of Sullivan subscribe and the court does hereby for and in behalf of said county subscribe two hundred thousand dollars to the capital stock of the Saint Joseph and Iowa Railroad Company in the name and for the use of the Central North Missouri Branch of the St. Joseph and Iowa Railroad Company, to aid in the construction of said branch railroad through the county of Sullivan, and that the subscription hereby made shall be paid by said county by issuing and delivering, upon the terms and conditions hereinafter specified, the bonds of said county, made by its county court and signed by the presiding justice of said court, and attested by the clerk thereof, with the seal of said court affixed, which said bond, are to be of the denomination of one thousand dollars, and to become due and
113 payable twenty years after the date thereof, bearing interest at the rate of seven per cent. per annum from date, payable semi-annually, with coupons for interest attached or annexed to said bonds. Said bonds when issued are to be placed in the hands of Warren McCullough as trustee for said county and the Burlington and Southwestern Railway Company, which said bonds are to be delivered to said Burlington and Southwestern Railway Company, subject to the conditions and in the manner following: That the work of constructing said branch railroad in the county of Sullivan shall be begun by said Burlington and Southwestern Railway Company within six months from the 1st day of May, 1871, and the construction thereof completed, with the rolling stock thereon, through said county within twenty-one months from the time of commencing the work; and that as soon as the work of grading on said road shall be commenced in said county, then the bonds in payment of said subscription are to be issued and placed in the hands of said trustee, and as soon as one-fourth in cost of said work in said county is completed as shown by the report and certificate of the engineer in charge of the work, and said work paid for by said company, then
114 the said county through said trustee shall deliver to said Burlington and Southwestern Railway Company forty thousand dollars of said bonds; and when one-half of said work is completed and paid for by said Burlington and Southwestern Railway Company, then the county in like manner to deliver forty thousand dollars more of said bonds, and so on until the road is completed through the county and paid for by said company, with the iron and rolling-stock thereon, when the last installment of said two hundred thousand dollars in bonds are to be delivered to said company: Provided, however, That the said bonds are not to be delivered to said company with overdue or half-matured coupons attached thereto; but such coupons are to be detached from said bonds and retained by said trustee for cancellation. And it is further hereby provided that said subscription is made upon condition that said railroad shall be permanently located and constructed so as to pass within a distance of not exceeding eight hundred yards from the court-house in the town of Milan, in said county, and that there shall, within the distance aforenamed from said court-house, a gen-
115 eral freight and passenger depot built and maintained by said company as soon as said road is ironed and operated through said county; and that in the event the said Burlington and Southwestern Railway Company fail to commence said work and prosecute the same to completion within the time herein limited, then this court shall be authorized to rescind this order and make the same null and void.

It is further ordered that said county will waive its right, by reason of the stock herein subscribed, to vote for directors in the said St. Joseph and Iowa Railroad Company.

That on or about the first day of November, 1871, in pursuance of said order of said court, the bonds mentioned in the aforesaid order were issued by said court and placed in the hands of this garnishee; that, in further pursuance of said order, this garnishee, at various times prior to the service of garnishment upon him in this cause, delivered to the said Burlington and Southwestern Railway Company one hundred and sixty of said bonds.

That at the time of the service of garnishment herein, this garnishee had, pursuant to the terms of the aforesaid order, in his possession or under his control the remaining forty bonds of the denomination aforesaid.

116 That afterward, to wit, on the 24th day of June, 1876, the county court of said county of Sullivan made and entered of record on the records of said circuit court a further and additional order in relation thereto, in words and figures as follows, to wit:

Whereas L. T. Hatfield has this day presented a petition to the county court of Sullivan County, Missouri, signed by more than sixteen hundred resident citizens of said county, praying saying court to make the necessary orders to carry out the proposition of Elijah Smith, receiver of the Burlington and Southwestern Railway Company, heretofore, on the 20th day of June, 1876, submitted to this court, in relation to the completion of the Linneus branch of the Burlington and Southwestern Railway Company: It is therefore ordered that, if the said Elijah Smith, receiver as aforesaid, or his successor in office, shall, on or before the 1st day of October, 1876, finish and complete said Linneus branch of said Burlington and Southwestern Railway in good order and condition, and permanently equip the same with the necessary rolling-stock for the complete accommodation of all shippers, freighters, and travelers, and shall erect a good and sufficient freight and passenger depot and station on said branch within 800 yards of the court-

117 house in the town of Milan, in said Sullivan County, all according to the original order of subscription of May 1st, 1871, and moreover shall pay all costs and charges that have accrued, or that may hereafter accrue in relation to or in way touching a certain suit now pending in the supreme court of the State of Missouri, styled The State of Missouri, ex rel., Sullivan County, against Warren McCullough, trustee of Sullivan County, and the Burlington and Southwestern Railway Company, and shall also pay all the attorneys' fees which have been or are now employed or retained by Sullivan County in said suit, and shall file the proper vouchers with the clerk of this court, then an order shall be made and entered of record, dismissing said suit, which shall be prosecuted no further; and the forty bonds of one thousand dollars each, the subject-matter of said suit, shall be left in the hands of said Warren McCullough, trustee as aforesaid, to be disposed of upon the terms and conditions, and as stated in the original order of subscription of date May 1, 1871, and as though said suit had never been instituted; but, if the said Elijah Smith, receiver as aforesaid, or his successor in office, shall in any manner, as to time or circumstances, fail or neg-

118 lect to do and perform each and all of the acts, matters, and things hereinabove mentioned and specified to be done by him, then this order shall become null and void, as though it had never been made, without any further action of this court or any other party whatever, and said suit shall be prosecuted to final judgment as though this

order had never been made. And upon the failure of said Elijah Smith, receiver of the Burlington and Southwestern Railway Company, to complete said road according to the time and manner herein specified, or to pay the costs and attorneys' fees, as above mentioned, the rights of the county under the original order subscribing stock to said railway, made May 1, 1871, are to be entirely unprejudiced or in any manner affected by this order; and the court saves and reserves to itself the right to rescind this order at any time after the 1st day of October, 1876.

And this garnishee further says that the said railroad or railway in both said orders mentioned is now and was on the 1st day of October, 1876, completed through the county of Sullivan aforesaid, and is being operated, trains running daily over the same through said county of Sullivan; and further, that in pursuance of the terms of the order first aforesaid, a freight and passenger depot has been built on the
119 line of said railway or railroad, near the town of Milan, in said county, and within 800 yards of the court-house in said town, but as to whether the other conditions of said order have been complied with, he has no knowledge or information.

And this garnishee further says that he is still in the possession of the remaining forty of said bonds of the denomination aforesaid.

And this garnishee further says that under and pursuant to his duties as such trustee as aforesaid, he has incurred large expenses and rendered a large amount of services, reasonably worth dollars, and that he has never received any compensation therefore.

And the garnishee further says that he is informed and believes that plaintiff's judgment was rendered upon demands accruing solely for work and labor done, materials and money furnished in the building of said railway or railroad in and through Sullivan County aforesaid.

Wherefore this garnishee submits to the court here whether or not said forty bond' of the denomination aforesaid are subject to plaintiff's garnishment as well as to other garnishments of a like nature, or whether or not said bonds should be delivered to the receiver of said railway.

W. McCULLOUGH.

Subscribed and sworn to before me this 6th day of October, 1876. Qualified November 20th, 1875. Term expires Nov. 20, 1881.

GEO. W. BUTLER,
Notary Public.

120 *The statement and application of the receiver to the county court upon the completion of said road.*

To the honorable county court of Sullivan County, Missouri:

The undersigned, Elijah Smith, receiver of the Burlington and Southwestern Railway, acting under the orders of the United States circuit court for the western district of Missouri, respectfully represents: That in pursuance of the contract with and the order of said court heretofore entered into with, and made on the 24th day of June, 1876, he has completed the Linneus Branch of the Burlington and Southwestern Railway, continuously through said county of Sullivan, with the iron thereon and the necessary rolling stock to transact the business of said branch road, and that he has erected a suitable and permanent freight and passenger depot, within eight hundred yards of the court-house, in the town of Milan, in said county, and that he has fully complied with the provisions of said contract and order. Wherefore he asks that the orders contemplated by said contract and order above referred to, be

made and for such other and further orders as may be necessary in the premises.

ELIJAH SMITH,
Receiver Burlington & Southwestern Railway.

121 STATE OF MISSOURI,
County of Sullivan, ss:

I, James Morris, clerk of the county court in and for said county hereby certify that the above is a true copy of the original application of Elijah Smith, receiver Burlington and Southwestern Railway, as the same appears on file in my office. Filed Oct. 13, 1876.

Witness my hand as clerk and the seal of said court.

Done at office in Milan, this 23rd day of October, 1876.

[SEAL.] JAMES MORRIS, *Clerk.*

The certificate of the engineer in charge of the construction of said railway, as to the completion thereof, in words and figures following, to wit:

MILAN, SULLIVAN COUNTY, MISSOURI,
Sept. 30, 1876.

I hereby certify, as engineer in charge of the construction of the Linneus Branch of the Burlington and Southwestern Railway, that said branch is completed through Sullivan County, in conformity with the requirements of the order of the county court of said county, in subscribing to the capital stock of the Central North Missouri Branch of the St. Joseph *and* Railroad, dated May 1, 1871, and also in conformity with the requirements of the order of said county court of said county,
122 dated June 24, 1876.

H. A. SUMNER,
Chief Engineer Burlington & Southwestern R'y.

STATE OF MISSOURI,
County of Sullivan, ss:

I, James Morris, clerk of the county court in and for said county, hereby certify that the above is a true copy of the original certificate of H. A. Sumner, chief engineer Burlington and Southwestern R'y, as the same appears on file in my office. Filed Oct. 13th, 1876.

Witness my hand as clerk and the seal of said court.

Done at office in Milan, this 23rd day of October, 1876.

[SEAL.] JAMES MORRIS, *Clerk.*

The order of the county court of Sullivan County, granting the request of the receiver in words and figures following, to wit:

STATE OF MISSOURI,
County of Sullivan, ss:

In the county court of Sullivan County, at the July adjourned term, 1876, held on the 13th day of October, 1876, amongst others were the following proceedings:

Whereas it has been shown to the court here that Elijah Smith,
123 receiver of the Burlington and Southwestern Railway Company, has finished the Linneus Branch of the Burlington and Southwestern Railway through Sullivan County, Missouri, and has equipped the same with the proper and sufficient rolling-stock for freight and pas-

sengers, and has erected on said branch, within eight hundred yards of the court-house, in the town of Milan in said county, a good and sufficient depot and station-house for freight and passengers, all according to the original order of May 1, 1871, subscribing two hundred thousand dollars to the capital stock of the St. Joseph and Iowa Railroad Company for the use of the Linneus branch of the said St. Joseph and Iowa Railroad, and also in accordance with an order of this court made and entered of record June 24th, 1876, in relation to the completion of said branch railroad through said county by Elijah Smith, and that said Elijah Smith has paid all costs and attorneys' fees that have accrued in an action of mandamus by the State of Missouri ex. rel. Sullivan County against Warren McCullough, trustee for the Burlington and Southwestern Railway Company and said Sullivan County, now pending in the supreme court of the State of Missouri, it is ordered that
124 the prosecuting attorney for said county dismiss said action of mandamus, and by leave of supreme court withdraw the papers filed on the part of the relator in said action, and that said action of mandamus be no further prosecuted in said supreme court, and that the said forty bonds of one thousand dollars each of said county, yet remaining in the hand of said Warren McCullough, trustee as aforesaid, be left to be disposed of according to law, as though said action of mandamus had never been commenced.

A true copy from the records of said court.

Witness my hand and the seal of said court this 4th day of December, 1876.

[SEAL.]

JAS. MORRIS, *Clerk*,
By J. H. B. SMITH, *Deputy*.

The affidavit of J. W. Smith in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri.

IN MATTER OF THE FARMERS' LOAN AND TRUST Company, plaintiff,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company et al., defendants.
} In equity. No. 297.

John W. Smith, on his oath, states that, in pursuance of the letter of authority from Elijah Smith, receiver of the Burlington and
125 Southwestern Railway Company, under the orders of this court (filed herewith, marked A), he did on the 24th day of October, 1876, demand of Warren McCullough, as trustee of Sullivan County, Missouri, and the Burlington and Southwestern Railway, the delivery of the forty thousand dollars in the bonds of said county, held by him as such trustee, which demand was refused by him.

JNO. W. SMITH.

Subscribed and sworn to before me in Sullivan County, in said western district of Missouri, the 23rd day of October, 1876.

[SEAL.]

L. T. HATFIELD,
Notary Public.

By consent treated as a deposition.

JNO. F. DILLON, *Judge*.

The said Exhibit A attached to said affidavit is in words and figures following, to wit:

BURLINGTON & SOUTHWESTERN RAILWAY COMPANY,
GENERAL SUPERINTENDENT'S OFFICE,
Burlington, Iowa, Oct. 19, 1876.

WARREN MCCULLOUGH, Esq.

DEAR SIR: Please deliver to John W. Smick, who is authorized by me to receive the same, the forty thousand dollars ($40,000) of Sullivan County bonds, which you hold as trustee & which you have been ordered by the Sullivan County court to deliver to me.

Yours, respectfully,

ELIJAH SMITH,
Receiver B. & S. W. R'way.

The said petition so filed as aforesaid is in words and figures following, to wit:

Petition of Elijah Smith, receiver appointed by this court.

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN AND TRUST COMPANY, pl'ff,
against
THE BURLINGTON & SOUTHWESTERN RAILWAY Company and others, defendants. } No. 297.

126 The said Elijah Smith, heretofore appointed by this court receiver of the Burlington and Southwestern Railway, with certain rights, powers, and duties, as will appear by reference to the orders of appointment and decree of foreclosure, now states to this court that prior to the commencement of proceedings in this cause, Sullivan County, in the western district of the State of Missouri, subscribed two hundred thousand dollars to the capital stock of the Burlington and Southwestern Railway Company, payable in installments, as will appear from a certified copy of the order of the county court of said county in subscribing said sum of two hundred thousand dollars, on file in this cause in this court. That the last installment was not to be paid until the road was built and trains running thereon through said county. That prior to appointment of petitioner all of said bonds had been delivered to said company in pursuance of said order of subscription except forty thousand dollars, and to which the company had no right until the road was completed through said county. And that prior to the appointment of your petitioner said railway company had become insolvent and was unable to complete said road and become entitled to said bonds, there then
127 being a gap of twenty-three miles in said county of Sullivan of unfinished road. That after the appointment of petitioner for the purpose of saving said subscription and finishing said railroad, he applied to the county court of said county (a copy of which said application is on file with the papers in this cause) to waive the question of time mentioned in the original order of subscription, and to enter into an agreement with him whereby he should complete said road and said bonds be delivered to him under said contract as part of the assets of said railway company; and an arrangement was made and entered into

(a copy of which is on file with the papers in this cause). Previous to this petitioner was authorized to purchase the necessary material and complete said unfinished part of said road by an order of this court. Before railway company become insolvent, and before the appointment of petitioner, said county of Sullivan had issued all of said bonds and placed them in the hands of Warren McCullough as trustee for all the parties, to be delivered to said railway company on the compliance by it with the terms of said subscription.

Your petitioner further shows that the mortgage to plaintiffs in
128 this cause conveyed all the property of said Burlington and Southwestern Railway Company of every kind, real, personal, and mixed, acquired and to be acquired; and that your petitioner, by the order of his appointment, was authorized to take, receive, and hold all property in any manner belonging to said company, or to which it was or might be entitled, subject to the order of this court. That after the execution, delivery, and recording of the mortgage to plaintiffs in this cause, and prior to the date, Joseph Combs, Joel H. Wilkinson, Marion Cave, Henry C. Prewitt, John L. Reynolds, Gavon D. Burgess, Alexander W. Mullins, William Smirck, Benjamin F. Northcutt, John T. Heath, John Bradley, Enoch W. Van Wye, Ira Sears, Joseph B. Seamon, Lucinda Head, James T. Reynolds, John Hollon, Joseph W. Mairs, John Mairs, Elihu E. Frazier, John N. Casperson caused garnishee process to be served on said Warren McCullough, trustee, in pursuance of judgments recovered against said Burlington and Southwestern Railway Company, or writs of attachment directed against the property of said railway company, claiming to hold said bonds by virtue of said process. That said several parties were made parties to the bid in this cause and properly court and their rights adjudicated and judgments and attachments set aside.

129 That your petitioner, under the orders of this court, has completed said road through said county, and by virtue of said original contract and the arrangement with the county court of said county hereinbefore referred to, has become entitled to receive from said McCullough the said forty bonds of one thousand dollars each. That said judgment and attachment creditors, notwithstanding the proceedings in this court, have required said McCullough to appear and answer said garnishee process in the State courts of Sullivan and Linn Counties, Missouri, and he has appeared in said courts and made answer; and that the circuit court of Sullivan County, Missouri, and the circuit and common pleas courts of Linn County, Missouri, have undertaken to order said McCullough to hold said bonds to satisfy the judgments and attachments, notwithstanding the proceedings herein. And said several judgment and attachment creditors threaten to cause the orders and judgments of said courts to be enforced and cause said McCullough to sell and dispose of said bonds and pay over the money received from said sales on said judgments, to the great injury of the plaintiffs in this cause and in contempt of this court.

130 Your petitioner therefore prays that said Warren McCullough be required to appear and show cause, if any he have, why said bonds should not be delivered to petitioner to be disposed of this court may adjudge proper, and that said Joseph Combs, Joel H. Wilkinson, Marion Cave, Henry C. Prewitt, John L. Reynolds, Gavon D. Burgess, Alexander W. Mullins, William Smick, Benjamin F. Northcutt, John T. Heath, John Bradley, Enoch W. Van Wye, Ira Sears, Jonah D. Seamon, Lucinda Head, James T. Reynolds, John Hollon,

Joseph W. Mairs, John Mairs, Elihu E. Frazier, John H. Casperson be required to appear before this court on the 21st day of November, 1876, and show cause why they should not be punished for contempt for interfering with the property belonging to the Burlington and Southwestern Railway Company controlled by this court, and that the court here do issue an order enjoining and restraining each and every of said parties from proceeding in any manner on the orders or judgments of said State courts, and said McCullough be enjoined from delivering, or selling, or paying over any of said bonds or their proceeds, or any said judgments in said State courts; and that said Warren McCullough be required to surrender said bonds to petitioner; and that upon a
131 final hearing all of said injunctions be made perpetual.

ELIJAH SMITH,
Receiver of the Burlington & Southwestern R'y Co.,
Pr. L. T. HATFIELD,
Attorney.

On this 10th day of November, 1876, L. T. Hatfield, on his oath, states that the matters and allegations set forth in the foregoing petition are true.

L. T. HATFIELD.

Subscribed and sworn to this 10th day of November, 1876.

H. C. GEISBERG, *Clerk.*

And afterwards, in vacation of said court, on the 10th day of November, A. D. 1876, at chambers, before the honorable Arnold Krekle, judge, the following proceedings were had in said cause and entered of record, to wit:

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON AND SOUTHWESTERN RAILway Company et al. } 297.

This day come' Elijah Smith, receiver of the Burlington and Southwestern Railway Company under the order of this court, by his solicitor, L. T. Hatfield, esq., and files herein a petition supported by proper affidavit, praying for a rule against Warren McCullough, Joseph
132 Combs, Joel H. Wilkinson, Marion Cave, Henry C. Prewitt, John L. Reynolds, Gavon D. Burgess, Alexander W. Millins, William Smick, Benjamin F. Northcutt, John T. Heath, John Bradley, Enoch W. Van Wye, Ira Sears, Jonah D. Seamon, Lucinda Head, James T. Reynolds, John Hollon, Joseph W. Mairs, John Mairs, Elihu E. Frazier, and John H. Casperson, requiring each and every of said parties to appear before the circuit court of the United States for the western district of Missouri, and show cause why they should not be restrained and enjoined from proceeding in any manner on the order or judgment of the circuit court of Sullivan County and the circuit and common pleas courts of Linn County, Missouri, set forth in said petition, and that said Warren McCullough, as trustee of the bonds in said petition mentioned, show cause why he should not be enjoined and restrained from delivering or selling or paying over any of said bonds or their proceeds upon any of the judgments of the said circuit court of Sullivan County and Linn County, and the common pleas court of said Linn County in said petition mentioned, and also requiring

the said Warren McCullough, as trustee of said bonds, to show cause why he should not deliver the said bonds to petitioner subject to the disposition of this court. And said petition having been submit-
133 ted to the honorable Arnold Krekle, judge, it is now ordered that the said parties, to wit, Warren McCullough, Joseph Combs, Joel H. Wilkinson, Marion Cove, Henry C. Prewitt, John L. Reynolds, Gavon D. Burgess, Alexander W. Mullins, William Smick, Benjamin F. Northcutt, John T. Heath, John Bradley, Enoch W. Van Wye, Ira Sears, Jonah D. Seamon, Lucinda Head, James T. Reynolds, John Hollon, Joseph W. Mairs, John Mairs, Elihu E. Frazier, and John H. Casperson, and each and every of them be and appear before said circuit court on Tuesday, the 21st day of November, A. D. 1876, and show cause why they should not be enjoined and restrained from proceeding in any manner to enforce the said order or judgment of said circuit court of Sullivan County and also the circuit and common pleas courts of Linn County, and that said Warren McCullough, as trustee of said bonds, show cause why he should not be enjoined and restrained from delivering or selling or paying over any of said bonds, or their proceeds upon any of the said judgments; and that the said Warren McCullough, as trustee of said bonds, show cause why he should not deliver the same to the said Elijah Smith, receiver, subject to the order and disposition of this court. It is further ordered that a copy hereof, together
134 with a copy of the petition filed as aforesaid, be served on each and all of the above-named parties.

And afterwards, to wit, at the regular term of the said circuit court of the United States in and for the western district of Missouri, begun and held at the city of Jefferson, in said district, on Monday, the 20th day of November, A. D. 1876, and on the 21st day of said month the marshal of the United States for said district returned a duly certified copy of said order of restraint, etc., into court with the following endorsement thereon, to wit:

I hereby certify that I executed the within petition and order by delivering a copy of the same to the within-named William Smick, in Sullivan County, to each of the within-named Joseph Combs, Joel N. Wilkinson, Henry C Prewitt, Alexander H. Mullins, John T. Heath, and John Bradley, in Linn County, all on the 14th day of November, 1876, also by leaving a copy of the same at the last usual place of abode of the within-named John L. Reynolds, Gavon D. Burgess, and Marion Cave, with a member of the family of each over the age of fifteen years.

Done in the county of Linn, on the 15th day of November, A.
135 D. 1876, all done in the western district of Missouri.

The within-named John H. Casperson could not be found in the western district of Missouri.

GEO. SMITH,
U. S. Marshal,
By L. R. SMITH,
Deputy.

I hereby appoint Jacob Quigly a special deputy to serve the within writ on John Hollon, E. W. Van Wye, J. D. Seamon, L. Head, J. T. Reynolds, J. Mairs, B. T. Northcutt, W. McCullough, E. E. Frazier, and J. W. Mairs.

GEO. SMITH,
U. S. Marshal.

I hereby certify that I executed the within petition and order by delivering a copy of the same to the within-named Ira Sears, William Smick, John Hollon, Enoch W. Van Wye, Jonah D. Seamon, Lucinda Head, James T. Reynolds, John Mairs, Benjamin F. Northcutt, and Warren McCullough, and by delivering a copy as aforesaid to members of the families of Elihu E. Frazier and Joseph W. Mairs, at their usual place of abode in the county of Sullivan, western district of Missouri, over the age of fifteen years.

All done on this 15th day of November, 1876.

GEORGE SMITH,
U. S. Marshal,
By JACOB QUIGLY,
Special Deputy.

Subscribed and sworn to before me this 17th day of November, 1876.
[SEAL.] L. S. HATFIELD,
Notary Public.

136 And afterwards, to wit, in vacation of said court, on the 1st day of November, 1876, the marshal of the United States for said district returned a duly certified copy of said order of restraint, etc., against Warren McCullough and others, into the office of the clerk of said circuit court of the United States with the following endorsement thereon, to wit:

I hereby appoint Hugh M. Cooper to serve the within writ upon the parties herein named.

GEO. SMITH,
U. S. Marshal.

I hereby certify that I executed the within orders of restraint and the petition which accompanied the same, by delivering a copy of the order and petition to the within-named Edmund Ash, John Q. Boner, and Joseph M. Stanley, on the 19th day of October of A. D. 1876, and I further executed the same by leaving a copy of the orders of restraint and petition accompanying the same at the last usual place of abode of the within-named Warren McCullough with a member of his family over the age of fifteen years.

Done at the county of Sullivan, western district of Missouri, on the 19th day of October, A. D. 1876.

GEO. SMITH,
U. S. Marshal,
By HUGH M. COOPER,
Special Deputy.

Subscribed and sworn to before me this the 19th day of October, 1876.

H. T. McCLANAHAN,
Clerk Circuit Court Sullivan County, Missouri.

137 THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY ET AL.

This day comes the defendant, Warren McCullough, by his solicitor,

John P. Butler, esq., and files separate answer to order to show cause, &c., of October 11, 1876; and also comes John Q. Boner, J. M. Stanley, and Edmund Ash, defendants herein, and file their joint and several answer to said order.

The said separate answer of Warren McCullough is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN AND TRUST COMPANY *against* THE BURLINGTON AND SOUTHWESTERN RAILway Co. et al. } No. 297.

Now comes Warren McCullough, one of the defendants, and for his separate answer to the petition of Elijah Smith filed herein on the 11th day of October, 1876, says that as to whether the said Smith has so complied with the orders of the county court of said Sullivan County as to entitle him as such receiver to the possession of the bonds mentioned in plaintiff's petition or any of them, he has no knowledge
138 or information whereof sufficient to form a belief.

This defendant, for further answer herein, denies that any levy or garnishment in relation to the property now sought to be brought into controversy, in either of the suits mentioned in these proceedings, viz, Edmund Ash, John Q. Boner, and Joseph M. Stanley against said Burlington and Southwestern Railway Company, were set aside by this or any other court, or in any manner interfered with; this defendant further denies that the plaintiff Smith is injured by any act or proceeding of this defendant in the sale of the bonds hereinafter mentioned.

This defendant, for further answer, says that on the 22 day of June, 1874, he was duly summoned as a garnishee in the case of Edmund Ash against said Burlington and Southwestern Railway Company, defendant; also, at the same time on the same day, he was further served as garnishee in the case of J. M. Stanley against the same defendant; also, at the same time on the same day, he was further served as garnishee in the case of John Q. Boner against the same defendant; and after several successive continuances of said garnishee proceedings at the October term of the circuit court in and for Sullivan County, Mis-
139 souri, begun and held at the court house in the town of Milan in said county on the 1st Monday of October, 1876, on the 5th day of said term, he filed his answer as garnishee in said suits of said Ash, Boner, & Stanley before mentioned, and after the filing of said answers (certified copies of which are herewith filed, marked Ex. A, B, & C, and made a part of this answer), on the 6th day of said term of said Sullivan circuit court, on the 7th day of October, 1876, the said court then and there rendered judgment against said McCullough as garnishee in favor of said Ash in the sum of $5,945.00, in favor of said Stanley and against said McCullough as garnishee in the sum of $2,889.74, in favor of said Boner and against said McCullough as garnishee in the sum of $4,225.16. Also for costs in favor of said Ash, amounting to the sum of $29.39; also for costs in favor of said Stanley, amounting to the sum of $25.05; also in favor of said Boner, amounting to $25.24; and this garnishee was therein allowed $50 in each of said cases for his answers filed therein (duly certified copies of which said several judgments are herewith filed, marked Exhibits D, E, & F), and

made a part of this answer, which said sums adjudged and allowed against and in favor of this garnishee amounted to a total aggre-
140 gate sum of $13,296.39; that by the terms of each of said judgments in favor of said Ash, Stanley, & Boner, this defendant was author ized and required within thirty days to make execution and deliver bonds to the State of Missouri conditioned for the faithful performance of his duties as such receiver; that on the 9th day of October, 1876, he duly executed said bonds as required by said several judgments, which were duly approved, and that he then and there entered upon the discharge of his duties as such receiver in each of said cases and took charge and control of 18 of said Sullivan County bonds; as such, that pursuant to and in further obedience of said orders and judgments of the Sullivan circuit court made in the premises aforesaid, this defendant, as receiver, offered for sale at private sale the said 18 Sullivan County bonds, numbered from 161 to 178, both inclusive, of the denomination of one thousand dollars, bearing interest at 7% per annum from the 1st day of November, 1876, and Mr. Edmund Ash offering for each of said bonds the sum of $750, and a total aggregate sum of $13,500 for all of said bonds, and this being a higher price offered for said bonds than was offered by any one else, and more than the market value thereof,
141 I did on the 10th day of October, A. D. 1876, pursuant to the order and judgment of said Sullivan circuit court, sell and deliver to said Edmund Ash the bonds before mentioned at and for said sum of $13,500, which said sum the said Edmund Ash then and there paid and satisfied to me; and after the said sale of said bonds to said Ash as aforesaid, to wit, on the same day, October 10, 1876, as such receiver he paid off and discharged the said several judgments of Ash, Boner, and Stanley, and as well as the garnishee's fee for answering them, amounting to the sum of $13,296.39, retained as his compensation as receiver the further sum of $130.60; and afterwards on the same day, to wit, October 10th, 1876, he made and exhibited to the judge of said Sullivan circuit court his report of his doings as receiver (a duly certified copy of which is herewith filed, made a part of this answer, and marked Exhibit G), at chambers of said judge in Linneus, Linn County, Missouri, which said report was by said judge then and there approved, and after the approval thereof on said 10th day of October, 1876, the same was by me duly filed in the office of the clerk of the circuit court within and for Sullivan County aforesaid.

Defendant further says that said judgments against this defend-
142 ant as garnishee as aforesaid, the sale of said bonds, the payment of the proceeds of said sale, were all rendered, had, and done, as well as the approval of my actions as receiver were all had, rendered, done, and performed prior to the filing of the bill or petition of said Smith in this court on the 11th day of October, 1876, and that at the time of filing of said bill or petition of said Smith, as last aforesaid, this defendant had in his hands as trustee 24 of said Sullivan County bonds.

This defendant, further answering, says that on the day of March, 1874, he was garnished by a writ of garnishment issuing out of the circuit court of Sullivan County, Missouri, in favor of William Smick and against defendant railway co., and, further, that prior to the first day of August, 1874, he had been duly served with garnishee process in the following cases, to wit, B. F. Northcutt vs. B. & S. W. R'y Co., G. D. Burgess vs. B. & S. W. R'y Co., also Joseph Combs vs. B. & S. W. R'y Co., also Marion Cave vs. B. & S. W. R'y Co., which last several suits are and were pending in the court of common pleas in the county of Linn, in the State of Missouri; that in all of said suits of said Burgess,

Northcutt, Combs, and Cave this defendant, prior to the filing of the petition of said Smith as aforesaid, had filed his answer as gar-
143 nishee substantially the same as that filed in the several case of Ash, Boner, and Stanley, and the same as well as the case of said Smick are still pending in said courts and undetermined.

And, further, that after the first day of August, 1874, and prior to the commencement this action by said Smith, the following other writs of garnishment have been duly served upon this defendant, to wit, in the case of J. H. Wilkerson vs. B. & S. W. R'y Co., also J. F. Heath vs. B. & S. W. R'y Co., also J. L. Reynolds vs. B. & S. W. R'y Co., also Edwards vs. B. & S. W. R'y Co., returnable to the circuit court of Linn County, Missouri, and now pending in said court, but this defendant has not yet filed his answer in said suits last aforesaid. There has also been further garnishment proceedings instituted in the case of Casperson & Combs vs. The B. & S. W. R'y Co., and also Cave & Prewitt and Combs and Wilkerson against the same defendant railway, now pending in the circuit court of Linn County, Missouri, as well as other causes of a like nature, and which this defendant has been summoned as garnishee but has not as yet filed any answers as such garnishee in regard thereto.

This defendant further says that on the 10th day of October,
144 1876, he was duly served with writs of garnishment in the following other cases in the circuit court of Sullivan County, Missouri, to wit, Thos. Hard vs. The B. & S. W. R'y Co., also M. J. Reynolds et als. vs. B. & S. W. R'y Co., also Joseph and John Mairs vs. B. & S. W. R'y Co., also Ira Sears vs. B. & S. W. R'y Co., also John Hollen vs. B. & S. W. R'y Co., also E. E. Frazier vs. B. & S. W. R'y Co., and that answers in said last mentioned cases are required to be filed at the April term of the circuit court of Sullivan County, Missouri, 1877.

This defendant further says that he ought not to be restrained herein nor compelled to deliver said bonds, nor any of them, as prayed in said petition or bill filed by said Smith.

This defendant further says that the bill or petition of said Smith, so filed as aforesaid, is insufficient in law and equity to entitle him to any relief whatever.

Wherefore this defendant prays that the bill or petition filed by said Smith be dismissed, and for naught held, in so far as concerns this defendant, and that he go hence without day, with his reasonable costs which he hath so wrongfully sustained.

(Signed) W. McCULLOUGH.

Warren McCullough, one of the defendants herein, being duly sworn, upon his oath states that the matters and things hereinbefore al-
145 leged are true to the best knowledge and belief of affiant.

(Signed) W. McCULLOUGH.

Subscribed and sworn to before me this 23d day of October, 1876.

H. T. McCLANAHAN,
Clerk Circuit Court.

(The said Exhibits A, B, & C, referred to in said answer, are not among the files, and are therefore omitted from this transcript.)

(N. B.—*The Exhibits A, B, & C, above referred to, will be found at page* 167.—*See stipulation No.* 2, *page* 257.)

The said Exhibit D is in words and figures following, to wit:

STATE OF MISSOURI,
Sullivan County, ss:

Be it remembered that at a regular term of the circuit court, begun and held at the court-house in the town of Milan, within and for the county of Sullivan, in the State of Missouri, on the 1st Monday of October, 1876, on the 6th day of said term, among others were had the following proceedings, to wit:

EDWARD ASH, PLAINTIFF,
against
146 THE BURLINGTON AND SOUTHWESTERN Railway Co., defendant, Warren McCullough, garnishee, defendant.

Be it ordered, adjudged, and decreed by the court there that Warren McCullough, the garnishee herein, be appointed receiver in this case, who shall execute bond, within thirty days, to the State of Missouri, in the sum of ten thousand dollars, with good and sufficient securities, conditional for the faithful performance of his duties as such receiver, to be approved by the clerk of this court. The said Warren McCullough shall, as such receiver, on or before the first day of the next term of this court, at public or private sale, sell and dispose of a sufficient number of the bonds shown by said garnishee's answer to be in his hands and under his control as garnishee or trustee, to pay off and satisfy the amount of plaintiff's indebtedness, to wit, the sum of five thousand nine hundred and forty-five dollars and three cents, and costs, to bear interest at the rate of ten per cent. per annum from this date, for which said sum judgment is by the court here rendered in favor of said plaintiff, and against said defendant garnishee, to be paid and satisfied out of the sale of said bonds. It is further adjudged that said garnishee be allowed the sum of fifty dollars for his answer filed therein.

A true copy from the records.
147 In witness whereof I have hereto set my hand and the seal of said court.
Done at office in Milan, in said county, this Oct. 7th, 1876.
[SEAL.] H. T. McCLANAHAN, *Clerk.*

The said Exhibit E, referred to in said answer, is in words and figures following, to wit:

STATE OF MISSOURI,
Sullivan County, ss:

Be it remembered that at a regular term of the circuit court, begun and held at the court-house in the town of Milan, within and for the county of Sullivan and State of Missouri, on the first Monday of October, 1876, on the 6th day of said term, among others were had the following proceeding, to wit:

JOSEPH M. STANLEY, PLAINTIFF,
against
THE BURLINGTON AND SOUTHWESTERN Railway Co., defendant, Warren McCullough, garnishee, def't.

Be it ordered, adjudged, and decreed by the court here that Warren McCullough, the garnishee herein, be appointed receiver in this cause,

who shall execute bond to the State of Missouri, within thirty days, in the sum of six thousand dollars, with good and sufficient security,
148 conditioned for the faithful performance of his duties as such receiver, to be approved by the clerk of this court. The said Warren McCullough shall, as such receiver, on or before the 1st day of the next term of this court, at public or private sale, sell and dispose of a sufficient number of the bonds shown by said garnishee's answers to be in his hands and under his control as garnishee or trustee, to pay of' and satisfy the amount of plaintiff's indebtedness, to wit, the sum of two thousand eight hundred and eighty-nine dollars and seventy-four cents and costs, to bear interest at the rate of ten per cent. per annum from this date, for which said sum judgment is by the court here rendered in favor of said plaintiff and against the defendant garnishee, to be paid and saitisfied out of the sale of said bonds. It is further adjudged that said garnishee be allowed the sum of fifty dollars for his answer filed herein.

A true copy from the records.

In witness whereof I have hereto set my hand and the seal of said court.

Done at office in Milan, in said county, this Oct. 7, 1876.

[SEAL.] H. T. McCLANAHAN, *Clerk.*

149 The said Exhibit F is in words and figures following, to wit:

STATE OF MISSOURI,
Sullivan County, ss:

Be it remembered that at a regular term of the circuit court, begun and held at the court-house in the town of Milan, within and for the county of Sullivan and State of Missouri, on the 1st Monday of October, 1876, on the 6th day of said term, among others were had the following proceedings, to wit:

JOHN Q. BONER, PLAINTIFF,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company, defendant, Warren McCullough, garnishee, def't.

Be it adjudged and decreed by the court here that Warren McCullough, the garnishee herein, be appointed receiver in this cause, and shall execute bond to the State of Missouri within thirty days in the sum of ten thousand dollars, with good and sufficient securities, conditioned for the faithful performance of his duties as such receiver, to be approved by the clerk of this court. The said Warren McCullough shall as such receiver, on or before the 1st day of the next term of this court, at
150 public or private sale, sell and dispose of a sufficient number of the bonds shown by said garnishee's answer to be in his hands or under his control as garnishee or trustee, to pay of' and satisfy the amount of plaintiff's indebtedness, to wit, the sum of four thousand two hundred and twenty-five dollars and sixteen cents and costs, to bear interest at the rate of ten per cent. per annum from this date, for which said sum judgment is by the court here rendered in favor of said plaintiff and against the defendant garnishee, to be and satisfied out of the sale of said bonds. It is further adjudged that said garnishee be allowed the sum of fifty dollars for his answer filed herein.

A true copy from the records.

In witness whereof I have hereunto set my hand and the seal of said court.

Done at office in Milan, in said county, this Oct. 7, 1876.

[SEAL.] H. T. McCLANAHAN, *Clerk.*

And the said joint and several answers of John Q. Boner, Edmund Ash, and Joseph M. Stanley is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

151 THE FARMERS' LOAN AND TRUST CO. *against* THE BURLINGTON AND SOUTHWESTERN Railway Company et al. } No. 297.

Petition of Elijah Smith, filed in this court October 11th, 1876.

Now comes Edmund Ash, J. M. Stanley, and John Q. Boner, and for plea and answer unto that part of the petition of said Smith which they are advised by counsel as proper and material to be answered, saving and reserving unto themselves and each of them all benefits and rights of exception to the many manifest errors contained in said petition of said Smith as aforesaid, says that as to whether said Smith as receiver was or is authorized to take, receive, or hold any or all property in any manner belonging to said company or to which it was or might be entitled, subject to the order of this or any other court, they nor any of them have sufficient knowledge or information thereof to form a belief. But the defendants here answering deny that the property in controversy, the bonds in said petition of said Smith mentioned, was or is included in the mortgage therein mentioned.

152 Defendants Ash, Boner, and Stanley, here answering, further allege that they and each of them as separate plaintiffs against the Burlington and Southwestern Railway Company, defendant, on the 20th day of June, 1874, instituted their said several suits by attachment in the circuit court of Sullivan County, Missouri; that in each of said several suits of the parties here answering on the 22nd day of June, 1874, Warren McCullough was summoned as garnishee in each of said actions; and afterwards, on the 23rd day of June, 1874, in each of said suits, the defendant, the Burlington and Southwestern Railway Company, was duly served with process to be and appear in said circuit court of Sullivan County, Missouri, and answer the respective actions of the parties here answering, at the October term, 1874, of said court. That afterwards, on the 2nd day of the October term, 1874, of the said Sullivan circuit court, the respective parties here answering caused separate interrogations to be filed and exhibited against the said Warren McCullough, garnishee; and afterwards, at the same term of said Sullivan circuit court, the said Boner, Ash, and Stanley recovered judgments in each of their said actions against the said Burling-

153 ton and Southwestern Railway Company for the amounts claimed by each of them respectively; that the proceedings against said garnishee were by successive continuances continued until the October term, 1876, when the said judgments of said parties respectively remained due and unpaid, and at which last term the said garnishee appeared before the said circuit court of Sullivan County, Missouri, on the

7th day of October, 1876, and filed his answer as such garnishee; also, on the 5th day of October, 1876, during said term, appeared the defendant's railway, by L. T. Hatfield, and moved the court to strike out plaintiffs' interrogations, which motion was afterwards by the court overruled; that at the same term, after the filing of said garnishee's answers, the said Sullivan circuit court rendered judgment against the said Warren McCullough, as garnishee, in each of said cases, respectively, for a sufficient amount of money to pay off and satisfy the claims of the parties here answering, and in each of said judgments the said Warren McCullough was by the circuit court of Sullivan County aforesaid appointed receiver to take charge of the bonds in his hands, as such
154 receiver to sell and dispose of a sufficient number thereof to pay and satisfy the judgments of the parties here answering; that pursuant to and in obedience to the order and judgment of the said Sullivan circuit court the said Warren McCullough, on the 9th day of October, 1876, duly qualified as such receiver, and on the 10th day of October, 1876, as such receiver the said Warren McCullough sold 18 of the bonds in his hands as such receiver at and for the sum of seven hundred and fifty dollars each, and a total aggregate sum of $13,500; that the said Warren McCullough, on said 10th day of October, 1876, with the proceeds of said sale as aforesaid, paid and satisfied the respective judgments of the parties here answering, amounting in the aggregate to the sum of $13,426.99; that afterwards, to wit, on said 10th day of October, 1876, the said Warren McCullough, as receiver, made to the judge of the said Sullivan circuit court a report of his doings as such receiver, which said report was on said 10th day of October, 1876, duly approved by said judge (all of which will more fully appear by a duly certified copy of the records of the said Sullivan circuit court filed herewith and marked Exhibit A).

The parties here answering deny that they or any of them were
155 ever parties in any court to any bill or petition in which the bonds in the hands of Warren McCullough were in controversy, or in any manner referred to, and further deny that any levy or process by them, or either of them, made in regard to said bonds were ever set aside or interfered with by any court or courts. Wherefore the parties here answering say that it is not true as in the petition of said Smith stated, nor otherwise that is stated by the parties here answering.

The parties here answering deny that said Smith is entitled to receive from said McCullough the said forty bonds of one thousand dollars each because of the premises before stated. And they admit that said Warren McCullough made answer in manner and form as shown by Exhibit A, filed herewith, and not otherwise. And the parties here answering say that long prior to the filing of the original bill in this cause, the Sullivan circuit court had acquired first and prior jurisdiction of the matters sought to be brought into controversy herein, and in pursuance of such first and prior jurisdiction, so acquired as aforesaid, the said Sullivan circuit court proceeded, as it had full power
156 and authority of law to do, finally enforce its judgments and orders in the premises, and all of its said orders and judgments being enforced and approved prior to the 11th day of October, 1876, as will more fully appear by Exhibit A filed herewith; wherefore the parties here answering say that the matters and things herein sought to be brought into controversy are res adjudicata, and said Smith and all other persons whomsoever are estopped from relitigating the same; nor are the parties here answering in contempt of this or any other court, nor has the said Smith nor any other person whomsoever been in any

Upon the filing of which said petition, affidavit, and bond the said George W. A. Preston, clerk as aforesaid, on the same day, to wit, June 22, 1874, issued a writ of attachment and summons in said cause returnable to the October term of said court, to be begun and held at the court-house in the town of Milan, in said county, on the first Monday of October, 1874, which said writ was issued, directed, and delivered to the sheriff of Putnam County, Missouri, who made return thereof in words and figures following, to wit:

Served the within writ by delivering to A. J. Young, station agent of the defendant, The Burlington and Southwestern Railway Company, at their usual place of business at Unionville, Mo., a copy of the within writ and petition, the principal office', the president of the Burlington and Southwestern Railway Company, not residing in nor being
163 found by me in Putnam Co., Mo.

Done in Putnam County, Missouri, this June 23rd, 1874. Further service not executed by order of plaintiff's attorney, J. P. Butler.

JOHN A. HELFERSTEINE,
Sheriff Putnam Co., Mo.

And afterwards, to wit, on the same day, to wit, June 22, 1874, a writ of attachment was issued in said cause returnable to the October term of said circuit court, to be begun and held at the court-house in the town of Milan, within and for the county of Sullivan, on the 1st Monday of October, 1874, which said last writ was issued, directed, and delivered to H. M. Cooper, sheriff of Sullivan County, Missouri, upon which said writ are the following endorsements and return, in words and figures as follows, to wit:

This writ came to hand June 22nd, 1874.

H. M. COOPER,
Sheriff Sullivan County, Mo.

Served the within writ by declaring to the within-named Warren McCullough that I did summon him, as garnishee, to appear before our circuit court to be begun and held within and for my said county of Sullivan on the 1st Monday of October, 1874, as commanded within, to answer the interrogatories which might be exhibited by the plaintiff.
164 Done at my county of Sullivan this 22 day of June, 1874. The within named defendant, the Burlington and Southwestern Railway Company, having no office or place of business in, nor the president nor other chief officer of said company being found in my said county, this writ is returned not further executed by me.

H. M. COOPER,
By C. PAYNE,
Dep't Sheriff, Sullivan County, Mo.

And afterwards, to wit, at the October term, Oct. 9, 1874, among other were had the following proceedings, to wit:

EDMUND ASA, PLAINTIFF,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company, defendants. } Civil action.

Now, to wit, October 9th, 1874, this cause came on be to heard, the

plaintiff appears and answer ready for trial, the defendant, although duly called, came not, but made default, and it appearing to the court that the defendant has been duly summoned in this cause at least fifteen days before the commencement of this term of the court and having failed to appear and answer according to summons, it is therefore
165 considered by the court that the plaintiff's petition be taken as true and confessed, and that he recover according to the prayer of his petition, and that this interlocutory judgment be now made final. And it further appearing to the court here that the plaintiff's demand is liquidated and certain, being founded upon notes executed by the defendant to plaintiff, it is therefore considered and adjudged that the plaintiff recover of the defendant the sum of $4,954.21 for this debt and damages, the same to bear ten per cent. from the rendition of this judgment and for the further sum of $ for his costs in this suit laid out and expended and that execution issue accordingly.

And previously to the rendition of said judgment at the same term on the second day of said term, to wit, October 6, 1874, the following other proceedings were had, to wit:

EDMUND ASH
vs.
WARREN MCCULLOUGH, GARNISHEE OF THE B. & S. W. R. R. Co. } Civil action.

Now, to wit, October 6th, 1874, plaintiff files interrogatories to garnishee.

Which said interrogatories were in words and figures following, to wit:

166 In the circuit court of Sullivan County, Mo., Oct. term, 1874.

EDMUND ASH, PLAINTIFF,
vs.
THE BURLINGTON AND SOUTHWESTERN RAILway Company, defendant.

To Warren McCullough, garnishee in the above entitled cause.

Interrogatories.

First. At the time of the service of the garnishment in the above-entitled cause had you in your possession, or under your control, any money, bonds, property, or effects belonging to the defendant; if so, how much, what property, effects, or bonds and when due?

JOHN P. BULTER,
Attorney for Pl'ff.

And afterwards at the same term the following other proceedings were had, to wit:

EDMUND ASH
vs.
WARREN MCCULLOUGH, GARNISHEE OF THE Burlington & Southwestern R. R. Co., defendant. } Civil action.

Now, to wit, October 9th, 1874, it is ordered that the garnishee have

until the next term of this court in which to file answer to plaintiff's interrogatories, and this cause is continued.

And afterwards, at the April term, 1875, the following other proceedings were had, to wit:

EDMUND ASH
vs.
167 WARREN MCCULLOUGH, GARNISHEE OF the Burlington and Southwestern R'y Co., defendant.

Now, to wit, April 10th, 1875, it is ordered that the garnishee have until the next term of this court in which to file answer to plaintiff's interrogatories, and this cause is continued.

And afterwards, at the October term, 1875, the following other proceedings were had, to wit:

EDMUND ASH
vs.
WARREN MCCULLOUGH, GARNISHEE OF THE Burlington and Southwestern Railway Co., defendant. } Civil action.

Now, to wit, October 8, 1875, it is ordered that the garnishee have until the next term of this court in which to file answer to plaintiff's interrogatories, and this cause is continued.

And afterwards, at the April term, 1876, the following other proceedings were had, to wit:

EDMUND ASH
vs.
WARREN MCCULLOUGH, GARNISHEE OF THE Burlington and Southwestern Railway Company, defendant. } Civil action.

Now, to wit, April 7, 1876, it is ordered that the garnishee have until the next term of this court in which to file answer to plaintiff's interrogatories, and this cause is continued.

And afterwards, at the October term, 1876, the following other proceedings were had, to wit:

168 The defendant, the Burlington and Southwestern Railway Company, by L. T. Hatfield, its attorney, filed its motion to strike out plaintiff's interrogatories, which said motion is as follows, to wit:

EDMUND ASH, PLAINTIFF,
against
WARREN MCCULLOUGH, GARNISHEE, BURlington & Southwestern Railway Co., defendant.

In the circuit court of Sullivan County, Missouri, October term, 1876.

Now comes the Burlington and Southwestern Railway Company, by

its attorn'y, and moves the court here to strike from the files of this court the interrogatories of the plaintiff, Edmund Ash to Warren McCullough, garnishee, for the reason that since the filing of said interrogatories the said Edmund Ash assigned and transferred to one John Q. Boner, his entire claim against the said railway company, and that he now has no claim against said railway company for which said garnishee should be held accountable.

L. T. HATFIELD,
Attorney for Burlington and Southwestern Railway Company.

And afterwards, at the same term, among other were had the following proceedings, to wit:

EDMUND ASH, PLAINTIFF,
against
THE BURLINGTON & SOUTHWESTERN RAILway Co., Warren McCullough, garnishee, defendant.

169 Now, to wit, October 6th, 1876, comes the said Warren McCullough and files his answer as garnishee herein; which said answer is in words and figures following, to wit:

In the circuit court of Sullivan County, Missouri, October term, 1876.

EDMUND ASH, PLAINTIFF,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company, defendant; Warren McCullough, garnishee.

Now at this day comes Warren McCullough, garnishee in the cause wherein Edmund Ash is plaintiff and The Burlington and Southwestern Railway Company defendant, and by leave of the court first had and obtained, for answer to the interrogatories exhibited to him by the plaintiff, says, first, that he is not indebted to the defendant in any sum or on any account whatever, nor *nor* was he at the time of the service of the garnishment upon him in this cause, nor at any other time since said time. And for answer to plaintiff's second interrogatory says that heretofore, to wit, on the 1st day of May, 1871, the said county court of Sullivan County, Missouri, made and entered of record on the records of said court an order of said courts, in words and figures as follows, to wit:

170 It is ordered by the court here that the county of Sullivan subscribe, and the court does hereby for and in behalf of said county subscribe, two hundred thousand dollars to the capital stock of the Saint Joseph and Iowa Railroad Company, in the name and for the use of the Central North Missouri Branch of the St. Joseph and Iowa Railroad Company, to aid in the construction of said branch railroad through the county of Sullivan, and that the subscription hereby made shall be paid by said county by issuing and delivering, upon the terms and conditions hereinafter specified, the bonds of said county, made by its county court, and signed by the presiding justice of said court, and attested by the clerk thereof, with the seal of said court affixed, which said bonds are to be of the denomination of one thousand dollars, and to become due

and payable twenty years after the date thereof, bearing interest at the rate of seven per cent. per annum from date, payable semi-annually, with coupons for interest attached or annexed to said bonds. Said bonds when issued are to be placed in the hands of Warren McCullough, as trustee for said county, and the Burlington and Southwestern Railway Company, which said bonds are to be delivered to said Burlington & Southwestern Railway Company subject to the conditions and in the manner following: that the work of constructing said branch rail-
171 road in the county of Sullivan shall be begun by said Burlington and Southwestern Railway Company within six months from the 1st day of May, 1871, and the construction thereof completed, with the rolling stock thereon, through said county within twenty-one months from the time of commencing the work; and that as soon as the work of grading on said road shall be commenced in said county then the bonds in payment of said subscription are to be issued and placed in the hands of said trustee; and as soon as one-fourth in cost of said work in said county is completed, as shown by the report and certificate of the engineer in charge of the work, and said work paid for by said company, then the said county, through said trustee, shall deliver to said Burlington and Southwestern Railway Company forty thousand dollars of said bonds; and when one-half of said work is completed and paid for by said Burlington and Southwestern Railway Company then the county in like manner to deliver forty thousand dollars more of said bonds, and so on, until the road is completed through the county and paid for by said company, with the iron and rolling-stock thereon, when the last installment of said two hundred thousand dollars in bonds are to
172 be delivered to said company: Provided, however, that the said bonds are not to be delivered to said company with over-due or half-matured coupons attached thereto; but such coupons are to be detached from said bonds and retained by said trustee for cancellation. And it is further hereby provided that said subscription is made upon condition that said railroad shall be permanently located and constructed so as to pass within a distance of not exceeding eight hundred yards from the court-house in the town of Milan, in said county; and that there shall within the distance aforenamed from said court-house a general freight and passenger depot built and maintained by said company, as soon as said road is ironed and operated through said county; and that in the event the said Burlington and Southwestern Railway Company fail to commence said work and prosecute the same to completion within the time herein limited, then this court shall be authorized to rescind this order and make the same null and void. It is further ordered that said county will waive its right, by reason of the stock herein subscribed, to vote for directors in said St. Joseph and Iowa Railroad Company.

That on or about the 1st day of November, 1871, in pursuance of
173 said order of said court the bonds mentioned in the aforesaid order were issued by said court and placed in the hands of this garnishee; that, in further pursuance of said order, this garnishee, at various times prior to the service of garnishment upon him in this cause, delivered to the said Burlington and Southwestern Railway Company one hundred and sixty of said bonds; that at the time of the service of garnishment herein this garnishee had, pursuant to the terms of the aforesaid order, in his possession and under his control, the remaining forty bonds of the denomination aforesaid; that afterward, to wit, on the 24th day of June, 1876, the said county court of Sullivan made and entered of record on the records of said circuit court a further and additional order in relation thereto, in words and figures as follows, to wit:

Whereas L. T. Hatfield has this day presented a petition to the county court of Sullivan County, Missouri, signed by more than sixteen hundred resident citizens of said county, praying said court to make the necessary orders to carry out the proposition of Elijah Smith, receiver of the Burlington and Southwestern Railway Company, heretofore, on
174 the 20th day of June, 1876, submitted to this court in relation to the completion of the Linneus Branch of the Burlington and Southwestern Railway Company, it is therefore ordered that if the said Elijah Smith, receiver as aforesaid, or his successor in office, shall, on or before the 1st day of October, 1876, finish and complete said Linneus branch of said Burlington and Southwestern Railway in good order and condition, and permanently equip the same with the necessary rolling-stock for the complete accommodation of all shippers, freighters, and travellers, and shall erect a good and sufficient freight and passenger depot and station on said branch within 800 yards of the court-house in the town of Milan, in said Sullivan County, all according to the original order of subscription of May 1st, 1871, and moreover shall pay all costs and charges that have accrued, or that may hereafter accrue, in relation to or in any way touching a certain suit now pending in the supreme court of the State of Missouri, styled the State of Missouri ex rel. Sullivan County against Warren McCullough, trustee of Sullivan County, and the Burlington and Southwestern Railway Company, and shall also pay all the attorneys' fees which have been or are now employed or retained by Sullivan County in said suit, and shall
175 file the proper vouchers with the clerk of this court, then an order shall be made and entered of record dismissing said suit, which shall be prosecuted no further, and the forty bonds of one thousand dollars each, the subject-matter of said suit, shall be left in the hands of said Warren McCullough, trustee as aforesaid, to be disposed of upon the terms and conditions, and as stated in the original order of subscription of date May 1, 1871, and as though said suit had never been instituted; but if the said Elijah Smith, receiver as aforesaid, or his successor in office, shall in any manner as to time or circumstances, fail or neglect to do and perform each and all of the acts, matters, and things hereinabove mentioned and specified to be done by him, then this order shall become null and void, as though it had never been made, without any further action of this court, or any other party whatever, and said suit shall be prosecuted to final judgment, as though this order had never been made. And upon the failure of said Elijah Smith, receiver of the Burlington and Southwestern Railway Company, to complete said road, according to the time and manner herein specified, or to pay the costs and attorneys' fees, as above mentioned,
176 the rights of the county under the original order subscribing stock to said railway, made May 1, 1871, are to be entirely unprejudiced, or in any manner affected by this order; and the court saves and reserves to itself the right to rescind this order at any time after the 1st day of October, 1876.

And this garnishee further says that the said railroad or railway, in both said orders mentioned, is now, and was on the 1st day of October, 1876, completed through the county of Sullivan aforesaid, and is being operated, trains running daily over the same, through said county of Sullivan; and further, that in pursuance of the terms of the order first aforesaid, a freight and passenger depot has been built on the line of said railway or railroad, near the town of Milan, in said county, and within 800 yards of the court-house in said town, but as to whether the other conditions of said order have been complied with he has no knowledge or information.

And this garnishee further says that he is still in the possession of the remaining forty of said bonds of the denomination aforesaid; and this garnishee further says that under and pursuant to his duties as such trustee as aforesaid he has incurred large expenses, and
177 rendered a large amount of services, reasonably worth dollars, and that he has never received any compensation therefore.

And the garnishee further says that he is informed and believes that plaintiff's judgment was rendered upon demands accruing solely for work and labor done, materials and money furnished in the building of said railway or railroad in and through Sullivan County aforesaid.

Wherefore this garnishee submits to the court here whether or not said forty bonds of the denomination aforesaid are subject to plaintiffs' garnishment, as well as to other garnishments of a like nature, or whether or not said bonds should be delivered to the receiver of said railway.

W. McCULLOUGH.

Subscribed and sworn to before me this 6th day of October, 1876. Qualified November 20, 1875; terms expires Nov. 20, 1881.

GEO. W. BUTLER,
Notary Public.

And afterwards, to wit, at the same term, the following other proceedings were had, to wit:

EDMUND ASH, PL'FF,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company, Warren McCullough, garnishee, defendant.

Now, to wit, October 7, 1876, defendant's railway company's
178 motion heretofore filed, to strike out *out* plaintiff's interrogatories, came on to be heard and determined, and the court, after having heard and considered the same, adjudged and decreed that said motion be overruled.

And afterwards, to wit, at the same term, the further following proceedings were had, to wit:

EDMUND ASH, PLAINTIFF,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company, defendant, Warren McCullough, garnishee, defendant.

Be it ordered, adjudged, and decreed by the court here that Warren McCullough, the garnishee herein, be appointed receiver in this cause, who shall execute bond within thirty days to the State of Missouri, in the sum of ten thousand dollars, with good and sufficient securities conditioned for the faithful performance of his duties as such receiver, to be approved by the clerk of this court. The said Warren McCullough shall, as such receiver, on or before the 1st day of the next term of this court, at public or private sale, sell and dispose of a sufficient number of the bonds shown by said garnishee's answer to be in his hands, and under his control as garnishee or trustee, to pay off and satisfy the

amount of plaintiff's indebtedness, to wit, the sum of five thou-
179 sand nine hundred and forty-five dollars and three cents, and costs, to bear interest at the rate of ten per cent. per annum from this date, for which said sum judgment is by the court here rendered in favor of said plaintiff and against the defendant garnishee, to be paid and satisfied out of the sale of said bonds. It is further adjudged that said garnishee be allowed the sum of fifty dollars for his answer filed herein.

And afterwards, to wit, on the 9th day of October, 1876, the said Warren McCullough made, executed, and filed with the clerk of this court his bond as receiver, which was by me approved, and is in words and figures as follows, to wit:

We, Warren McCullough, as principal, and Edmund Ash, J. Q. Boner, and Joseph M. Stanley, as his securities, acknowledge ourselves to owe and be indebted to the State of Missouri in the sum of ten thousand dollars, as witness our hands and seals this 9th day of October, 1876.

The condition of the above obligation is such that whereas Warren McCullough, on the 7th day of October, 1876, was by the circuit court of Sullivan County, Missouri, appointed receiver in the case of Edmund Ash, plaintiff, against the Burlington and Southwestern Railway Company, defendant, Warren McCullough, garnishee, defendant,
180 to sell and dispose of certain bonds garnished in the hands of said Warren McCullough: Now, if the said Warren McCullough shall well and faithfully discharge his duties as such receiver, then this bond to be void; otherwise to remain in full force and effect, as witness our hands and seals this day and year aforesaid.

W. McCULLOUGH. [SEAL.]
EDMUND ASH. [SEAL.]
J. Q. BOUER. [SEAL.]
J. M. STANLEY. [SEAL.]

Approved Oct. 9, 1876.

H. T. McCLANAHAN,
Clerk Circuit Court.

And afterwards, on the 10th day of October, 1876, the said Warren McCullough, as such receiver, made and filed with the clerk of this court a report, in words and figures as follows:

Now, to wit, October 10th, 1876, comes Warren McCullough, receiver, in the case of Edmund Ash, plaintiff, against the Burlington and Southwestern Railway Company, and John Q. Boner, plaintiff, against the Burlington and Southwestern Railway Company, and Joseph M. Stanley against the Burlington and Southwestern Railway Company,
181 defendant, Warren McCullough, garnishee and defendant in all of the above entitled causes, and reports to this court that, pursuant to the orders and judgments of this court made and entered of record at its October term, October 7, 1876, in the above entitled causes respectively, and in obedience thereto on the 9th day of October, 1876, he, the said Warren McCullough, receiver as aforesaid, executed the bonds required of him as such receiver, which bond was duly approved by the clerk of this court, and is on file herewith, and that he thereupon entered upon the discharge of his duties as such receiver, and took charge of the bonds mentioned in said judgment as such; that

pursuant of and in obedience to the orders and judgments in said causes this receiver offered for sale at private sale a sufficient number of said bonds in said causes mentioned and ordered to be sold to satisfy and pay off the judgments of the plaintiffs mentioned herein, namely, as follows: This receiver offered for sale 18 of the bonds in the judgments of this court in the above named causes mentioned at private sale, and Edmund Ash offering for cash of said bonds the sum of seven hundred and fifty dollars, that being the highest price offered for said bonds, I did, on the 10th day of October, 1876, at private sale, sell to the
182 said Edmund Ash 18 of said bonds, each of the denomination of $1,000, numbered as follows, to wit: 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, both inclusive, dated November 1, 1871, at and for the sum of $750 for each bond, amounting in the aggregate to the sum of $13,500; that in pursuance and obedience to said orders and judgments of this court, this receiver has disposed of said sum of thirteen thousand five hundred dollars as follows:

Charged to this receiver the net proceeds of said sale.....	13,500 00
By am't paid judgment in favor of E. Ash vs. Burlington & Southwestern R. R. Co.....	$5,945 03
By am't paid judgment in favor of J. M. Stanley vs. Burlington & Southwestern R. R. Co.....	$2,889 74
By am't paid judgment in favor of John Q. Boner vs. Burlington & Southwestern R. R. Co.....	$4,225 16
Amounting to.....	$13,059 93
Interest for three days' at 10%.....	10 88
	$13,070 71
By am't paid costs in case of E. Ash vs. B. & S. W. R. R. Co., McCullough, garnishee.....	25 39
Garnishee fee in same.....	50 00
By am't of costs paid in case of J. M. Stanley vs. B. & S. W. R. R. Co.....	25 05
Garnishee's fee in same.....	50 00
183 By am't costs paid in case of J. Q. Boner vs. B. & S. W. R. R. Co.....	25 24
Garnishee's fee in same.....	50 00
By receiver's services in selling bonds and paying out money.	130 60
	13,426 99
Balance in hands of receiver.....	$73 01

Wherefore this receiver hereby prays the court to approve his proceedings herein and for such other orders and judgments as may be necessary to carry the same into full force and effect if anything further be necessary.

WARREN McCULLOUGH,
Receiver.

Subscribed and sworn to before me this 10th day of October, A. D. 1876, as witness my hand & seal of said court.

[SEAL.] H. T. McCLANAHAN,
Clerk.

The within report of the doings and proceedings of Warren McCullough, as receiver in the cases therein mentioned, are in all things as therein set out by me approved and confirmed.

Done at chambers, at Linneus, in the county of Linn, in the State of Missouri, on this 10th day of October, 1876.

G. D. BURGESS,
Judge of Sullivan County Circuit Court within the Eleventh Judicial Circuit of Missouri.

On which said report is endorsed the following:

Filed October 10th, 1876.

H. T. McCLANAHAN,
Clerk.

184 STATE OF MISSOURI,
Sullivan County, ss:

I, H. T. McClanahan, clerk of the circuit court within and for the county of Sullivan aforesaid, do hereby certify that the foregoing is a true and correct copy of the records and proceedings, papers and reports as fully as the same is of record in my office in relation to the matters therein mentioned.

In witness whereof I have hereto set my hand and the seal of said court.

Done at office in Milan, within said county, this 23rd day of October, 1876.

[SEAL.] H. T. McCLANAHAN,
Clerk Circuit Court.

And on the same day, to wit, the 21st day of November, A. D., 1876, the following proceedings were had in said cause and entered of record, to wit:

FARMERS' LOAN AND TRUST COMPANY
vs.
BURLINGTON & SOUTHWESTERN RAILWAY Company et al. } 297.

This day comes Elijah Smith, the receiver of said defendant's railway under the order of this court, by his solicitor, P. Henry Smythe, esq., and L. T. Hatfield, esq., and thereupon comes also the following defendants, by their solicitors: C. L. Dobson, esq., and John P.
185 Butler, esq., to wit: William Smick, E. W. Van Wye & Warren McCullough, and file separate answers herein, and Warren McCullough, J. M. Stanley, Edmund Ash, and John Q. Boner and the separate amended answers herein, and said receiver thereupon files exceptions to said answer and a stipulation as to facts signed by counsel is also filed, and also comes Gavon D. Burgess et al., by C. L. Dodson, esq., and files answer herein.

The said answer of William Smick is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN AND TRUST COMPANY, pl'ff
against
THE BURLINGTON AND SOUTHWESTERN R'Y Co. et al.
No. 297.

ELIJAH SMITH, BY PETITION FILED NOV. 10, 1876, plff.,
against
WILLIAM SMICK, DEFENDANT.

Now comes the said William Smick, defendant herein, and for his separate answer says, that now and at all times hereafter saving and reserving to himself all benefits and advantages of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the petition or complaint of said Elijah Smith, re-
186 ceiver, filed in this court on the 10th day of November, 1876, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, says: That on the 16th day of March, 1874, he brought suit by attachment in the circuit court of Sullivan County, Missouri, against the Burlington and Southwestern Railway Company on certain indebtedness due this defendant from said railway, amounting at that time to the sum of one thousand and fifty dollars and cents; that on the 17th day of March, 1874, and long before the filing of the original bill for foreclosure in this suit, he caused Warren McCullough, as the holder of certain Sullivan County bonds, to be summoned as garnishee; that at the April term, 1874, of the circuit court of Sullivan County, Missouri, the garnishee appeared in said court and filed his answer therein; that at the October term, 1874, of said Sullivan circuit court this defendant recovered judgment against said railway for the amount claimed to be due from said railway; that at the April term, 1874, of said Sullivan circuit court the garnishee proceedings against said McCullough were continued at the October term, 1874, but no judgment has yet been rendered in favor of or against said garnishee.

187 Defendant denies that he was ever a party to any proceedings in any court or courts in which the validity of his garnishment or judgment was brought in question; denies that he was a party to the original bill or any supplemental bill or bills in the foreclosure suit, or that his judgment, or levies, or garnishments, or any of them, were ever set aside; denies that he is in contempt of this court; denies that Elijah Smith, as receiver, is entitled to the bonds garnished, or any of them; denies that said bonds, or any of them, are included in the mortgage foreclosed in this court at the April term thereof, 1876, entitled The Farmers' Loan and Trust Company against The Burlington and Southwestern R'y Co.; denies each and every allegation or statement of the petition of Smick or any knowledge or information thereof sufficient to form a belief in contravention to the statements of this answer. And defendant says that the said receiver has an ample and complete remedy at law in this, to wit, that he can file his interplea in the circuit court of Sullivan County, Mo., and contest the rights to said bonds with defendant. Defendant says that the petition of said Smith is insufficient

in law or equity to entitle him to the relief prayed, or any relief whatever.

188 Wherefore defendant prays to go hence without day, that no injunction issue, and that he be allowed his reasonable charges.

W. SMICK.

Subscribed and sworn to before me this 16th day of Nov., 1876.

[SEAL.] H. T. McCLANAHAN,
Clerk Circuit Court.

The said answer of E. W. Van Wye is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN & TRUST CO., PL'FF,
against
THE BURLINGTON & SOUTHWESTERN R'Y Co. et als., def'ts. } No. 297.

ELIJAH SMITH, BY PETITION FILED No. 10, 1876,
against
E. W. VAN WYE, DEF'T.

Now comes the said defendant, E. W. Van Wye, and for answer to petition of said Smith, filed on the said 10th day of Nov., 1876, says that he denies each and every allegation in said petition contained, or any knowledge or information thereof sufficient to form a belief; and further says that said petition of said Smith is insufficient in law or

189 equity to entitle him to any relief whatever, and by way of answer says that on the day of May, 1873, the defendant railway company, for work and labor done and materials furnished in the building of said railway in and through Sullivan County, Missouri, become and was indebted to defendant in the sum of $910.33; that on the day last aforesaid the defendant railway made, executed, and delivered to this defendant its promissory note of that date for said sum, payable 4 months after the date thereof with 10% interest. That on the 17th day of October, 1876, said note and interest remained due and unpaid, and on which last day this defendant instituted a suit by attachment in the circuit court of Sullivan County, Missouri, against the said railway company, and caused Warren McCullough on said last day to be summoned as garnishee, and that said McCullough is required to answer said garnishment at the April term, 1877, of said Sullivan circuit court.

Wherefore this defendant prays to be discharged, and that he go hence without day and for his reasonable costs and charges.

E. W. VAN WYE,
By JOHN P. BUTLER,
His Solicitor.

The said separate answer of Warren McCullough is in words and figures following, to wit:

190 In the circuit court of the United States for the western district of Missouri, term, 1876.

THE FARMERS' LOAN AND TRUST CO.
vs.
THE BURLINGTON & SOUTHWESTERN RAILroad Co. et al.

In the matters of petition of Elijah Smith, receiver, against Warren McCullough to show cause, etc.

Now comes the said Warren McCullough, and for cause why he should not deliver to the said Elijah Smith the bonds described in his petition, and why he should not be enjoined as therein prayed, states that the suit of the Farmers' Loan & Trust Co. against the Burlington & Southwestern Railway Co., in aid of which this proceeding is had, was brought solely to foreclose a certain mortgage given by said co. to said plaintiff for the purpose of securing the payment of certain bonds therein described, a copy of which mortgage is on file in this case. He further states that at the time said mortgage was executed and delivered, the bonds which it is sought in this proceeding to have turned over to Elijah Smith, receiver, under the decree of foreclosure, were not the property of the said railroad co., and were not included in and did not pass by said mortgage; he further states that neither the petition for foreclosure, nor the decree in said cause mentioned, described or included
191 said bonds. He further states that in none of the proceedings for foreclosure, nor by virtue of any proceeding since had, has this court acquired any jurisdiction over said bonds, nor has the said decree of this court ever acquired any rightful authority to demand or receive said bonds, or in any way to interfere with this defendant's possession thereof. He admits that prior to the appointment of said receiver the said railway company had become insolvent, and a portion of the road in Sullivan County remained unfinished. He admits that said receiver made an arrangement with the county court of Sullivan County on behalf of said railway co. for the purpose of getting an extension of time for the completion of said road, but he states that as to whether previous to such arrangement the said receiver was authorized by this court to purchase the necessary material and complete said road through said Sullivan County, he does not know nor has he any knowledge, or any information thereof sufficient to form a belief. He denies that the mortgage to plaintiff conveyed all of the property of the said railway co. of every kind, real, personal, and mixed, acquired, and to be acquired, and he denies that by the order of his appointment
192 the said receiver was authorized to take and hold all the property in any manner belonging to said co., or to which it was or might be entitled, subject to the order of this court. He admits that the parties named in the petition by the receiver in this case caused garnishee process to be served on him in pursuant of attachments and executions issued against the property of said railroad co. out of the State courts of Linn and Sullivan Co's. He says that as to whether such attaching or execution creditors were made parties to the bill foreclosure in this cause, or whether they were properly in court, or their rights adjudicated, and their attachments or judgments set aside, he does not know, nor has he any knowledge or any information thereof sufficient to form a belief. He denies that said receiver has in

any way become entitled to receive said forty bonds of one thousand dollars each, or any part thereof. For further cause he states that on the first day of May, 1871, the said county court of Sullivan Co., in the State of Missouri, subscribed two hundred thousand dollars to the capital stock of the Iowa and St. Joseph Railway Co. for the use and benefit of the Linneus branch thereof, which said subscription was to be paid in bonds of the said co. of the denomination of one thou-
193 sand dollars, each running twenty years with interest at (7) seven % per annum, which said bonds were issued and placed in the hands of this defendant, as trustee, to hold and deliver to said co., in accordance with the terms and conditions of said order of subscription, a copy of which is on file with the papers in this cause, that said order of subscription, among other conditions, required that said road should be completed said co. within twenty-one months after said order was made; that when one-fourth in cost of the work of completing said road through said co. should be done and paid for, he should deliver to said co. forty thousand dollars in said bonds; when one-half of the work was done, paid for, he should deliver one other installment of forty thousand dollars, and so on until the road should be fully built, equipped, trains running thereon, and all paid for, when he should deliver the last forty thousand dollars in said bonds. He further states that, in compliance with the terms of said trust, he delivered all of said bonds, except the last forty bonds of one thousand dollars each, which is found here in dispute. He further states that the Burlington and Southwestern Railway Co. soon after, or about the time said subscription was made, by some consolidation, sale, or assignment,
194 the particulars of which are unknown to the defendant, succeeded to all the rights and franchises of the said Iowa and St. Joseph Railway Co. He further states that on the 16th day of June, 1874, Jos. Combs, Marion Cave, Gavon D. Burgess, Benjamin F. Northcutt, and Cave & Prewitt each commenced separate suits against the Burlington and Southwestern Railway Co. by attachment in the Linn court of common pleas, a court of competent jurisdiction, and caused writs of attachment to issue thereon, upon which said several writs this defendant was summoned as garnishee on the 20th day of June, 1874, to appear and answer such interrogatories as might therein be exhibited against him; that said suits were regularly prosecuted to final judgment in said court, and judgment rendered therein for the aggregate sum of $14,111\frac{13}{100}$ & costs; that he further states that said plaintiffs in said attachment suits duly exhibited interrogatories in said court, and required said defendant to make full, true, and complete answers thereto under oath; that said garnishee cause was continued from term to term until the November term of 1876, when Marion Cave, Jos. H. Combs, and Benjamin F. Northcutt filed an interplea in the aforesaid attachment suits, claiming twelve of the forty bonds, on account of which this defendant was summoned in said court, which interplea was
195 filed on the 10th Nov., 1876, and after issues joined therein a trial was had and judgment rendered thereon in favor of said interpleaders, a copy of which interplea, answer, and judgment thereon are filed therewith; that thereupon this defendant filed his amended answer to the interrogatories in each of said cases, setting up all the facts and making every available defense, a copy of which answer and the reply thereto are herewith filed; that a trial was had thereon and judgment rendered against this defendant, ordering and directing him to deliver all of said bonds remaining in his hands to one W. H. Brownlee, who was by said Linn Co. court of common pleas appointed

receiver, a copy of which judgment and order is filed herewith. He further states that said W. H. Brownlee has given bond as such receiver and has demanded said bonds. He further states that after the aforesaid attachments were commenced, and after this defendant had been summoned as garnishee in said causes, Jno. L. Reynolds and John T. Heath commenced suit against the Burlington and Southwestern Railway Co., and obtained judgment against the same for the amount, in which cases this defendant was duly summoned as garnishee, which garnishee cases are still pending and unsettled. He further
196 states that after he was summoned as garnishee in the attachment suits heretofore described, except the last two, Jno. Q. Boner, Edmund Ash, and J. M. Stanley commenced suits by attachment in the circuit court of Sullivan County against the property of the said Burlington and Southwestern Railway Co., in which cases the defendant was duly summoned as garnishee on account of the bonds here in dispute; that said suits were duly prosecuted to judgment, amounting in the aggregate to thirteen thousand and five hundred dollars; that this defendant duly answered the interrogatories exhibited against him in the said several causes; that a trial was had thereon at the September term, 1876, of said Sullivan circuit court, and judgment rendered against him, said garnishee, ordering and requiring him to sell and dispose of enough of said forty bonds to realize enough to pay said judgments of thirteen thousand five hundred dollars, costs and allowances; that in obedience to said order and judgments he sold 18 of said bonds, and appropriated the proceed to the payment of said judgments and allowances and costs, which action of his he reported to the said circuit court of Sullivan Co., and which was approved by said
197 court, the particulars of all which attachments, garnishments, judgments, and proceedings thereon will more fully appear by reference to an answer heretofore filed by this defendant, in compliance with an order to show cause issued in this case against him on 11th day October, 1876, and by reference to the orders, judgments, and other exhibits filed therewith. He further states that his other co-defendants herein, besides those already named, have summoned him as garnishee upon executions and attachments against the property of the Burlington and Southwestern Railway Co., issuing out of the circuit courts of Linn and Sullivan Co's upon judgments and attachments to a very large amount, all of which cases are pending undetermined. He further states that in acting as such trustee, in taking care of, being responsible for, and disbursing said sum of two hundred thousand dollars, he has been put to a great expense, loss of time, litigation, attendance on courts, and has been compelled to expend large sums of money for attorneys' fees, all of which is reasonably worth five thousand dollars, which sum the said Burlington and Southwestern Railway Co. agree to pay him, but no part of which has been paid, and said company is now bankrupt and insolvent. For further cause he states that there
198 is no equity in the bill; that upon it said Elizah Smith is not entitled to the relief prayed, or any other relief. He asks this court to settle all questions of priority and conflicting claims as to the aforesaid bonds. And in case this court should order this defendant to deliver said bonds, or any of them, to said Elizah Smith, that this court will make him a proper allowance for his services and expenses in the premises; as to all his rights involved in this case, he places himself under the care of this court and asks its protection; wherefore, having shown sufficient cause why the receiver herein is not entitled to the re

lief prayed, nor to any other relief, he asks to be discharged with his costs.

W. McCULLOUGH.

Subscribed and sworn to before me this 21st day of November, 1876.

WARREN WATSON,
U. S. Court, West. Dist. Mo.

(The interplea, answer and judgment, amended answer, reply and judgment first mentioned and referred to in the above answer of Warren McCullough will be found set forth in the transcript in the case of Joseph Combs against the Burlington and Southwestern Railway Company, Warren McCullough, garnishee, recorded on page 259 of this transcript.)

199 And the said separate amended answer of Warren McCullough is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN AND TRUST CO., PL'FF,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company et als., def't. } No. 297.

ELIJAH SMITH, BY PETITION FILED OCT. 11TH, 1876, pl'ff,
against
WARREN McCULLOUGH, DEF'T.

Now comes Warren McCullough and for his separate amended answer, by leave of the court first had and obtained, says that, now and at all times hereafter saving and reserving to himself all benefit and advantages of exceptions which can or may be had or taken to the many errors, uncertainties, and other imperfections in the petition or complaint of the said Elijah Smith, receiver, filed in this coprt on the 11th day of October, 1876, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is or are material or neces-

200 sary for him to make answer unto, says that as to whether the said Smith has complied with the orders of the county court of said Sullivan County as to entitle him as such receiver to the possession of the bonds mentioned in the petition of said Smith, or any of them, he does not know, but is informed and believes that the judgments rendered in the circuit court of Sullivan County, Missouri, in favor of Edmund Ash, John Q. Boner, and Joseph M. Stanley, and against The Burlington and Southwestern Railway Company, were rendered upon demands accruing solely to each of said parties for work and labor done, materials and labor furnished in the building of said railway in and through Sullivan County aforesaid, and that under and by virtue of the contract; that before said railway company should become entitled to said bonds (the bonds in controversy here) that said railway should not only be completed in and through Sullivan County, aforesaid, but that the building and completing thereof should be paid for; and this defendant is informed and believes that the said railway company, the said receiver, nor any one for them or either of them, have ever in any manner paid or satisfied the said judgments of said Ash,

Boner and Stanley accruing solely for work and labor done,
201 materials and money furnished, to aid in the building of said railway in and through Sullivan County aforesaid, as this defendant is informed and believes.

This defendant, for further answer herein, denies that any levy or garnishment in relation to the property now sought to be brought into controversy in either of the suits mentioned in this proceedings, viz, Edmund Ash, John Q. Boner, and Joseph M. Stanley against said Burlington and Southwestern Railway Company, were set aside by this or any other court, or in any manner interfered with; this defendant further denies that the complainant Smith is injured by any act or proceeding of this defendant in the sale of the bonds hereinafter mentioned.

This defendant, for further answer, says that on the 22nd day of June, 1874, he was duly summoned as garnishee in the case of Edmund Ash against the Burlington and Southwestern Railway Company, defendant; also at the same time, on the same day, he was further served as garnishee in the case of J. M. Stanley against the same defendant; also, at the same time on the same day he was further served as garnishee in the case of John Q. Boner against the same defendant; that after
202 several successive continuances of said garnishee proceedings, at the October term of the circuit court in and for Sullivan County, Missouri, begun and held at the court-house at the town of Milan in said county, on the first Monday of October, 1876, and on the 6th day of said term, he filed his answer as garnishee in said suits of said Ash, Boner and Stanley, before mentioned; and after the filing of said answer (certified copies of which are herewith filed, marked Exhibits A, B, & C, and made a part of this answer), on the 6th day of said term of said Sullivan County circuit court, on the 7th day of October, 1876, the said court then and there rendered judgment against said McCullough as garnishee, in favor of said Ash, in the sum of $5,945.03; in favor of said Stanley, in the sum of $2,889.74; in favor of said Boner, in the sum of $4,225.16; also for costs, in favor of said Ash, in the sum of $29.39; also for costs, in favor of said Stanley, in the sum of $25.05; also for costs, in favor of said Boner, in the sum of $25.24; and this garnishee was therein allowed $50 in each of said cases, for his answer filed therein (duly certified copies of which said several judgments are herewith filed, marked Exhibits D, E, & F), and made a part of
203 this answer; which said several sums *were* adjudged and allowed against and in favor of this garnishee amounted to a total aggregate sum of $13,296.39; that by the terms of each of said judgments in favor of said Ash, Stanley and Boner this defendant was authorized and required within 30 days to make, execute, and deliver bonds to the State of Missouri, conditioned for the faithful performance of his duties as such receiver; that on the 9th day of October, 1876, he duly executed said bonds as required by said several judgments, which were duly approved, and that he then and there entered upon the discharge of his duties as such receiver in each of said cases, and took charge and control of 18 of said Sullivan County bonds as such; that pursuant to and in further obedience of said orders and judgments of said Sullivan circuit court, made in the premises aforesaid, this defendant, as receiver, offered for sale, at private sale, the said 18 Sullivan County bonds, numbered from 161 to 178, both inclusive, of the denomination of one thousand dollars each, bearing interest at 7% per annum from the 1st day of November, 1876, and one Edmund Ash offering for each of said bonds the sum of $750, and a total aggregate sum of $13,500 for all of

said bonds, and this being a higher price offered for said bonds
204 than was offered by any one else, and more than the market value thereof, I did on the 10th day of October, 1876, pursuant to the orders and judgments of said Sullivan circuit court, sell and deliver to said Edmund Ash the bonds before mentioned *at* for said sum of $13,500, which said sum the said Edmund Ash then and there paid and satisfied to me. And after the sale of said bonds to said Ash as aforesaid, to wit, on the same day, October 10, 1876, as such receiver he paid off and discharged the said several judgments of Ash, Boner, and Stanley, and as well the garnishee's fees for answering therein, amounting to the sum of $13,296.39, retained as his compensation as receiver the further sum of $130.60; and afterwards on the same day, to wit, October 10, 1876, he made and exhibited to the judge of said Sullivan circuit court his report of his doings as receiver (a duly certified copy of which is herewith filed marked Exhibit G), at chambers of said judge, in Linneus, Linn County, Missouri, which report was by said judge then and there approved; and
after the approval thereof on said 10th day of October, 1876, the
205 same was by me duly filed in the office of the clerk of the circuit court within and for Sullivan County aforesaid.

Defendant further says that the said judgments against this defendant, as garnishee as aforesaid, the sale of said bonds, the payment of the proceeds of said sale, were all rendered, had, and done, as well as the approval of the actions of this defendant as receiver, were all had, rendered, done, and performed prior to the filing of the bill, petition, or complaint of said Smith in this court on the 11th day of October, 1876, and that at the time of filing of said bill, petition, or complaint as last aforesaid, this defendant had in his hands as trustee 22 of said Sullivan County bonds.

This defendant, further answering, says that on the 17th day of March, A. D. 1874, he was garnished by a writ of garnishment issuing out the circuit court of Sullivan County, Missouri, in favor of William Smick, and against defendant railway company; and further, that prior to the 1st day of August, 1874, he had been duly served with garnishee process in the following cases, to wit: B. F. Northcutt vs. The Burlington and Southwestern Railway Company; G. D. Burgess against the same defendant; Joseph Combs against same; Marion Cave against
206 same, which last several suits were pending in the court of common pleas in the county of Linn, in the State of Missouri; that in all of said suits of said Northcutt, Burgess, Combs, and Cave this defendant, prior to the filing of the bill, petition, or complaint of said Smith as aforesaid, had filed his answer as garnishee substantially the same as that filed in the said several cases of Ash, Boner, and Stanley; that at the April term, 1874, this defendant filed his answer in the case of said Smick in said Sullivan circuit court, and the same is yet pending and undetermined in said court. And further, that after the 1st day of August, 1874, and prior to the commencement of this action by said Smith, the following other writs of garnishment have been duly served upon this defendant, to wit: In the case of J. H. Wilkerson against the Burlington and Southwestern Railway Company; J. T. Heath against same; J. L. Reynolds against same; Edwards against same, returnable to the circuit court of Linn County, Missouri, and now pending in said court, but this defendant has not yet filed his answers in said suits last aforesaid; there has also been further garnishment proceedings instituted in the case of Casperson & Combs vs. The B. and S. W. R'y
Co., also Cave & Prewitt and Combs and Wilkerson against the
207 same defendant railway now pending in the circuit court of Linn

County, Mo., as well as other causes of a like nature and in which this defendant has been summoned as garnishee, but has not as yet filed any answers as such garnishee in regard thereto.

This defendant further says that on the 10th day of October, 1876, he was duly served with garnishee process in the following other cases in the circuit court of Sullivan County, Missouri, to wit: Thomas J. Hood against the Burlington and Southwestern Railway Company; May J. Reynolds et al. against same; Joseph W. & John Mairs against same; Ira Sears against same; John Hollon against same; E. E. Frazier against same defendant; and that answers in said last-mentioned suits are required to be filed at the April term, 1877, of the circuit court of Sullivan County, Missouri. That on the 17th day of October, 1876, he was duly served with garnishee process in the following other cases pending in the circuit court of Sullivan County, Missouri, to wit: E. W. Van Wye vs. The Burlington and Southwestern Railway Co., defendant, and G. D. Burgess against same; and that he is required to answer
208 such garnishments at the April term, 1877, of said Sullivan circuit court.

This defendant, further answering, says that he ought not to be restrained herein nor compelled to deliver said bonds nor any of them as prayed in said petition of said Smith, for that, because in the said several suits of John Q. Boner, Edmund Ash, and Joseph M. Stanley against the Burlington and Southwestern Railway Company and Warren McCullough, defendant, the said railway company had due and legal notice, as had also Elijah Smith, receiver, and all other persons whomsoever, due and ample notice of the pendency of said garnishee proceedings, and they and each of them failed and refused to assert their title, if any, at law by filing their interplea, and claiming the bonds garnisheed in the hands of this defendant, and having so failed and refused to interplead and claim said bonds, they, and each of them, ought to be forever debarred and estopped from asserting any right, title, or interest in or to said bonds, or any of them, in a court of equity.

This defendant, further answering, says that he ought not to be enjoined or restrained for that because said bonds, and all of them,
209 since the date of their issue on the 1st day of November, 1871, have ever been in the possession and under the control of this defendant and have never at any time been in the possession or under the control of the Burlington and Southwestern Railway Company, Elijah Smith, receiver, nor any of its officers, agents, or servants; that the mortgage under which said Smith pretends to claim said bonds was foreclosed, and the decree of foreclosure made and entered of record at the last April term of this court, 1876, wherefore the said mortgage was inoperative after such foreclosure and could not include said bonds nor any of them. That this defendant is not in contempt of this court by reason of the premises aforesaid, and for the reason that he did but obey the orders and judgments of the Sullivan circuit court, which was then and there a court of competent and prior jurisdiction in said matters.

This defendant further says that the bill, petition, or complaint of said Smith, so filed as aforesaid, is insufficient in law or equity to entitle complainant to the relief prayed, or to any relief whatever.

Wherefore this defendant prays that the bill, petition, or complaint of said Smith filed herein Oct. 11, 1876, be dismissed and for
210 naught held, and that this defendant go hence without day with the reasonable costs and charges which he has most wrongfully sustained.

W. McCULLOUGH.

Subscribed and sworn to before me this 21st day of November, 1876.

WARREN WATSON,
U. S. Comr West. Dist., Mo.

The said Exhibits A, B, & C are not among the files, but the papers which they represent may be found on page 167 of this transcript.

The said Exhibit D is in words and figures following, to wit:

STATE OF MISSOURI,
Sullivan County, ss:

Be it remembered that at a regular term of the circuit court begun and held at the court-house in the town of Milan within and for the county of Sullivan and State of Missouri on the first Monday of October, 1876, on the 6th day of said term, among others were had the following proceedings, to wit:

EDMUND ASH, PLAINTIFF,
against
THE BURLINGTON & SOUTHWESTERN
211 Railway Co., defendant, Warren McCullough, garnishee, defendant.

Be it ordered, adjudged, and decreed by the court here that Warren McCullough, the garnishee herein, be appointed receiver in this cause, who shall execute bond within thirty days to the State of Missouri, in the sum of ten thousand dollars, with good and sufficient securities, conditioned for the faithful performance of his duties as such receiver, to be approved by the clerk of this court; the said Warren McCullough shall, as such receiver, on or before the 1st day of the next term of this court, at public or private sale, sell and dispose of a sufficient number of the bonds shown by said garnishee answer to be in his hands, and under his control as garnishee or trustee, to pay off and satisfy the amount of the plaintiff's indebtedness, to wit, the sum of five thousand nine hundred and forty-five dollars and three cents and costs, to bear interest at the rate of ten per cent. per annum from this date, for which said sum judgment is by the court here rendered in favor of said plaintiff and against the defendant garnishee to be paid and satisfied out of the sale of said bonds. It is further adjudged that said garnishee be allowed the
212 sum of fifty dollars for his answer filed herein.

A true copy from the records.

In witness whereof I have hereunto set my hand and the seal of said court. Done at office in Milan in said county this Oct. 7, 1876.

[SEAL.] H. T. MCULANAHAN, *Clerk.*

And the said Exhibit E is in words and figures following, to wit:

STATE OF MISSOURI,
Sullivan County, ss:

Be it remembered that at a regular term of the circuit court begun and held at the court-house in the town of Milan within and for the county Sullivan, and State of Missouri, on the 1st Monday of October, 1876, on the 6th day of said term, among others were had the following proceedings, to wit:

JOSEPH M. STANLEY, PLANITIFF,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company, defendant, Warren McCullough, garnishee def't.

Be it ordered, adjudged, and decreed by the court here that Warren McCullough, the garnishee herein, be appointed receiver in this
213 cause, who shall execute bond to the State of Missouri within thirty days, in the sum of six thousand dollars, with good and sufficient securities, conditioned for the faithful performance of his duties as such receiver, to be approved by the clerk of this court; the said Warren McCullough shall, as such receiver, on or before the 1st day of the next term of this court, at public or private sale, sell and dispose of a sufficient number of the bonds shown by said garnishee answer to be in his hands and under his control as garnishee or trustee to pay off and satisfy the amount of plaintiff's indebtedness, to wit, the sum of two thousand eight hundred and eighty-nine dollars and seventy-four cents and costs, to bear interest at the rate of ten per cent. per annum from this date, for which said sum judgment is by the court here rendered in favor of said plaintiff and against the defendant garnishee, to be paid and satisfied out of the sale of said bonds. It is further adjudged that said garnishee be allowed the sum of fifty dollars for his answer filed herein.

A true copy from the records.

In witness whereof I have hereto set my hand and the seal of said court.

Done at office in Milan in said county this Oct. 7, 1876.

[SEAL.] H. T. McCLANAHAN, *Clerk.*

214 The said Exhibit F is in words and figures following, to wit:

STATE OF MISSOURI,
Sullivan County, ss:

Be it remembered that at a regular term of the circuit court begun and held at the court-house in the town of Milan within and for the county of Sullivan and State of Missouri, on the 1st Monday of October, 1876, on the 6th day of said term, among others were had the following proceedings, to wit:

JOHN Q. BONER, PLAINTIFF,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company, defendant, Warren McCullough, garnishee def't.

Be it ordered, adjudged, and decreed by the court here that Warren McCullough, the garnishee herein, be appointed receiver in this cause, who shall execute bond to the State of Missouri within thirty days in the sum of ten thousand dollars, with good and sufficient securities, conditioned for the faithful performance of his duties as such receiver, to be approved by the clerk of this court; the said Warren McCullough
shall, as such receiver, on or before the 1st day of next term of this
215 court, at public or private sale, sell and dispose of a sufficient number of the bonds shown by said garnishee's answers to be in his hands and under his control as garnishee or trustee to pay off and

satisfy the amount of plaintiff's indebtedness, to wit, the sum of four thousand two hundred and twenty-five dollars and sixteen cents, to bear interest at the rate of ten per cent. per annum from this date, for which said sum judgment is by the court here rendered in favor of said plaintiff and against the defendant garnishee, to be and satisfied out of the sale of said bonds. It is further adjudged that said garnishee be allowed the sum of fifty dollars for his answer filed herein.

A true copy from the records.

In witness whereof I have hereto set my hand and the seal of said court.

Done at office in Milan, in said county, this Oct. 7, 1876.

[SEAL.] H. T. McCLANAHAN,
Clerk.

The said Exhibit G is in words and figures following, to wit:

Now, to wit, October 10th, 1876, comes Warren McCullough, receiver, in the case of Edmund Ash, plaintiff, against the Burlington and Southwestern Railway Company, and John Q. Boner, plaintiff, against the said Burlington and Southwestern Railway Company, and Joseph
216 M. Stanley, plaintiff, against the said Burlington and Southwestern Railway Company, Warren McCullough, garnishee and defendant in all the above-entitled cases, and reports to this court that pursuant to the orders and judgments of this court, made and entered of record at its October term, October 7, 1876, in the above-entitled causes, respectively and in obedience thereto on the 9th day of October, 1876, he, the said Warren McCullough, receiver as aforesaid, executed the bonds required of him as such receiver, which bond was duly approved by the clerk of this court, and is on file herewith, and that he thereupon entered upon the discharge of his duties as such receiver, and took charge of the bonds mentioned in said judgments as such; that pursuant of and in obedience to the orders and judgments in said causes this receiver offered for sale at private sale *at private sale* a sufficient number of said bonds in said causes mentioned, and ordered to be sold to satisfy and pay off the judgments of the plaintiffs mentioned herein, namely, as follows: This receiver offered for sale 18 of the bonds in the judgments of this court in the above-named causes mentioned at private sale, and Edmund Ash offering for each of said bonds the sum of seven hundred and fifty dollars, that being the highest
217 price offered for said bonds, I did, on the 10th day of October, 1876, at private sale, sell to the said Edmund Ash eighteen of said bonds, each of the denomination of one thousand dollars, numbered as follows, to wit: 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, both inclusive, dated Nov. 1st, 1871, at and for the sum of seven hundred and fifty dollars for each bond, amounting in the aggregate to the sum of thirteen thousand five hundred dollars; that in pursuance and obedience of said orders and judgments of this court this receiver has disposed of said sum of thirteen thousand five hundred dollars as follows:

Charged to this receiver the nett proceeds of said sale..	$13,500
By amount paid judg't in favor of E. Ash vs. Burlington & Southwestern R. R. Co.....	$5,945 03
By am't paid in favor of J. M. Stanley vs. Burlington & Southwestern R. R. Co.....	$2,889 74

By am't paid judg't in favor of John Q. Boner vs. Burlington & Southwestern R. R. Co	$4,225 16
Amounting to	$13,059 93
Interest for 3 days at 10 %	10 88
	13,070 71
By amount costs paid in case of E. Ashs vs. B. & S. W. R. R. Co., W. McCullough, garn	25 39
Garnishee's fee in same	50 00
By amount cost in case of J. M. Stanley vs. B. & S. W. R'y Co	25 05
Garnishee's fee in same	50 00
Amount paid in case of John Q. Boner vs. B. & S. W. R'y Co	25 24
Garnishee's fee in same	50 00
Receiver's services in selling bonds and paying out money	130 60
	$13,426 99
Balance in hands of receiver	$73 01

Wherefore this receiver hereby prays the court here to approve his proceedings herein, and for such other orders and judgments as may be necessary to carry the same into full force and effect, if anything farther be necessary.

WARREN McCULLOUGH,
Receiver.

Subscribed & sworn to before me this 10th day of October, A. D. 1876, as witness my hand & seal of said court.

H. T. McCLANAHAN, *Clerk.*

The within report of the doings and proceedings of Warren McCullough as receiver in the cases therein mentioned are in all things as therein set out by me approved and confirmed.

Done at chambers, at Linneus, in the county of Linn, in the State of Missouri, on this 10th day of October, 1876.

G. D. BURGESS,
Judge of the Sullivan County Circuit Court
219 *within the 11th Judicial Circuit of Missouri.*

STATE OF MISSOURI,
County of Sullivan, ss:

I, H. T. McClanahan, clerk of the circuit court in and for said county, hereby certify that the above is a true copy of the original report of the receiver to the judge in the cause therein named as the same appears of record and on file in my office.

Witness my hand as clerk and the seal of said court.

Done at office in Milan this 23rd day of October, 1876.

[SEAL.] H. T. McCLANAHAN,
Clerk.

And the said separate amended answer of J. M. Stanley is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN & TRUST CO., PL'FF,
vs.
THE BURLINGTON AND SOUTHWESTERN R'Y Co. et als., def'ts. } No. 297.

ELIJAH SMITH, RECEIVER, BY PETITION FILED Oct. 11, 1876, pl'ff.
against
JOSEPH M. STANLEY, DEF'T.

Now comes the , Joseph M. Stanley and, by leave of the
220 court first had and obtained, for his first amended and separate answer to the petition of Elijah Smith, filed herein Oct. 11, 1876, says that as to the truth of the pteition of said Smith he has no knowledge or information thereof sufficient to form a belief; and said Stanley further says that although he, at the October term, 1874, recovered judgment for a large sum of money against said railway company, and had also caused Warren McCullough to be summoned as garnishee in said cause, that on the 12th day of October, 1874, for value and in writing he assigned his said judgment to John Q. Boner; that in addition thereto he authorized John Q. Boner to continue such garnishee proceedings against said Warren McCullough and said railway company in the name of said Stanley.

Wherefore he prays that he go hence without day, and that he be allowed his reasonable costs and charges.

J. M. STANLEY.

Subscribed and sworn to before me this 16th day of Nov., 1876.
[SEAL.] H. T. McCLANAHAN,
Clerk Circuit Court.

And the said separate amended answer of Edmund Ash is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

221 THE FARMERS' LOAN AND TRUST COMpany, plaintiff,
against
THE BURLINGTON AND SOUTHWESTERN R'Y Co. et als., def'ts. } No. 297.

ELIJAH SMITH, RECEIVER, BY PETITION FILED Oct. 11, 1876, pl'ff,
against
EDMUND ASH, DEF'T.

Now comes the said Edmund Ash and, by leave of the court first had and obtained, for his first amended and separate answer to the petition of Elijah Smith, filed herein Oct. 11, 1876, says that as to the truth of the petition of said Smith he has no knowledge or information thereof sufficient to form a belief, and said Ash further says that although he,

at the October term, 1874, recovered judgment for a large sum of money against said railway co., and had also caused Warren McCullough to be summoned as garnishee in said cause, that on the 12th day of October, 1874, for value and in writing, he assigned his said judgment to John Q. Boner; that in addition thereto he authorized John Q. Boner to continue such garnishee proceedings against said McCullough and said railway co. in the name of said Ash.

Wherefore he prays that he go hence without day and that he be allowed his reasonable costs and charges.

EDMUND ASH.

Subscribed and sworn to before me this 16th day of Nov. 1876.
[SEAL.] H. T. McCLANAHAN,
Clerk Circuit Court.

222 And the said separate amended answer of John Q. Boner is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri, at chambers. In equity.

THE FARMERS' LOAN AND TRUST CO., PL'FF,
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company et als., def'ts. } No. 297.

ELIJAH SMITH, APPOINTED RECEIVER IN SAID cause, impleading certain parties by petition, with prayer for injunction, filed October 11, 1876, pl'ff.
against
JOHN Q. BONER, DE'FT.

Defendant, John Q. Boner, by leave of the court first had and obtained, for his first amended and separate answer herein says, that now and at all times hereafter saving and reserving to himself all benefits and advantages of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the petition or complaint of said Elijah Smith, receiver, filed in this court on the 11th day of October, 1876, for answer thereunto or unto so much or such parts thereof as this defendant is advised is or are material or ne-

223 cessary for him to make answer unto, says that as to whether said Smith as such receiver was or is authorized to take, receive, or hold any or all property in any manner belonging to said company or to which it was or might be entitled, subject to the order of this court or any other court, he, the defendant, here answering, has no knowledge or information thereof sufficient to form a belief. But defendant denies that said Smith, receiver as aforesaid, is entitled to take, receive, or hold all or any of the bonds sought to be brought into controversy herein. Defendant denies that the bonds in the petition of said Smith mentioned, was or is included in the mortgage therein mentioned, but on the contrary thereof defendant alleges and charges the truth to be that said mortgage in the petition of said Smith mentioned, was at the April term, 1876, foreclosed in this court and the decree of such foreclosure then and there entered of record; that at the time of entering the decree of foreclosure of said mortgage the defendant railway, the re-

ceiver Smith, nor any other person whomsoever was entitled to said bonds or any of them for that because said bonds and all of them were at the date of the foreclosure of said mortgage the property of
224 Sullivan County, Missouri, and that as a condition precedent to said railway company receiving said bonds or any of them, said company was required to not only complete said railway through Sullivan County but to pay for the same, and defendant says that the several judgments hereinafter mentioned were rendered upon demands accruing solely for work and labor done, materials and money furnished in the building of said railway in and through Sullivan County aforesaid; and defendant further denies that the defendant railway or the receiver Smith or any *for* them or either of them was at the time of filing the petition of said Smith and are not now entitled to the said bonds or any of them. Defendant further says that he, John Q. Boner, and one Edmund Ash and one J. M. Stanley as separate plaintiffs against the Burlington and Southwestern Railway, defendant, on the 20th day of June, 1874, before the commencement of the foreclosure suit by the Farmers' Loan and Trust Company against the Burlington and Southwestern Railway Company et als., instituted their said several and separate suits by attachment in the circuit court of Sullivan County,
225 Missouri; that in each of said several and separate suits of said Boner, Ash, and Stanley, on the 22nd day of June, 1874, before the commencement of the *the* foreclosure suit aforesaid, Warren McCullough was summoned as garnishee in each of said actions, and afterwards, on the 23rd day of June, 1874, and also before the commencement of the foreclosure suits aforesaid, in each of said suits the defendant, the Burlington and Southwestern Railway Company, was duly served with process to be and appear in said circuit court of Sullivan County, Missouri, and answer the separate and respective actions of the said John Q. Boner, Edmund Ash, and Joseph M. Stanley at the October term, 1874, of the said Sullivan circuit court. That afterwards, on the second day of the October term, 1874, of the said Sullivan circuit court, the said John Q. Boner, Edmund Ash, and Joseph M. Stanley, caused separate interrogatories to be filed and exhibited against the said Warren McCullough, garnishee. And afterwards, at the same term of said Sullivan circuit court, the said Boner, Ash, and Stanley recovered separate judgments in each of their said actions against the said Burlington and Southwestern Railway Company for the respective and sepa-
226 rate amounts claimed by each; that the proceedings against said garnishee were in each of said causes of Ash, Boner, and Stanley, continued at said October term, 1874, of said Sullivan circuit court until the next April term, 1875, of said court. That on the 12th day of October, 1874, the said Edmund Ash and the said Joseph M. Stanley separately and in writing assigned their said separate judgments to this defendant, John Q. Boner; that under the provisions of section 9 of article X of chapter 107 of Wagner's Statutes (page 1048) of Missouri, the said John Q. Boner, by and with the full knowledge and consent of said Ash and said Stanley, prosecuted the said garnishee proceedings against said McCullough and said railway co. in the name of each of said parties, to wit, Ash and Stanley as well as his own separately; that the proceedings against said garnishee and said railway company were by successive continuances continued until the October term, 1876, of said Sullivan circuit court, at which last date the said several judgments of Boner, Ash, and Stanley remained due and unpaid *due and unpaid*; that at the October term, 1876, of said Sullivan circuit court, on the 5th day of October, L. T. Hatfield, as attorney for the Burlington and

Southwestern Railway Company, filed its motion in said court to
227 strike out the interrogatories filed in the name of Edmund Ash and in the name of Joseph M. Stanley; that said motion was by said Sullivan circuit court, prior to the rendition of the judgments hereinafter mentioned, overruled; that at said October term, 1876, of said Sullivan circuit court, on the 6th day of October, the said Warren McCullough appeared before the said circuit court of said Sullivan County and filed his answer, as garnishee, in said causes prosecuted in defendant Boner's own name, and as well also in the cases prosecuted in the name of Ash and Stanley aforesaid. That at the same term, after filing of the said garnishee's answers, the said causes and each of them came on to be heard and determined, and the said Sullivan County circuit court, on the 7th day of October, 1876, rendered judgment against the said Warren McCullough, as garnishee, in each of said causes, aggregating the total sum of thirteen thousand two hundred and ninety-six dollars and thirty-nine cents. That in each of said causes so prosecuted in the name of Ash and Stanley, and as well also in *in* defendant Boner's own name, the said Warren McCullough was, by said Sullivan County circuit court, appointed receiver to take charge of the bonds in his hands, as such receiver to sell and dispose of a sufficient
228 number of said bonds to pay and satisfy the judgments of this defendant Boner, rendered in his own name, and in the names of Ash and Stanley as aforesaid. That pursuant to and in obedience to the orders and judgments of the said Sullivan County circuit court the said Warren McCullough, on the 9th day of October, 1876, duly qualified as receiver, and on the 10th day of October, 1876, as such receiver, the said Warren McCullough sold 18 of the bonds of the denomination of one thousand dollars each, bearing interest at the rate of seven per cent. per annum from the 1st day of November then next, and in his hands as such receiver, at and for the price and sum of seven hundred and fifty dollars for each of said 18 bonds, and at and for a total aggregate sum of thirteen thousand five hundred dollars; that the said Warren McCullough, on said 10th day of October, 1876, with the proceeds of said sale of said bonds as aforesaid, paid and satisfied the respective judgments of this defendant, Boner, amounting to the aggregate sum of $13,426.99 as aforesaid; that afterwards, to wit, on said 10th day of October, 1876, the said Warren McCullough, as receiver, made the judge of the said Sullivan circuit court a report of his doings as such receiver, which report was, on said 10th day of
229 October, 1876, duly approved by said judge, (all of which will more fully appear by duly certified copies of the records of said Sullivan circuit court filed herewith, and marked Exhibit A.)

The defendant Boner denies that he was ever a party in any court to any bill or petition in which the bonds in the hands of Warren McCullough were in controversy, or in manner referred to other than as aforesaid, and further denies that any levy or process made in regard to said bonds were ever set aside or interfered with by this or any other court or courts; wherefore the party here answering says that it is not true, as in the petition of said Smith stated, nor otherwise than as stated herein.

The defendant Boner denies that said Smith is entitled to receive from said McCullough the said forty bonds, or any of them, of the denomination aforesaid. Defendant Boner admits that said Warren McCullough made answer in the Sullivan County circuit court, in manner and form as shown by Exhibit A, filed herewith, and not otherwise. And said Boner further says that long prior to the filing of the original

bill, to wit, August 8, 1874, for foreclosure of said mortgage in this court, the said Sullivan circuit court had acquired first and prior jurisdiction of the matters sought to be brought into controversy herein, and in pursuance of such first and prior jurisdiction so acquired
230 the said Sullivan circuit court proceeded, as it had full power and authority of law to do, to finally enforce its judgments and orders in the premises, and all of its said orders and judgments were enforced and approved prior to the 11th day of October, 1876, the day of the date of the filing of the petition herein by said Smith; and said Boner denies that he is in contempt of this or any other court; nor has the said Smith, nor any other person whomsoever, been in any manner injured by the acts or doings of this defendant, nor ought to be required to show cause as in the petition of said Smith prayed, nor ought he to be in any manner punished for contempt for that because, by reason of the premises before stated, the property here sought to be brought into controversy has never at any time been and is not now in the custody of this court or any of its officers; and this defendant further says, as a matter of law, if the said Smith claimed said bonds, or any of them, he was bound to implead in the Sullivan circuit court and claim and assert his rights thereto, and having failed so to do, by his negligence is estopped from proceeding in equity.

And the said Boner further says that the said petition of said Smith is insufficient in law or equity to entitle him to the relief
231 prayed, or any relief whatever.

Wherefore defendant prays that he go hence without day, that the bill or petition of said Smith be dismissed, and for judgment for his costs, which he has most wrongfully sustained, and for all other proper relief.

JOHN Q. BONER.

Subscribed and sworn to before me this 16th day of Nov., 1876.

[SEAL.] H. T. McCLANAHAN,
Clerk Circuit Court.

Subscribed and sworn to before me this 17th day of November, 1876.

SUMNER BOYNTON,
Judge of the Sullivan Co. Court, and ex-officio Judge of Probate within and for said County.

(The said exhibit A is omitted from this place, but will be found recorded on page 157 of this transcript.)

And the said joint and separate answer of Joseph Combs, Marion Cave, Benjamin F. Northcutt, Garon D. Burgess, and Prewitt and Cave, is in words and figures following, to wit:

UNITED STATES OF AMERICA,
Western District of Missouri, sct.:

232 In the circuit court of the United States for the western district of Missouri. In equity.

Before the honorable Arnold Krekel, judge at chambers.

THE FARMERS' LOAN AND TRUST COMPANY, plaintiff,
against
THE BURLINGTON & SOUTHWESTERN RAILway Company et al., defendant.

In matter of the petition of Elijah Smith, receiver, appointed by this court.

Now, at this day comes Joseph Combs, Marion Cave, Benjamin F.

Northcutt, and Gavon D. Burgess, also Henry C. Prewitt and the said Marion Cave, as joint judgment creditors of the said Burlington and S. W. Railway Co., who have been made parties to the above-entitled cause, and who have been ordered by this court to appear on this day and show cause why they should not be enjoined and restrained from proceeding to enforce their judgments and garnishee process against the defendant Warren McCullough, as garnishee of the said Burlington & Southwestern R. W. Co., rendered in the Linn Co. court of common pleas, in the State of Missouri. In obedience to the said order, the said parties, in answer to the petition of Elijah Smith, receiver, and to show cause why these defendants here answering should not be en-
233 joined and restrained as aforesaid, state the following: They admit the subscription of $200,000 stock of Sullivan County, Missouri, but they say that said subscription was made to the capital stock of the St. Joseph and Iowa Railroad Company instead of to the Burlington & Southwestern Railway Company, as stated in the petition, and that such subscription was afterwards in some way transferred from the said St. Joseph and Iowa Railroad Co. to the said Burlington and Southwestern R. R. Co. They admit that all of said subscription has been paid by Sullivan County to the said B. & S. W. R'y Co., except the sum of forty thousand dollars thereof.

The said defendants deny that after the appointment of said petitioner by this court, he, for the purpose of saving said subscription and finishing said railroad, applied to the county court of Sullivan County, to waive the question of time mentioned in the original order of subscription, and to enter into an agreement with him, whereby he should complete said road and said forty bonds of $1,000 each be delivered to him under said contract as part of the assets of said railway company, and they deny that such an arrangement was entered into; on the contrary they allege that such application was made to said county court by the citizens of Sullivan County. That as to whether or not
234 previous to the presenting of said application to said court, the said petitioner was authorized to purchase the necessary material and complete the unfinished part of said railroad by an order of this court, these defendants say they do not know, nor have they any knowledge or information thereof, sufficient to form a belief. But they say that if the petition' was so authorized by this court, he was not in any way or manner authorized to use or receive the said forty bonds of Sullivan County, now in question, or any part thereof for that purpose.

Said defendants deny that the mortgage to the plaintiff mentioned in the petition conveyed all of the property of said Burlington and Southwestern Railway Company, real, personal and mixed, acquired and to be acquired. They deny that said mortgage in any manner included or conveyed the said 40 bonds of Sullivan County aforesaid, or any of them.

These defendants admit that they were made parties to the bills in this cause to foreclose said mortgage, but they deny that their rights were adjudicated, or that their judgments or attachments were set aside. They deny that this court had any power or authority to set aside said judgment or attachments.

Said defendants admit that said road is now complete through said Sullivan County, but they deny that the petitioner herein has
235 become entitled to receive from said McCullough said 40 bonds of $1,000 each or any of them, and on the contrary said defendants aver that they and their co-defendants, as judgment creditors of said Burlington & Southwestern Railway Company, and by virtue of

their judgments against Warren McCullough as garnishee of said company are entitled so receive said bonds from said McCullough; said defendants further show to this court that heretofore, to wit, on the 16th day of June, 1874, the said Burlington and Southwestern Railway Company being jointly indebted to each of these defendants in large sums of money, they did on said day commence suits against said railway company by attachment in the Linn County court of common pleas, which said court then and there had full power and authority and jurisdiction to hear and determine said suits, and to render *each* judgments, and make such others as it afterwards did render and make, and that writs of attachment were thereupon duly issued by the clerk of said court directed against the property of the said Burlington and Southwestern Railway Company, and were on said day duly and regularly served upon said Warren McCullough, as garnishee, in said suits under
236 and by virtue of the laws of the State of Missouri, and that the said forty bonds of said Sullivan County now in controversy were thereby duly levied upon, and attached in the hands of said McCullough, as the property of said Burlington and Southwestern Railway Company; that said several suits came on regularly for trial in the said common pleas court, and duly answered and defended by the said Burlington & Southwestern Railway Company, and the said court rendered judgment in favor of the said defendant Joseph Combs for the sum of $2,825 on the 5th day of October, 1875, and in favor of said defendant Burgess, for the sum of $1,100 on the 6th day of November, 1874, and in favor of said Marion Cave for the sum of $2,925, dated Feb'y 5th, 1875, and in favor of the defendant B. F. Northcutt in the sum of $4,050, dated December 29, 1874, and in favor of the said defendants Cave & Prewitt jointly, in the sum of $3,111.13 on the 5th day of Feb'y, 1875. That interrogatories were duly filed by the plaintiffs in said several suits, and exhibited to the said McCullough as garnishee as aforesaid, and that afterwards, to wit, on the * * day of November, 1876, the said McCullough duly filed his answer in said several suits, a copy of which said answer is herewith filed, and on the day of November, 1876, the said several causes coming on to be heard on the issues presented by
237 the answers of the garnishee, and the other pleadings in said suits, and the court after being fully advised in the premises rendered judgment in each of said causes in favor of the plaintiffs in said several suits, and ordering and directing the said garnishee, McCullough, to deliver all of said 40 bonds then remaining in his hands to W. H. Brownlee, who was duly appointed receiver in said causes under and by virtue of the laws of the State of Missouri. And said Brownlee was ordered to sell said bonds except 12 of them, and pay $2,500 to the said garnishee, and next to pay the costs and allowances to the garnishee, and next to distribute the balance of the proceeds of such sale of said bonds among these defendants in proportion to the amount of their respective judgments. Said Brownlee was duly required by said judgment to give a good and sufficient bond conditioned for the faithful performance of his duties as such receiver. (That a certified copy of said judgment is herewith filed.) That prior to the rendition of said judgments the said Benjamin F. Northcutt, Marion Cave and Joseph Combs filed their interplea in said causes, claiming twelve of said Sullivan County bonds as their own property, a certified copy of
238 which said interplea is herewith filed, and after issue duly joined, on the trial of the same the court gave judgment against said McCullough and the parties to the original attachments suits, and in

favor of the said interpleaders, for twelve of said one thousand dollar bonds, a copy of which said judgment on said interplea is herewith filed.

Said defendants say that all of said judgments and proceedings in said common pleas court remain in full force and effect, and that said court has now finally adjourned until the regular court in course in Feb'y, 1877. That said W. H. Brownlee, who was appointed receiver as aforesaid, has duly qualified and given bond as required by law and the order of said court (which said bond or a copy thereof is herewith filed), and the said Brownlee has demanded the said bonds from the said McCullough in accordance with the provisions of said judgments. That the said suits of these defendants in said common pleas court were the first suits commenced against the said Burlington and Southwestern Railroad and the first attachments served upon the said McCullough, and these defendants therefore have a prior and subsisting lien
239 upon the said bonds in the hands of said McCullough. That the said suits were commenced and the said attachments served upon the said McCullough before the appointment of the petitioner as receiver in said cause, and before his qualification as such receiver, and before the appointed or qualification of any other receiver in said cause.

These defendants deny that they have at any time acted in contempt of the orders or judgments or process of this court in any manner, but on the contrary allege that they have at all times endeavored to act, and they believe they have acted, in obedience and conformity to the directions of this and all other courts exercising any jurisdiction over them in any manner pertaining to the bonds in controversy.

And said defendants allege that there is no equity in the petitioner's bill, and that he is not entitled to any relief from this court upon the facts as stated. Said defendants further say they have acted in utmost good faith in all of the proceedings herein stated and upon the advice of their counsel, and they ask the court to protect them in their just rights as creditors of the Burlington and Southwestern Railway Company.

Wherefore they pray that the petitioner's bill may be dismissed, and that they may be allowed to go hence with theirs costs in this cause.

CHARLES L. DOBSON,
240 *Of Counsel for said Defendants Answering.*

STATE OF MISSOURI,
County of Linn, ss;

Joseph Combs, one of the defendants in the above-entitled cause, answering herein, first being duly sworn, on his oath says the facts and allegations in the attached and foregoing answer to the petition are true as therein stated, as he verily believes.

JOSEPH COMBS.

Subscribed and sworn to before me, a notary public within and for said county, at my office in Linneus, this 18th day of November, 1876.

In witness whereof I hereto set my hand and notarial seal the day and year aforesaid.

[SEAL.] C. L. DOBSON,
Notary Public (qualified 28 Dec., '71, office expires 17 Dec., '76.)

The said judgments referred to in the foregoing answer are in words and figures following, to wit:

Proceedings in the common pleas court of Linn County, Missouri.

Among others the following, to wit:

GAVON D. BURGESS
vs.
THE BURLINGTON AND SOUTHWESTERN RAILroad Company, Warren McCullough, garnishee.

FRIDAY, *Nov. 10th*, 1876.

241 Now, on this 10th day of November, 1876, this cause coming on to be heard on the issues made between the plaintiff and this garnishee, Warren McCullough, and both parties appearing, waive a jury and submit the issues to the court, and after hearing all the evidence in the case the court doth find for the plaintiff; that the 22 bonds of Sullivan County, each for one thousand , described in the garnishee's answer herein, are the property of the Burlington and Southwestern Railroad Company, and of the value of twenty-two thousand dollars, and it is therefore ordered, adjudged, and decreed that the said garnishee, Warren McCullough, turn over forthwith the twenty bonds in his possession and described in his answer to W. H. Brownlee, upon his giving bond to the State of Missouri in the sum of forty thousand dollars, to be approved by the judge of this court; that of the said bonds said receiver, W. H. Brownlee, shall deliver the first twelve to parties interpleading herein, Joseph Combs, Marion Cave, and B. F. Northcutt; that the said receiver sell the remainder of said bonds for the highest price obtainable, and out of the proceedings thereof he shall pay the cost of the garnishee proceedings and allowances made
242 to the garnishee for answering in said causes; next he shall pay to Warren McCullough twenty-five hundred dollars, then he shall apply the balance on the judgments of G. D. Burgess, B. F. Northcutt, Marion Cave, Joseph Combs, and Cave and Prewitt for value in proportion to the various amounts thereof, and that said receiver report his proceedings herein; that said garnishee be allowed seventy-five dollars for answering herein.

JOSEPH COMBS
vs.
THE BURLINGTON & SOUTHWESTERN R. R. Company, Warren McCullough, garnishee.

Now, on this 10th day of November, 1876, this cause coming on to be heard on the issues made between plaintiff and garnishee, Warren McCullough, and both parties appearing, waive a jury and submit the issues to the court, and after hearing all the evidence in the case the court doth find for the plaintiff; that the twenty-two bonds of Sullivan County, each for one thousand dollars, described in the garnishee's answer herein, are the property of the Burlington and Southwestern Railroad Company, and of the value of twenty-two thousand dollars, and it is therefore ordered, adjudged, and decreed that the said garnishee,
243 Warren McCullough, turn over forth with the twenty-two bonds in his possession and described in his answer to W. H. Brownlee, upon his giving bond to the State of Missouri in the sum of forty thousand dollars, to be approved by the judge of this court; that of the said bonds

said receiver, W. H. Brownlee, shall deliver the first twelve to the parties interpleading herein, Jos. Combs, Marion Cave, and B. F. Northcutt; that said receiver sell the remainder of said bonds for the highest price attainable, and out of the proceeds thereof he shall first pay the cost of the garnishee proceedings and allowances made to the garnishee for answering in said cause; next he shall pay Warren McCullough twenty-five hundred dollars, and then he shall apply the balance on the judgments in favor of G. D. Burgess, B. F. Northcutt, Marion Cave, Joseph Combs, and Cave & Prewitt pro rata in proportion to the various amounts thereof, and that said receiver report his proceedings herein, and that said garnishee be allowed seventy-five dollars for answering herein.

B. F. NORTHCUTT
vs.
THE BURLINGTON AND SOUTHWESTERN R. R. Company, Warren McCullough, garnishee.

244 Now, on this 10th day of November, 1876, this cause coming on to be heard upon the issues made between the plaintiff and this garnishee, Warren McCullough, and both parties appearing, waive a jury and submit the issues to the court, and after hearing all the evidence in the case the court doth find for the plaintiff; that the twenty-two bonds of Sullivan County, each for one thousand dollars, described in the garnishee's answer herein, are the property of the Burlington and Southwestern Railroad Company, and of the value of twenty-two thousand dollars, and it is therefore ordered, adjudged, and decreed that the said garnishee, Warren McCullough, turn over forthwith the twenty-two bonds in his possession and described in his answer to W. H. Brownlee, upon his giving bond to the State of Missouri in the sum of forty thousand dollars, to be approved by the judge of this court; that of the said bonds said receiver, W. H. Brownlee, shall deliver the first twelve to the parties interpleading herein, Jos. Combs, Marion Cave, and B. F. Northcutt; that the said receiver sell the remainder of said bonds for the highest price attainable, and out of the proceeds thereof he shall pay the cost of the garnishee proceedings and allowances made to the garnishee for answering in said causes; next he shall
245 pay to Warren McCullough twenty-five hundred dollars, then he shall apply the balance on the judgments of G. D. Burgess, B. F. Northcutt, Marion Cave, Joseph Combs, and Cave and Prewitt pro rata in proportion to the various amounts thereof, and that said receiver report his proceedings herein; that said garnishee be allowed seventy-five dollars for answering herein.

MARION CAVE AND HENRY C. PREWITT, P'L'FFS,
vs.
THE BURLINGTON & SOUTHWESTERN R. R. COMpany.

Now on this 11th day of November, 1876, this cause coming on to be heard on the issues made between the plaintiff and the garnishee, Warren McCullough, and parties appearing waive a jury and submit the issues to the court, and after hearing all the evidence in the case the court doth find for the plaintiff, that the twenty-two bonds of Sullivan County, each for one thousand dollars, described in the garnishee's answer herein, are the property of the Burlington and Southwestern Rail-

road Company, and of the value of twenty-two thousand dollars, and it is therefore ordered, adjudged and decreed that the said garnishee, Warren McCullough, turn over forthwith the twenty-two bonds in his
246 possession and described in his answer to Brownlee, upon his giving bond to the State of Missouri in the sum of forty thousand dollars, to be approved by the judge of this court. That of the said bonds the said receiver, W. H. Brownlee, shall deliver the first twelve to the parties interpleading herein, Jos. Combs, Marion Cave, and B. F. Northcutt. That said receiver sell the remainder of said bonds for the highest price obtainable, and out of the proceeds thereof he shall pay the costs of the garnishee proceedings and allowances made to the garnishee for answering in said causes, next he shall pay to Warren McCullough twenty-five hundred dollars, then he shall apply the balance on the judgments of G. D. Burgess, B. F. Northcutt, Marion Cave, Joseph Combs, and Cave and Prewitt pro rata in proportion to the various amounts thereof, and that said receiver report his proceedings herein; that said garnishee be allowed seventy-five dollars for answering herein.

MARION CAVE, PLAINTIFF,
vs.
THE BURLINGTON AND SOUTHWESTERN RAILroad Co., def'ts; Warren McCullough, garnishee.

Now on this 11th day of Nov., 1876, this cause coming on to be heard on the issues made between plaintiff and the garnishee, Warren
247 McCullough, and both parties appearing waive a jury and submit the issues to the court, and after hearing all the evidence in the cause the court doth find for the plaintiff that the twenty-two bonds of Sullivan County, each for one thousand dollars, described in the garnishee's answer herein, are the property of the Burlington and Southwestern Railroad Company, and of the value of twenty-two thousand dollars; and it is therefore ordered, adjudged and decreed that the said garnishee, Warren McCullough, turn over forthwith the twenty bonds in his possession, and described in his answer, to Wm. H. Brownlee on his giving bond to the State of Missouri in the sum of forty thousand dollars, to be approved by the judge of this court; that of the bonds of said receiver, Wm. H. Brownlee, he shall deliver the first twelve to the parties interpleading herein, Jos. Combs, Marion Cave and B. F. Northcutt; that the said receiver sell the remainder of said bonds for the highest price obtainable and out of the proceeds thereof he shall pay first the cost of the garnishee proceedings and allowance made to the garnishee for answering in said causes, next he shall pay to Warren McCullough twenty-five hundred dollars, then he shall apply the balance on the judgment in favor of G. D. Burgess, B. F. Northcutt, Marion
248 Cave, Joseph Combs, and Cave and Prewitt pro rata in proportion to the various amounts thereof, and that the said receiver report his proceedings herein; that said garnishee be allowed seventy-five dollars for answering herein.

And the said judgment on the interpleas of Northcutt, Combs and Cave is in words and figures following, to wit:

FRIDAY, *Nov. 10th*, 1876.

G. D. BURGESS
vs.
WARREN MCCULLOUGH, GARNISHEE. } Judge. on inter.

Now on this day comes the parties by their respective attorneys, A.

W. Mullins, esq., for the interpleaders, B. F. Northcutt, Jos. Combs and Marion Cave, and C. L. Dobson, esq., for the plaintiff, G. D. Burgess, and the issues joined by the petition of said interpleaders and the said plaintiff's answer thereto coming on to be heard, and neither party demanding a jury, but waiving the same, said cause is submitted to the court for trial; and the court after hearing all the evidence offered and the argument of counsel, and having considered the same, finds that the twelve (12) bonds mentioned in the said interpleaders' petition, and now in the possession of Warren McCullough, the garnishee
249 in said cause of Gavon D. Burgess against The Burlington and Southwestern Railway Company are the property of said interpleaders. It is therefore considered and adjudged by the court that B. F. Northcutt, Joseph Combs and Marion Cave have and recover, and that said Warren McCullough forthwith deliver to them, said twelve (12) bonds, of the denomination of one thousand dollars each, issued by Sullivan County to the St. Joseph and Iowa Railroad Company, and numbered from 189 to 200, both inclusive, and that said interpleaders pay the costs incurred herein.

The said copy of the bond of W. H. Brownlee, as receiver of said bonds, in said Linn County court of common pleas, is in words and figures following, to wit:

Know all men by these presents that I, W. H. Brownlee, as principal, and W. S. Snow and Hamilton De Graw, as securities, acknowledge ourselves to owe and be indebted to the State of Missouri in the sum of forty thousand dollars, for the payment whereof we bind ourselves, our heirs and assigns, jointly and severally, by these presents, sealed with our seals and dated this 13th day of November, 1876.

250 The conditions of this bond is this: That whereas said Wm. H. Brownlee has been, by the Linn County court of common pleas, appointed receiver in several suits by attachment against the Burlington and Southwestern Railroad Company: Now if the said Brownlee shall pay over all money and account for all property which may come to his hands by virtue of said appointment, at such times and in such manner as the court may direct, then this bond shall be void, else to remain in full force and effect.

W. H. BROWNLEE. [SEAL.]
W. S. SNOW. [SEAL.]
H. DE GRAW. [SEAL.]

Approved this 13th day of Nov., 1876.

THOS. WHITAKER,
Judge of Linn County Court of Common Pleas.

The said exception of the receiver to the answers of the defendants is in words and figures following, to wit:

Petition of E. Smith, receiver.

In U. S. circuit court, western district Missouri.

FARMERS' LOAN & TRUST CO.
vs.
BURLINGTON & S. W. R. W. CO. ET ALS.

251 Said Smith excepts to the answers of the several respondents

filed herein because the same show no sufficient answer to the rule on them, nor any reason in law or fact why the orders prayed for against said several respondents should not be granted with the injunctions made perpetual.

ELIJAH SMITH, *Rec.*,
By L. T. HATFIELD,
Attorney.

And the said stipulation as to the facts, so filed as aforesaid, is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN & TRUST CO., PLAINTIFF, *against* THE BURLINGTON AND SOUTHWESTERN RAILway Company et als., def'ts. } No. 297.

On petition of Elijah Smith, receiver of said defendant railway, against Ira Sears, defendant, impleaded in this cause on the 10th day of Nov., 1876, before the Hon. Arnold Krekle, judge at chambers, the following agreed state of facts are submitted to the court here:

1st. That Ira Sears, on the 7th day of April, 1874, in the circuit court of Sullivan County, Missouri, recovered a judgment against the St. Joseph and Iowa Railroad Company for the sum of two hundred and eighty-two $\frac{87}{100}$ dollars. That the said judgment was recovered as damages and costs for the condemnation of a right of way over land owned by said Ira Sears in the name of the said St. Joseph and Iowa Railroad Company, for the use of the Linneus Branch of the Burlington and Southwestern Railway Company, and the Burlington and Southwestern Railroad Company, one of the defendants in this suit. That said Burlington and Southwestern Railway is now located and operating its line over and along the aforesaid condemned right of way. That said judgment has never been paid or satisfied. That on the 10th day of October, 1876, an execution was issued on said judgment, and on said last day Warren McCullough was summoned as garnishee, as the holder of certain Sullivan County bonds, to appear and answer at the April term, 1877, of the Sullivan circuit court.

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And the said court, upon the foregoing statement, is to render judgment according to the law and equity of the case, the said receiver saving and reserving to himself all rights and benefits of exceptions to the proceedings of condemnation of said right of way as aforesaid; the said Ira Sears saving and reserving to himself all benefits and rights of exception to the jurisdiction of this court in this proceeding, and as well also to the insufficiency of the pleading filed herein by Elijah Smith, receiver, on the 10th day of Nov., 1876. That the following other cases are similar, and the foregoing statement, with the reservation and exceptions is to be taken as to them and similar judgments and orders in regards thereto, to wit: E. E. Frazier, Lucinda Head, John Hollon, Joseph W. Mairs, John Mairs, James T. Reynolds.

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L. T. HATFIELD,
Solicitor for Elijah Smith.
JNO. P. BUTLER,
Solicitor for

That on the 17th day of Oct., 1876, G. D. Burgess brought suit in the circuit court of Sullivan County, Missouri, vs. The Burlington and Southwestern Railway Company for legal services, by attachment, seeking to recover the sum of $500. That on said day Warren McCullough was summoned as a garnishee in said cause, as the holder of certain Sullivan Co. bonds, and is required to answer at the April term, 1877, of the Sullivan circuit court. That the above is a statement of the facts in said case, and is submitted with the same conditions,
254 limitations, and restrictions as the cases first mentioned.

JNO. P. BUTLER,
Solicitor for B.

And afterwards, to wit, at the said November term of said court, and on the 22 day of November, A. D. 1876, the following other proceedings were entered of record, to wit:

FARMERS' LOAN AND TRUST COMPANY
vs.
BURLINGTON & SOUTHWESTERN RAILWAY CO. et al.

This day again come the parties, the receiver by his solicitors and the defendants by their solicitors, and thereupon the said receiver files an amended petition herein, and defendants Boner & McCullough file answer thereto, and the receiver files reply, and there is also filed two stipulations as to the evidence herein.

And the said amended petition of receiver is in words and figures following, to wit:

Amendment to petition of receiver for order on W. McCullough et al.

U. S. circuit court, west. district Missouri. Equity.

FARMERS' LOAN & TRUST CO.
vs.
BURLINGTON & SOUTHWESTERN RAILWAY Company et al. } 297.

Said receiver amends the petition heretofore filed herein, by leave of court, and says that as it appears from the answer of said
255 McCullough, trustee, and J. Q. Boner, filed herein, that before the service of the process herein on them the said McCullough sold 18 of the bonds in controversy, and paid over the proceeds thereof, amounting to $13,296, to said Boner, as plaintiff in one of the judgments of said circuit court of Sullivan County, and as assignee of the judgments of Ash and Stanley. Petitioners says that said acts were wrongfull, and that they ought to be now required to pay over said proceeds to said receiver or procure and return said bonds, and he asks for an order on them severally, requiring them so to do, and prays the court to adjudge him entitled to the said property or its value, and for such other relief as he may be entitled to under the circumstances.

P. HENRY SMYTHE &
L. T. HATFIELD,
For Petitioner.

And the said answer of Boner and McCullough to the said amended petition of the receiver is in words and figures following, to wit:

Amended petition of Elijah Smith, receiver, filed Nov. 22, 1876, against John Q. Boner, Warren McCullough.

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN AND TRUST CO., PL'FF.,
against
THE BURLINGTON & SOUTHWESTERN R'Y CO., def't. } No. 297.

256 Defendants McCullough & Boner, for answer to the amended petition of said Smith, filed Nov. 22, 1876, says that they and each of them, jointly and severally, deny each and every allegation in said Smith's amended petition contained, or any knowledge or information thereof sufficient to form a belief; denies that said Smith is entitled to the relief prayed, or any relief whatever.

JOHN P. BUTLER,
Solicitor for Defendants Boner & McCullough.

And the said reply of the receiver to said answer is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN & TRUST CO.
vs.
THE BURLINGTON & SOUTHWESTERN R'Y CO. et al. } 297.

Elijah Smith, receiver of the Burlington and Southwestern Railway Co., under this court's orders, for reply to the answer of respondents to rules issued by Hon. A. Krekle, associate judge, at chambers, in vacation, returnable Oct. 25th, 1876, and Nov. 21st, 1876, denies that he had notice of the garnishments of defendants, or that he should have
257 interpleaded in the respective courts and proceedings; that no authority of this court was ever obtained by either of the parties to prosecute said proceedings in the State courts, and he was not bound either by law or the orders of this court to interplead in said proceedings.

ELIJAH SMITH,
Receiver,
By L. T. HATFIELD,
Attorney.

And the stipulation as to facts first named is in words and figures following, to wit:

It is stipulated between L. T. Hatfield, solicitor for Elijah Smith, and John P. Butler, one of the solicitors for J. Q. Boner, J. M. Stanley, and Edmund Ash, and also for W. McCullough, that the record certified by H. T. McClanahan, clerk of the circuit court of Sullivan County, Mo., in case of E. Ash vs. B. &. S. W. R'y Co., and E. Ash vs. B. & S. W. R'y Co., W. M. McCullough, garnishee, shall be taken as the record in the case of J. Q. Boner and J. M. Stanley against the same defendant;

that is to say, that as to the cases of Boner and Stanley, the same proceedings have been had at the same time and at the same term and only differ in amount of claims and judgments, and that the same judgment shall be rendered in the cases of Boner and Stanley as in the case of Ash.

And it further agreed and understood that the affidavit of War-
258 ren McCullough is to be taken in each of the cases of Ash, Boner, and Stanley as the deposition of said McCullough duly and regularly taken, as also the affidavit of L. T. Hatfield is to be likewise taken.

J. P. BUTLER.
L. T. HATFIELD.

(The transcript referred to in the foregoing stipulation will be found recorded on page 157 of this transcript.)

U. S. circuit court for the western dist. of Mo.

FARMERS' LOAN AND TRUST CO.
against
THE BURLINGTON & SOUTHWESTERN RAILWAY Company et al., defendants.

In the matter of petition of Elijah Smith, receiver.

It is hereby stipulated and agreed between the attorneys signing this stipulation that the record and statements contained in the transcript in the case of Joseph Combs vs. Warren McCullough, garnishee of said Burlington and Southwestern Railway Company, now on file in this case, shall be the only record of the proceedings in the Linn County court of common pleas required. That said attorneys, representing the receiver, hereby waive the filing of complete records in the cases of G. D. Burgess,
of Marion Cave, of B. F. Northcutt, and of Cave and Prewitt
259 against said railway and said McCullough in said common pleas court, and that the statements of the clerk of said common pleas court as to the amounts, dates, etc., of said several judgments shall be taken as correct and treated as complete transcripts of said cases. It is further agreed that *that* the affidavits of Warren McCullough and L. T. Hatfield, esq., on file in this cause, shall be taken and treated as depositions of said parties regularly and duly taken.

C. L. DOBSON,
Solicitor for the Linn Co. Creditors who have answered.
L. T. HATFIELD,
Solicitor for Receiver.

And the said transcript in the case of Joseph Combs vs. The Burlington and Southwestern Railway Company is in words and figures following, to wit:

A transcript of the records and proceedings had in the Linn County court of common pleas in the cases of Joseph Combs vs. The Burlington and S. W. R. R. Co.

Be it remembered that the said plaintiff, Joseph Combs, on the 16th day of June, 1874, filed in the office of the clerk of said court his petition against the said railroad, which is as follows:

In the Linn County court of common pleas, Aug. term, 1874.

260 JOSEPH COMBS, PLAINTIFF,
vs.
THE BURLINGTON & SOUTHWESTERN RAILROAD Company, def't.

Plaintiff states that the defendant a corporation duly incorporated by and under the laws of the State' of Iowa and Missouri, and that as such corporation it owes him the sum of two thousand eight hundred and thirteen dollars and twenty-five cents for and on account of services rendered for it at its special instance and request, commencing on the first day of June, 1871, and ending on the 1st day of September, 1873, twenty-seven months, at one hundred dollars per month, which sum said services were reasonable worth.

Wherefore plaintiff prays judgment for said sum of two thousand eight hundred and thirteen dollars and twenty-five cents, together with six per cent. interest per annum thereon from the first day of Sept., 1873.

G. D. BURGESS,
Att'y for Pl'ff.

At same time plaintiff filed affidavit for attachment, which is as follows:

In the Linn County court of common pleas, August term, 1874.

JOSEPH COMBS, PLAINTIFF,
vs.
THE BURLINGTON AND SOUTHWESTERN RAILroad Company, defendant.

261 This affiant states that the plaintiff in the above-entitled cause has a just demand against the defendant thereon now due, and the amount which this affiant believes the plaintiff ought to recover, after allowing all just credits and set offs, is two thousand eight hundred and thirteen dollars and twenty-five cents, and that this affiant has good reasons to believe and does believe that the defendant is a corporation whose chief office or place of business is out of this State.

JOSEPH COMBS.

Subscribed and sworn to before me on this the 16th day of June, 1874.

In witness whereof I, the undersigned, a notary public within and for Linn Co., Mo., have hereunto set my hand and official seal.

[SEAL.] THOS. H. FLOOD,
Notary Public.

At same term plaintiff filed his bond for attachment, as follows:

In the Linn County court of common pleas, Aug. term, 1874.

JOSEPH COMBS, PLAINTIFF,
vs.
THE BURLINGTON AND SOUTHWESTERN RAILRoad Company, defendant.

We, Joseph Combs, as principal, and G. D. Burgess and Thomas H.

Flood, as securities, acknowledge ourselves to be indebted to the
262 State of Missouri in the sum of eight thousand dollars, for the payment of which we bind ourselves, our heirs, executors, and administrators.

The condition of the above obligation is, that whereas Joseph Combs, as plaintiff, is about to commence a suit by attachment, in the Linn County court of common pleas, against the Burlington and Southwestern Railroad Company, defendant, returnable to the next term thereof, wherein the sum sworn to is two thousand eight hundred and thirteen dollars and twenty-five cents: Now, if the said plaintiff shall prosecute his action without delay and with effect, refund all sums of money that may be adjudged to be paid and refunded to the defendant or found to have been received by the plaintiff and not justly due to him, and pay all damages that may accrue to any defendant or garnishee by reason of the attachment or any process or proceeding in the suit or by reason of any judgment or process thereon, then this obligation to be void, otherwise to remain in full force.

Witness our hands and seals this 16th day of June, 1874.

JOSEPH COMBS. [SEAL.]
G. D. BURGESS. [SEAL.]
THOS. H. FLOOD. [SEAL.]

Approved June 16, 1874.

C. L. DOBSON,
Judge & Clerk.

Whereupon the clerk of said court, on the 16th day of June, 1874, issued the following writ of attachment:

263 STATE OF MISSOURI,
County of Linn, ss:

The State of Missouri to the sheriff of Linn County, greeting:

We command you to attach the Burlington and Southwestern Railroad Company, by all and singular its lands and tenements, goods, chattels, moneys, credits, evidences of debt and effects, or so much thereof as may be sufficient to secure the sum of one thousand eight hundred and thirteen dollars and twenty-five cents, with interest and costs of suit, in whose hands or possession soever the same may be found, and that you summon the said Burlington and Southwestern Railroad Company to be and appear at the next term of the Linn County court of common pleas, before the judge thereof, on the first day of said term, to be holden at the town of Brookfield, Linn County and State of Missouri, on the first Monday of August next, and then and there to answer the complaint of Joseph Combs, as set forth in the next petition; and also that you summon all and every person in whose hands or possession soever any personal property, rights, goods, chattels, moneys, credits, evidences of debt or effects may be found, or who may be named by the plaintiff or his attorney as garnishees, and particularly Warren McCullough, that he be and appear before the
264 judge of our said court on the first day of the term aforesaid, then and there to answer unto what may be objected against them, and have you then and there this writ.

Witness C. L. Dobson, clerk of our said court of common pleas, and the seal thereof hereto affixed, at the court house in the town of Brookfield, this 16th day of June, A. D. 1874.

[SEAL.] C. L. DOBSON, *Clerk.*

Afterwards, at the September adjourned term (1874) of our said , and on the 11th day of said month, the following proceedings were had:

JOSEPH COMBS, P.,
vs.
B. & S. W. R. R. Co.

And now on this day comes the defendant by A. W. Mullins, esq., and enters its voluntary appearance herein; and it is ordered by the court here that said defendant have leave to answer by the first day of the next term of this court, and this cause is continued.

At the same term, and on the 7th day of Sept., 1874, plaintiff filed interrogatories to garnishee W. McCullough, which are as follows:

In the Linn County court of common pleas, Aug. term, 1874.

JOSEPH COMBS, PLAINTIFF,
vs.
B. & S. W. R. R. Co., DEFENDANT, AND WHEREIN Warren McCullough has been summoned
265 as garnishee.

Interrogatories to Warren McCullough, garnishee, to be answered under oath.

First. At the time of the service of the garnishment on you in this court, had you in your possession or under your control any money, property or effects of the defendant? If so, state what property, how much, and of what value, and what money or effect.

Second. At what time of the service of the garnishment did you owe the defendant any money, or do you owe it any now; if so, how much, on what account, and when did it become due; if not yet due, when will it become due?

G. D. BURGESS,
Att'y for Pl'ff.

Afterwards, at the Nov. term, 1874, of our said court, and on the first day thereof, the defendant filed answer as follows:

In the Linn County court of common pleas, Nov. term, 1874.

JOSEPH COMBS, PLAINTIFF,
vs.
THE BURLINGTON AND SOUTHWESTERN RAILroad Company, defendant.

The defendant, the Burlington and Southwestern Railroad Company, for its answer to the plaintiff's petition, denies that it owes the plaintiff the sum of two thousand eight hundred and thirteen dollars and
266 twenty-five cents, or any part thereof, or any sum whatever, for or on account of services rendered for defendant at its special instance or request, or otherwise, commencing on the first day of June, 1871, and ending on the 1st day of September, 1873, twenty-seven months, or any number of months or period of time; defendant denies that the plaintiff ever rendered any services whatever for defendant.

Defendant says that it is not indebted to the plaintiff in the sum of two thousand eight hundred and thirteen dollars and twenty-five cents, or any part thereof, on any account whatever.

A. W. MULLINS,
Att'y for Def'ts.

Afterwards, and at the same term, the court made the following order:

OSEPH COMBS, COM.,
vs.
B. & S. W. R. R. CO., DEF.

It is herein ordered by the court that this cause be continued.

Afterwards, and at the February term, 1875, of our said court, and on the 5th day of said month, the following proceedings was had:

JOSEPH COMBS
vs.
THE BURLINGTON AND SOUTHWESTERN RAILroad Co.

This cause coming on to be heard, comes the parties and do waive their right to a trial by jury and submit the issues joined to
267 the court, who, after hearing the evidence in the cause, and being fully informed in the premises, doth find for plaintiff in the sum of two thousand eight hundred and twenty-five dollars. It is therefore ordered and adjudged by the court here that the plaintiff do have and recover of defendant the said sum of two thousand eight hundred and twenty-five dollars as his debt and damages, together with his costs in this behalf expended, and that execution issue therefor.

Afterwards, at each of the regular terms of our said court up to the November term, 1876, the proceedings against W. McCullough, garnishee, were continued with leave to answer.

On the 10th day of Nov., 1876, at the regular Nov. term of our said court, the following interpleader was filed, to wit:

In the Linn Co. court of common pleas, Nov. term, 1876.

JOSEPH COMBS, PLAINTIFF,
vs.
THE BURLINGTON AND SOUTHWESTERN RAILroad Company, defendant; Warren McCullough, garnishee.

Now, at this day, comes Benjamin F. Northcutt, Joseph Combs and Marion Cave, and file this their interplea in the cause of said
268 Joseph Combs, plaintiff, against said Burlington and Southwestern Railroad Company, defendant, and wherein the said Warren McCullough was summoned as garnishee, and say that heretofore, to wit, on the day of April, 1871, the said Northcutt, Combs and Cave entered into an agreement or contract in writing with the said Burlington and Southwestern Railroad Company (filed herewith), whereby it is provided that if said Northcutt, Combs and Cave should obtain collectible and responsible subscription, either from individuals,

counties, townships, &c., to the St. Joseph and Iowa Railroad Company, to be used in the construction of the Central North Missouri branch of said railroad, which said last named line of railroad it was contemplated should be built by said Burlington and Southwestern Railroad Company, and become by consolidation or purchase, a part of said company's line of railway, and that said subscriptions should be obtained for the use and benefit of said Burlington and Southwestern Railway Company, to be used and applied in the construction of said branch railway, afterwards known as the Linneus branch of the Burlington & Southwestern Railway, and that if deemed advisable and expedient so to do said last named com-
269 pany would accept said subscriptions and build said branch road, and that of all such subscriptions so obtained by said Northcutt, Combs and Cave, ninety per cent. thereof should be accepted and taken by said Burlington and Southwestern Railroad Company, and the re-remainder ten per cent. thereof should belong to said Northcutt, Combs and Cave, as full compensation to them for services rendered and moneys expended in procuring said subscriptions, and said ninety per cent. and ten per cent. respectively should be accepted by said parties out of whatever should be given or paid, whether of cash or bonds, in satisfaction of such subscription. And said interpleaders further state that, heretofore, to wit, on the 1st day of May, 1871, they obtained from the county of Sullivan, in the State of Missouri, a subscription to the capital stock of said St. Joseph and Iowa Railroad Company, for the use and benefit of said Burlington and Southwestern Railroad Company to aid in the construction of the said Branch Railroad through the county of Sullivan, to the amount of two hundred thousand dollars, to be paid in the bonds of said county, and which said bonds were duly issued and placed in the hands of Warren McCullough, the trustee named
270 in the order of subscription made by the said county court of said county to said railroad company and the garnishee in the cause aforesaid; and they further state that said Burlington and Southwestern Railroad Company accepted said subscription, upon the terms, conditions, and stipulations contained in the order of subscription made by the county court of said Sullivan County for and on behalf of said county and upon the terms of the contract filed herewith, and undertook the construction of said Branch Railroad through the said county of Sullivan, which said Branch Railroad was consolidated with and became a part of said Burlington and Southwestern Railroad; that said bonds were and are of the denomination of $1,000 each, and that by the terms of the subscription aforesaid said bonds were to be delivered by said trustee by installments of $40,000, as the work of construction of said railway through said county progressed, and upon the completion of the same through said county the last installment of $40,000 should be delivered. They further state that said railway company is now completed through said county, and that said Warren McCullough, as such trustee, has heretofore delivered up one hundred
271 and sixty of said bonds, amounting to one hundred and sixty thousand dollars, and of which these interpleaders have received sight of said bonds, amounting to $8,000, and state there are yet in the hands of said McCullough twelve of said remaining bonds, amounting to $12,000, belonging to these interpleaders, under the control herein set forth and filed herewith. And these interpleaders further state that subsequent to the execution of said contract and the making of said subscription, but prior to the completion of said railway through said Sullivan County, the plaintiff herein and divers other persons obtained

judgment against said Burlington and Southwestern Railroad Company for large amounts, and the plaintiff herein and said other parties have summoned said McCullough, as garnishee of said causes, attaching in his hands the whole of said remaining bonds now held by him, including the said twelve bonds now due and belonging to these interpleaders.

These interpleaders further state that said railway company is now insolvent, and that the whole of said bonds would be insufficient to pay off the claims of said parties wherein said McCullough has been garnisheed.

272 Wherefore these interpleaders pray judgment that said Warren McCullough be required to deliver to them twelve of said bonds, so held by him as aforesaid, and for all proper relief.

A. W. MULLINS,
Att'y for said Northcutt, Combs and Cave.

B. F. Northcutt, one of the said interpleaders, makes oath and says the matters and things as herein set forth are true, to the best of his knowledge and belief.

B. F. NORTHCUTT.

Subscribed and sworn to before me this 10th day of Nov., 1876.
THOS WHITAKER, *Clerk.*

At the same time the plaintiff filed his answer to the interplea, which is as follows:

In the matter of the interplea of Joseph Combs, Marion Cave, and B. F. Northcutt, in said cause.

JOSEPH COMBS, PLAINTIFF,
vs.
THE BURLINGTON & SOUTHWESTERN RAILroad Company, defendant, and Warren McCullough, garnishee.

Now comes the plaintiff, and for answer to the interplea filed by said parties says he denies each and every material allegation therein contained.

C. L. DOBSON,
Att'y for Pl'iff.

Whereupon the court rendered the following judgment, to wit:

273 JOSEPH COMBS
vs.
THE BURLINGTON & SOUTHWESTERN RAILroad Company, defendant; Warren McCullough, garnishee.

Now, on this 10th day of November, 1876, comes the parties by their respective attorneys, A. W. Mullins, esq., for the interpleaders, B. F. Northcott, Joseph Combs, and Marion Cave, and C. L. Dobson, esq., for the plaintiff; and the issues joined by the petition of said interpleaders and the said plaintiff's answer thereto coming on to be heard, and neither party demanding a jury, but waiving the same, said cause is submitted to the court for trial; and the court, after hearing all the evidence

offered and the argument of the counsel, and having duly considered the same, finds that the twelve bonds mentioned in the said interpleaders' petition, and now in the possession of said Warren McCullough, the garnishee in said cause of Joseph Combs vs. The Burlington and Southwestern Railway Company, is the property of said interpleaders. It is therefore considered and adjudged by the court, that said Benjamin F. Northcott, Jos. Combs, and Marion Cave have and recover, and
274 that said Warren McCullough forthwith deliver to them said twelve bonds, of the denomination of one thousand dollars each, issued by Sullivan County to the St. Joseph and Iowa Railroad Company, and numbered from 189 to 200, both inclusive, and that said interpleaders pay the costs incurred herein.

Afterwards comes Warren McCullough, garnishee, and files his answer to the interrogatories filed herein, and which is as follows:

In the Linn Co. court of common pleas, Nov. term, 1876.

JOSEPH COMBS, PLAINTIFF,
vs.
THE BURLINGTON & SOUTHWESTERN RAILroad Co., def't; W. McCullough, garnishee.

Now comes the said garnishee, and for his answer, amended by leave of court, to the interrogatories exhibited herein, states that he is not now, nor was he at the time of the service of the garnishment upon him, nor has he since been indebted to said defendant in any sum whatever.

In answer to the second interrogatory he says that at the time of the service of the garnishment upon him he did not have in his possession or under his control any money, property, or effects belonging to said defendant, except as hereinafter stated; that, on the 1st day of
275 May, 1871, the county court of Sullivan County in this State two hundred thousand dollars to the capital stock of the Iowa and St. Joseph Railroad Company for the use of the Linneus Branch thereof, which subscription was to be paid in bonds of the county of the denomination of one thousand each at twenty years at seven per cent. interest; that by the terms and conditions of said subscription said bonds were to be issued by said county court and placed in the hands of this garnishee as trustee to hold until the said company should fulfil and carry out each and all of the conditions in said order of said subscription contained. He further states that said order prescribed that said bonds were to be delivered to said company as the work progressed, for the purpose of building and finishing said railroad through said county of Sullivan, as follows: When one-fourth of the work of the completing of said road through said county was completed and paid for, said trustee was to deliver to said company forty thousand dollars in said bonds, and when one-half of the work of completing of said road through said county was completed and paid for he was to deliver another installment of forty thous-
276 and dollars, and so on till the road was completed and paid for, when the last installment of forty thousand dollars was to be delivered; provided said road should be completed, equipped, and trains running thereon within twenty-one months from the date of said subscription; he further states that such subscription was so made for the purpose of defraying the expenses of the construction of said road through said Sullivan County, and said bonds placed in his hands as a

fund solely applicable to that purpose; he further states, that in compliance with the terms of said trust and the conditions thereof, he, before the service of the process of garnishment in this suit, *he* delivered to said company entitled thereto all of said bonds except the last installment of forty thousand dollars. He further states, that afterwards the Burlington and Southwestern Railway Company by some sale or assignment, the particulars of which are to this garnishee unknown, succeeded to the rights and property of said railroad company. He further states, that neither the Iowa and St. Joseph Railroad Company nor the Linneus Branch thereof, nor the Burlington and Southwestern Railway Company, ever completed said road through Sullivan Coun-
277 ty, nor did any of them pay for said completion. He further states that said Burlington and Southwestern Railroad Company, long prior to the commencement of the suit upon which this garnishment is made, become indebted and issued its bonds to the amount of * * * * dollars, and for the purpose of securing the same executed a mortgage conveying all of its property, real, personal, and mixed, including this branch road, together with all of its property and franchises, which mortgage was duly recorded. That the holders of the bonds so secured, to wit, The Farmers' Loan & Trust Company, a corporation organized under the laws of the State of New York, and a citizen of that State, commenced a suit against the said Burlington and Southwestern Railroad Company to foreclose the said mortgage in the circuit court of the United States for the western district of Missouri, and that thereupon one Elijah Smith was by said court appointed receiver, to take full and complete charge and control of all the property, real, personal, and mixed, belonging to said Burlington and Southwestern Railroad Company,
278 and to run and operate the same. He further states, that at the time said receiver was appointed and took charge of the assets of said company, there was a gap of about twenty-three miles of said road unfinished through said county of Sullivan, and the twenty-one months given for the completion of said road had then expired; he further states, that said receiver by authority and order of the said circuit court of the United States applied to the county court of Sullivan County to arrange for the completion of said road, and thereupon the said county court authorized said receiver to complete said road and authorized this trustee upon completion thereof on or before the 1st day of October, 1876, to deliver said bonds to said receiver; that thereupon, relying upon the forty thousand dollars in bonds, said receiver proceeded to and did complete said road through said county within the time limited and now claims the bonds in the hands of this trustee. He further states that the plaintiff in this case was joined as a party defendant in the proceedings to foreclose said mortgage and was duly notified thereof, and was a party to all the proceedings in which said receiver was appointed. He further states, that said foreclosure proceeding is still pending in
279 the United States court, and that on the 11th day of October, 1876, the said receiver, Elijah Smith, procurred from the judge of said circuit court of the United States an order which was duly served upon this garnishee, ordering and directing him to pay over and deliver all of said bonds in his possession to said receiver, and enjoining and restraining him from delivering any of said bonds or their proceeds to any other person. This garnishee further states that said bonds constituted a special fund to be used solely in the construction of said road through Sullivan County; that relying upon said fund various parties in said county did work and labor for said company in the construction of said road through said county to the amount of about eighteen thousand

dollars, upon which judgment was obtained, and this defendant garnishee was required to answer thereto in the circuit court of Sullivan County; that of these garnishments * * * * of them was prior to the service of the garnishment in this case; that the names of said creditors are as follows: ; that upon said garnishment this trustee answered, and at the last term of the circuit court of said Sullivan County an order was made by said circuit court
280 ordering him to deliver into court a sufficient amount of said bonds to pay said judgment. He further states that at the present term of this court an interplea was filed by Joseph Combs et al., claiming twelve of the one thousand dollar bonds in the possession of this garnishee, upon which plea issue was joined and a trial had, and judgment rendered in favor of said interpleaders, adjudging them to be the owners of twelve of the one thousand dollar bonds so held by him. Said garnishee futher states that in holding and disbursing said two hundred thousand dollars, he was put to great trouble, expense, and litigation, for all of which he has received nothing, although promised remuneration by said company at the rate of two and one-half per cent. upon the sum held by him; that his services and expenses were worth five thousand dolars, and that said company is now insolvent. He further states that he is not acting in collusion with any of the various claimants but only for his own protection, and that he has no interest in said bonds except as above stated.

Wherefore he asks this court to order all parties interested as
281 hereinbefore set out to appear in this court and interplead and have their rights adjusted and determined, and that the proper process may issue therefor, and he asks the court to protect his interest and rights.

W. McCULLOUGH.

Subscribed and sworn to this 10th day of Nov., 1876.

THOMAS WHITAKER, *Clerk.*

At same time plaintiff filed his replication to the answer of garnishee.

In the Linn Co. court of common pleas, Nov. term, 1876.

JOSEPH COMBS, PLAINTIFF,
vs.
THE BURLINGTON & SOUTHWESTERN RAILroad Company, defendant, Warren McCullough, garnishee.

Comes now the plaintiff and for his reply to the answer of the garnishee filed herein, denies each and every material allegation therein contained.

C. L. DOBSON,
Att'y for Pl'ff.

Whereupon the court made the following order, to wit:

JOSEPH COMBS
vs.
THE BURLINGTON AND SOUTHWESTERN RAILroad Company, defendant, Warren McCullough, garnishee.

Now this cause coming on to be heard, the garnishee, Warren Mc-

Cullough, upon his answer asked the court to cause all parties
282 claiming conflicting interest in said bonds to appear and interplead, and that proper process might issue therefor, which coming on to be heard, the court refused the prayer for an order of interpleader.

At same time the following proceeding was had, to wit:

JOSEPH COMBS
vs.
THE BURLINGTON AND SOUTHWESTERN RAILroad Co., Warren McCullough, garnishee.

Now on this 10th day of November, 1876, this cause coming on to be heard on the issues made between the plaintiff and the garnishee, Warren McCullough, and both parties appearing waive a jury and submit the issues to the court, and after hearing all the evidence in the cause the court doth find for the plaintiff, and it is therefore ordered, adjudged, and decreed that the said garnishee, Warren McCullough, turn over the 22 bonds in his possession and described in his answer to W. H. Brownlee upon his giving bond to the State of Missouri, in the sum of forty thousand dollars, to be approved by the judge of this court; that of said bonds said W. H. Brownlee shall deliver the first twelve
283 to the parties interpleading herein, Jos. Combs, Marion Cave, and and B. F. Northcott; that the said receiver sell the remainder of said bonds for the highest price obtainable, and out of the proceeds thereof he shall first pay the costs of the garnishee proceedings and allowances made to the garnishee for answering in said causes, next he shall pay to Warren McCullough twenty-five hundred dollars, then he shall apply the balance on the judgments in favor of G. D. Burgess, B. F. Northcott, Marion Cave, Joseph Combs, and Cave & Prewitt, pro rata in proportion to the various amounts thereof, and that the said receiver report his proceedings herein; that said garnishee be allowed seventy-five dollars for answering herein.

Comes now on the 13th day of Nov., 1876, W. H. Brownlee, receiver, and files his bond, which said bond is as follows:

Know all men by these presents that I, W. H. Brownlee as principal, and Hamilton De Graw and W. T. Snow are securities, acknowledge ourselves to owe and be indebted to the State of Missouri, in the sum of forty thousand dollars, for the payment whereof, we bind ourselves, our heirs and assigns jointly and severeally by these presents,
284 sealed with our seals, and dated this 13th day of November, 1876.

The condition of this bond is that, whereas the said W. H. Brownlee has been by the Linn County court of common pleas appointed receiver in several suits by attachment against the Burlington and Southwestern R. R.: Now, if said Brownlee shall pay over all money and account for all property which may come to his hands by reason of such appointment at such time and in such manner as the court may direct, then this bond shall be void; else to remain in full force and effect.

W. H. BROWNLEE. [L. S.]
W. T. SNOW. [L. S.]
H. DE GRAW. [L. S.]

Approved this 13th day of Nov., 1876.

THOS. WHITAKER,
Judge Linn Co. Court Common Pleas.

The suits of G. D. Burgess, M. Cave, B. F. Northcott, and Cave and Prewitt were commenced June 16th, 1874.

Writs of attachment were not served.

Defendant and garnishee herein, Warren McCullough, entered voluntary appearance.

Date of judgment			Burgess	vs. B. & S. W.,		Nov. 6th, 1875.
"	"		Cave	"	" "	Feb. 5th, 1875.
"	"	"	Northcott	"	" "	Dec. 29, 1874.
"	"	"	Cave & Prewitt	"	" "	Nov. 6, 1875.
Amount Burgess				"	" "	$1,100.

Amount Northcott vs. B. & S. W., $4,050.

285 Amount Cave & Prewitt vs. B. & S. W., $3,111.13.

" " " " " $2,925.

STATE OF MISSOURI,
County of Linn, ss:

I, Thomas Whitaker, judge and clerk of the Linn County court of common pleas, do hereby certify that the above and foregoing is a complete transcript of all the record and proceedings had in our said court in the cause therein stated as fully as the same are on file and of record in my office; that the statement immediately preceding this certificate of the dates of commencement of the various suits mentioned and the amounts of the respective judgments therein are all true as taken from the papers and record in my office.

Witness my hand and the seal of said court at office in Brookfield, Mo., this 18th day of November, A. D. 1876.

[SEAL.] THOMAS WHITAKER,
Judge & Clerk.

And the affidavit of Warren McCullough is in words and figures following, to wit:

STATE OF MISSOURI,
County of Cole, ss:

In the circuit court of the United States for the western district of Missouri. In equity.

286 THE FARMERS' LOAN & TRUST CO., plaintiff, *against* THE BURLINGTON & SOUTHWESTERN RAILWAY CO. et al., def'ts. } No. 297.

In the matter of the petition of Elijah Smith, receiver.

This affiant, Warren McCullough, one of the defendants in the above cause and trustee of the Sullivan County bonds in controversy in this cause, being first duly sworn, on his oath states that on or about the 26th day of September, 1876, prior to the completion of the gap in said railway in Sullivan County, he, affiant, was asked in said Sullivan County by Elijah Smith, receiver in the above entitled cause, if he, affiant, would deliver the 40 one thousand dollar bonds of Sullivan County then in his hands as trustee to him, the said Smith, upon the completion of said railway through said Sullivan County as required by the orders of the Sullivan County court; that affiant then and there re-

plied to said Smith that he, affiant, could not then tell; that the said bonds were attached in his hands by creditors in the circuit court of Sullivan County and in the common pleas court of Linn County, Misouri, and that affiant would have to advise with his counsel and would be governed by his directions in regard thereto.

287 That affiant afterwards and within a few days did advise with his counsel, A. C. Eubanks, esq., of Sullivan County aforesaid, and said counsel advised affiant not to deliver said bonds to any one until said attachment cases in Linn & Sullivan Counties were disposed of; that affiant then notified said Smith of the advice he had received and declined to deliver said bonds to said Smith prior to the filing of his answer in any of said suits in either Linn or Sullivan Counties; that in October, 1876, this affiant caused his answers to be written out ready to be filed in the cases of Joseph Combs, of Benjamin F. Northcott, of Marion Cave, and of Gavon D. Burgess against this affiant, as garnishee of said Burlington and Southwestern Railway Company, all pending in the said Linn County court of common pleas; and after said answers were so prepared by counsel, he, affiant, took the said answers in the said four causes and submitted them to L. T. Hatfield, esq., who was then and is now attorney for the said Elijah Smith, receiver, and at the suggestion and instance of said Hatfield, he, affiant, caused cer-

288 tain alterations or amendments to be made to each of said answers, and further that the said Hatfield, prior to the November term of the said Linn County court of common pleas, which begun on the 6th day of Nov., 1876, employed one Wm. H. Brownlee, an attorney and counselor at law, residing in Brookfield, Mo., where said common pleas court is held, to appear in said common pleas court on said 6th day of November, and cause the said cases of Gavon D. Burgess and of the said Marion Cave against this affiant, as garnishee as aforesaid, to be continued by the court to Thursday, November 10th, 1876, when the other cases in said court against this affiant mentioned in this cause were set for trial, and that said Brownlee did so appear on said 6th day of November in said court, and have said causes so continued to said 10th day of Nov., and that on said day the said Hatfield was in said town of Brookfield, where said court was held, and knew that this affiant was there answering in said garnishment causes.

W. McCULLOUGH.

Subscribed and sworn to before me this 22 day of November, 1876.

WARREN WATSON,
U. S. Com'r West. Dis. Mo.

The foregoing, by stipulation, treated as a deposition of said McCullough.

JOHN F. DILLON,
Judge.

289 And the said affidavit of L. T. Hatfield is in words and figures following, to wit:

In the circuit court of United States, western district Missouri. In equity.

FARMERS' LOAN AND TRUST CO.
vs.
THE BURLINGTON & SOUTHWESTERN R'Y CO. et al. } No. 297.

In matter of Elijah Smith, receiver Burlington and Southwestern Railway Company.

In relation to proceeding against the bonds held by Warren McCullough, trustee, L. T. Hatfield, on his oath, states that he did make suggestions to Warren McCullough, trustee, in reference to his answers to the garnishee process in the Linn and Sullivan County circuit and common pleas courts, but that he did so at the instance and request of said McCullough as a personal friend, and that he did also write to W. H. Brownlee asking him to have the cases in the Linn Co. common pleas court continued, but that was also at the instance and request of McCullough, and that he did not enter any appearance for nor did he have any order nor authority from said Elijah Smith to appear in any of said causes as attorney or otherwise.

L. T. HATFIELD.

290 Subscribed and sworn to this 22nd day of November, 1876.
WARREN WATSON,
U. S. Com'r West. Dist. Mo.

By consent treated as a deposition.

JNO. F. DILLON,
Judge.

The said affidavit of Warren McCullough referred to in said stipulation is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN & TRUST CO., PL'FF,
against
THE BURLINGTON & SOUTHWESTERN R'Y CO. et als., def'ts. } No. 297.

ELIJAH SMITH, RECEIVER, BY PETITION FILED Oct. 11, 1876,
vs.
WARREN MCCULLOUGH, DEFENDANT.

Now comes Warren McCullough, defendant, and being duly sworn, upon his oath states that on or about the 26th day of Sept., 1876, prior to the completion of said railway in and through Sullivan County, this affiant had a conversation with Elijah Smith, receiver of said railway, and in that conversation said Smith asked this affiant if he would deliver the bonds (all of which affiant then held) to said receiver when the road was completed, to which inquiry of said receiver this affiant

291 replied "that he could not deliver said bonds to him on account of the attachment and garnishee proceedings against him." That afterwards at the October term, 1876, of the Sullivan circuit court this affiant exhibited his answers as garnishee in the cases of Edmund Ash, John Q. Boner, and Joseph M. Stanley prior to the filing thereof in said Sullivan circuit to L. T. Hatfield as a personal friend, the attorney of the receiver, and on the suggestion of said Hatfield each of said answers in each of said cases of Ash, Boner, and Stanley were severally amended.

W. McCULLOUGH.

Subscribed and sworn to before me this 22 day of November, 1876.

WARREN WATSON,
U. S. Com'r West. Dist. Mo.

And afterwards, to wit, in vacation of said circuit court of the United , in and for the western district of Missouri, and on the 19th day of March, A. D. 1877, the following proceedings were entered of record, to wit:

FARMERS' LOAN & TRUST COMPANY
vs.
BURLINGTON AND SOUTHWESTERN RAILWAY Co.

292 This day there is received by mail a motion for leave to file the intervening petition of Sullivan County, upon which is endorsed the following:

Leave to file the said petition granted Feb'y 22, 1877.

JOHN F. DILLON,
Judge.

And there is also received by mail the petition of Sullivan County, intervenor in the above cause, upon which is endorsed the following:

AT CHAMBERS, *Feb'y* 22, '77.

Leave to file within petition granted.

JOHN F. DILLON.

And said petition is thereupon filed.

And said motion for leave to file petition is in words and figures following, to wit:

Before Hon. Jno. F. Dillon, judge, at chambers, in the city of Davenport, Iowa.

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN & TRUST CO., PL'IFF,
against
THE BURLINGTON & SOUTHWESTERN RAILway Company et als., def'ts. } No. 297.

ELIJAH SMITH, RECEIVER OF SAID RAILWAY, by petition filed Oct. 11, 1876, and Nov. 10, 1876, pl'ff,
against
JOHN Q. BONER ET ALS., DEF'TS.

Now comes Sullivan County, in the State of Missouri, by her assist-

ant counsel and special solicitor, Jno. P. Butler, and moves the
293 court here for leave to file for and on behalf of said county the printed intervening petition of said county in this cause to which this motion is attached, for the following reasons, to wit: Because said county has material and important rights in controversy in this action; that unless she be suffered to become a party hereto, she will be materially and irreparably injured in her said rights; that she cannot protect her said rights in another and independant action whatever. Wherefore leave is prayed as aforesaid, and that the court will make all such other orders in the premises as may be necessary to fully adjudicate between the said several parties and the said county.

SULLIVAN COUNTY, MISSOURI,
By JNO. P. BUTLER,
Her Ass't Counsel & Special Solicitor.

And the said petition of Sullivan County, intervenor, is in words and figures following, to wit:

In the circuit court of the United States for the western district of Missouri. In equity.

THE FARMERS' LOAN AND TRUST COMPANY, plaintiff,
against
THE BURLINGTON & SOUTHWESTERN RAILway Company et als., defendants. } No. 297.

294 ELIJAH SMITH, RECEIVER OF SAID RAILway, by petition filed October 11, 1876, and November 10, 1876, plaintiff,
against
JOHN Q. BONER, J. M. STANLEY, JOSEPH Combs, Marion Cave, John L. Reynolds, Alexander W. Mullins, Benjamin F. Northcott, John Bradley, Enoch W. Van Wye, Jonah D. Seamon, James T. Reynolds, Joseph W. and Elihu Frazier, Edmund Ash, Warren McCullough, Joel H. Wilkerson, Henry C. Prewitt, Gavon D. Burgess, Wm. Smick, John T. Heath, John H. Casperson, Ira Sears, Lucinda Head, John Hollon, John Mairs, *and* defendants.

The intervening petition of Sullivan County, Missouri, against all other parties, pl'ffs & def'ts.

Sullivan County, in the State of Missouri, by Jno. P. Butler, her assistant special counsel and solicitor, comes and by leave of the court first had and obtained, files this her intervening petition in this cause and for right of action herein states that heretofore, to wit, on the first day of May, 1871, the county court of said county being then in session, for and on behalf of said county made and entered into a contract of
295 subscription to and with the Saint Joseph and Iowa Railroad Company and the Burlington and Southwestern Railway Company upon conditions to be done and performed by said last company; that

the said St. Joseph and Iowa Railroad Company and the said Burlington and Southwestern Railway Company severally accepted said order contract of subscription with all of its reservations, limitations, and conditions (a copy of which said order or contract is filed as an exhibit in this suit and marked Exhibit 1).

That on the 1st day of November, 1871, the county court of said county fully performed all the conditions of said order or contract of subscription on its part required in this, to wit, on the day last aforesaid said county court, for and on bahalf of said county, caused to be issued its bonds to the number of two hundred of the denomination of one thousand dollars each, due and payable twenty years after the date thereof, bearing interest at the rate of seven per cent. per annum, payable semi-annually, with coupons for interest attached or annexed to each of said bonds, caused then to be signed by the presiding justice of said court, attested by the clerk thereof with the seal of said court affixed,
296 and placed said bonds and all of them in the hands of Warren McCullough, the trustee in the contract of subscription mentioned; that heretofore on the 1st Monday of October, 1871, the said Burlington and Southwestern Railway Company entered upon the performance of the conditions of said contract on its part required in this, to wit, that on the day and time last aforesaid, said railway company began work on said road in said county under and pursuant to the terms of said contract of subscription; that said subscription was made for and on behalf of said county upon the following express conditions contained in said contract of subscription, to wit: "That the work of constructing such branch railroad in the county of Sullivan shall be begun by said Burlington and Southwestern Railway Company within six months from the 1st day of May, 1871, and the construction thereof complete with the rolling stock thereon, through said county, within twenty-one months from the time of commencing work," and the other condition, namely, "that in the event the said Burlington and Southwestern Railway Co. fail to commence work and prosecute the
297 same to completion within the time limited, then this court shall be authorized to rescind this order and make the same null and void."

That said Burlington and Southwestern Railway Company failed and refused to perform all the conditions of said order or contract of subscription on its part required in this, to wit, the said Burlington and Southwestern Railway Company failed and refused to complete and construct said road with the rolling stock thereon within twenty one months from the 1st Monday of October, 1871; that, on the contrary thereof, petitioner avers and charges the fact and truth to be that on or before the 1st day of June, 1873, said railway company stopped work on said road in said county, and abandoned the building of the same; that on the day and time last aforesaid not more that one-fourth in the cost of the building said railway complete in said county had been done by said company, and that ever thereafter the said company failed and refused to build or complete said railway, although by chicanery and fraud the said railway company had illegally and wrongfully obtained from said trustee one hundred and sixty thousand dollars in the bonds of said county.

That said Burlington and Southwestern Railway Company having failed and refused to complete said railway in and through said
298 County within the time limited as aforesaid, the county court of said county on and prior to the 17th day of August, 1874, caused the said Burlington and Southwestern Railway Company and the said Warren McCullough to be each duly notified that on the 1st day of September,

1874, said court would rescind and make null and void the order or contract of subscription aforesaid of date May 1st, 1871, under and pursuant to the power so to do, contained in said order or contract of subscription as aforesaid.

That on the 1st day of September, 1874, the county court of said county, being then in session, did then and there rescind and make null and void the order contract of subscription of date May 1st, 1871, in accordance with the power contained therein authorizing it so to do (a copy of the record of said county court pertaining to the rescission of said contract being filed as an exhibit in the suit and marked Exhibit 2); that at the time of such rescission of said contract as last aforesaid, there remained in the hands of said Warren McCollough forty thousand dollars in the bonds of said county; that within ten days after such rescission of said contract as aforesaid, said county, by its proper officers, made demand upon said McCullough that he deliver up said bonds to said county for cancellation; the said McCullough then and there
299 refused so to do.

Petitioner states that she is informed and believes that Joseph Combs, Joel H. Wilkerson, Marion Cove, Henry C. Prewitt, John L. Reynolds, Gavon D. Burgess, Alexander W. Mullins, Benjamin F. Northcott, John T. Heath, John Bradley, John H. Casperson, and other citizens of Linn County, Missouri, who are to petitioner unknown, have instituted suits, and perhaps recovered judgments, in the common pleas court of Linn County and in the circuit court of the same, against Warren McCullough, as garnishee of the Burlington and Southwestern Railway Company and holders of petitioner's bonds, as aforesaid; that said parties are endeavoring to subject petitioner's bonds, in the hands of said McCullough, to the payment of their debts against said Burlington and Southwestern Railway Company.

Petition' further states that she is informed and believes that Wm. Smick, Enoch W. Van Wye, Ira Sears, Jonah D. Seamon, Lucinda Head, Joseph W. and John Mairs, James T. Reynolds, John Hollon, and Elihu E. Frazier, residents of Sullivan County, Missouri, and creditors of said Burlington and Southwestern Railway Company, are proceeding in the circuit court of Sullivan County, Missouri, and endeavoring therein to subject the bonds of this petitioner in the hands of said McCullough to the payment of their debts.

300 Petitioner is further informed and believes that John Q. Boner, Edmund Ash, and J. M. Stanley have heretofore succeeded *have heretofore succeeded* in subjecting eighteen of said bonds, in the hands of said McCullough, to the payment of their debts, as judgment creditors of said Burlington and Southwestern Railway Company, but as against the said Boner, Ash, and Stanley, no relief is prayed in this action.

Petitioner is further informed and believes that Elijah Smith, receiver of said Burlington and Southwestern Railway Company, is endeavoring, by proceedings in this court and in this suit, to gain control and possession of this petitioner's bonds in the hands of said McCullough, as aforesaid. That said receiver claims and asserts his rights to the possession and control of said bonds under and by virtue of the contract of subscription of date May 1, 1871, as aforesaid. And petitioner is further informed and believes that said receiver asserts a further right to the possession and control of said bonds under and by virtue of two separate orders of the county court of said Sullivan County, dated June 24, 1876, and October 13, 1876 (copies of which said orders are hereto attached and marked Exhibit 3). But the petitioner avers and charges

that the contract of subscription of date May 1, 1871, has been
301 rescinded, as aforesaid; that the order of said county court of date June 24, 1876, and October 13th, 1876, neither or both constitute any new contract of subscription; and if they did, or were intended to constitute any such contract, they are ultra vires and void as contrary to the statute and constitutional laws of the State of Missouri.

Petitioner is informed and believes that Warren McCullough, the said trustee, asserts and maintains some right or interest in and to the bonds in controversy for compensation as trustee, but this petitioner avers and charges that in and by the rescission of said contract of subscription as aforesaid said bonds ceased to be and were no longer trust property, but that in and by such rescission said bonds in controversy become and were and are now the sole and absolute property of petitioner, freed from the trust created by said contract of subscription, and that said McCullough is not entitled to any compensation whatever out of the bonds in controversy; and this petitioner avers and charges that neither of the parties, plaintiff or defendant in this suit, other than the petitioner, have any right, title, or claim in or to said bonds in law or in equity, and that said bonds are by said McCullough illegally and wrongfully
302 withheld from this petitioner; that unless said McCullough be compelled to deliver up said bonds to this petitioner, and the parties aforesaid enjoined and restrained from interfering therewith, irreparable harm, damage, and mischief will be done this petitioner.

Therefore, by reason of the premises aforesaid, this petitioner prays that they, the said Joseph Combs, Joel H. Wilkerson, Marion Cove, Henry C. Prewitt, John L. Reynolds, Gavon D. Burgess, Alexander W. Mullins, William Smick, Benjamin F. Northcott, John T. Heath, John Bradley, Enoch W. Van Wye, Ira Sears, Jonah D. Seamon, Lucinda Head, James T. Reynolds, John Hollon, Joseph W. and John Mairs, Elihu E. Frazier, and John H. Casperson, and each of them, their agents, attorneys, and assignees, be enjoined and restrained from proceeding at law or in equity in the common pleas court of Linn County, Missouri, in the circuit court thereof, or in the circuit court of Sullivan County, Missouri, or in any other court or courts, to enforce payment of their judgments, claims, or demands against the said Burlington and Southwestern Railway Company, out of the bonds in the hands of said McCullough; that the said Warren McCullough be enjoined and restrained from obeying any judgment, decree, or process of, or issuing out of, the common pleas court of Linn County, the circuit court of Linn
303 County, the circuit court of Sullivan County, Missouri, or any other court or courts which would, if obeyed, subject said bonds to the payment of any such judgments or decree. That the said Elijah Smith, receiver of said railway company, his successors in office, and the Burlington and Southwestern Railway Company, and all other persons whomsoever, be enjoined and restrained from interfering with the possession of said bonds.

Petitioner further prays that the said Warren McCullough be compelled to deliver to said county for cancellation the twenty-two bonds in his hands, as trustee as aforesaid, to this petitioner, her agent or solicitor, and for all other further and proper relief.

SULLIVAN COUNTY, MISSOURI,
By JNO. P. BUTLER,
Assistant Counsel and Special Solicitor.

Jno. P. Butler, being duly sworn, upon his oath states that he is assistant counsel and special solicitor of Sullivan County, Missouri, in

relation to the matter for which relief is prayed; that he believes the matters stated in such petition are true.

JNO. P. BUTLER.

Subscribed and sworn to before me this 30th day of January, 1877.

SAM'L M. GRIGSLEY,
Judge Probate and sole Judge of the County Court.

The said Exhibit 1 is in words and figures following, to wit:

304 EXHIBIT 1.

Order or contract of subscription, May 1, 1871.

It is ordered by the court here that the county of Sullivan subscribe, and the court does hereby, for and in behalf of said county, subscribe two hundred thousand dollars to the capitol stock of the St. Joseph and Iowa Railroad Company to aid in the construction of said branch railroad through the county of Sullivan, and that the subscription hereby made shall be paid by said county by issuing and delivering, upon the terms and conditions hereinafter specified, the bonds of said county, made by its county court, and duly signed by the presiding justice of said court, and attested by the clerk thereof, with the seal of said court affixed; which said bonds are to be of the denomination of one thousand dollars each, and to become due and payable twenty years after the date thereof, bearing interest at the rate of seven per cent. per annum from date, payable semi-annually, with coupons for interest attached or annexed to said bonds; said bonds when issued are to be placed in the hands of Warren McCullough, as trustee for said county and the Burlington and Southwestern Railway Company; which said bonds are to be delivered to said Burlington and Southwestern Railway Com-
305 pany, subject to the conditions and in the manner following, to wit: That the work of constructing said branch railroad in the county of Sullivan shall be begun by said Burlington and Southwestern Railway Company within six months from the first day of May, 1871, and the construction thereof complete, with the rolling stock thereon, through said county within twenty one months from the time of commencing the work; and that as soon as the work of grading on said road shall be commenced in said county, then the bonds in payment of said subscription are to be issued and placed in the hands of said trustee, and as soon as one-fourth in cost of said work in said county is complete as shown by the report and certificate of the engineer in charge of the work, and said work paid for by said company, then the said county, through said trustee, shall deliver to said Burlington and Southwestern Railway Company forty thousand dollars of said bonds; and when one-half of said work is completed and paid for by said Burlington and Southwestern Railway Company, then the said county in like manner to deliver forty thousand dollars more of said bonds, and so on until the road is completed through the county, and paid for by said com-
pany, with the iron and rolling stock thereon, when the last in-
306 stallment of the two hundred thousand dollars in bonds is to be delivered to said company: provided, however, that the said bonds are not to be delivered to said company with overdue or half-matured coupons attached thereto, but such coupons are to be detached from said bonds and retained by said trustee for cancellation. And it is further hereby provided said subscription is made upon condition that said railroad shall be permanently located and constructed so as to pass

within a distance of not exceeding eight hundred yards of the court-house in the town of Milan in said county, and that there shall be, within the distance above named from said court-house, a general freight and passenger depot built and maintained by said company as soon as said road is ironed and operated through said county, and that in the event the said Burlington and Southwestern Railway Company fail to commence said work and prosecute the same to completion within the time limited, then this court shall be authorized to rescind this order, and make the same null and void. It is further ordered that said county will waive its rights by reason of the stock herein subscribed to vote for directors in the St. Joseph and Iowa Railroad Company.

STATE OF MISSOURI,
Sullivan County, ss:

307 I, James Mairs, clerk of the county court within and for said county, hereby certify that the foregoing printed matter, purporting to be an order of this court dated May 1st, 1871, subscribing stock, &c., is a true and correct copy of the original as fully as the same appears of record in my office.

In witness whereof I have hereto set my hand, and affixed the seal of said court, at office in Milan, in said county, this 30 day of January, 1877.

[SEAL.] JAMES MORRIS,
Clerk of the County Court.

EXHIBIT 2.

Orders of the county court relating to the rescission of the order of date May 1, 1871, *dated July 6th*, 1874, *August* 17, 1874, *and September* 1, 1874.

Whereas, on the first day of May, at the May term of the county court of Sullivan County, Missouri, the said court, by its proper order, made and entered of record on the records of said court in words and figures following, viz: (Here follows order of county court of May 1, 1871, as certified in Exhibit 1, and, after reciting said order, proceeds as follows:) And whereas the said St. Joseph and Iowa Railroad Company, to the use of the Central North Missouri branch thereof, and the Burlington and Southwestern Railway Company, severally accepted the term, limitations, and conditions in the aforesaid order contained,

308 and in pursuance of said order of said court subscribing stock to said St. Joseph and Iowa Railroad Company in the name and for the use of the Central North Missouri Branch of said railroad last aforesaid, Sullivan County aforesaid, by its proper officers, fully complied with the terms of said order or contract made and entered into as aforesaid. But whereas the said Burlington and Southwestern Railway Company has failed and refused to comply with the terms, limitations, and conditions in said order or contract contained, and still fails and refuses to complete or pay for the building of said railroad according to the time and terms, limitations and conditions, in said order or contract contained as aforesaid, in this, to wit, that the said Burlington and Southwestern Railway Company has wholly failed to complete said railway, as mentioned in the order of said court subscribing stock to the said St. Joseph and Iowa Railroad Company to the use aforesaid within the time limited in said order aforesaid, viz, within twenty-seven months from the first day of May, 1871, as they were legally bound to do by the

order or contract aforesaid; that the said twenty-seven months mentioned in said order or contract has long since expired, viz, on the
309 first day of August, 1873; and whereas a large amount of the bonds of said county issued under the aforesaid order or contract subscribing stock, to wit, the sum of $40,000, yet remains in the hands of Warren McCullough, trustee, as aforesaid, therefore it is ordered that the Burlington and Southwestern Railway Company and Warren McCullough be each summoned to be and appear before this court on the 3rd Monday of August at the July term thereof, to be begun and held at the court-house in the town of Milan, in the county of Sullivan aforesaid, on the 3rd Monday of July, 1874, then and there to show cause why the order of this court made at the May term, 1871, as hereinbefore set forth, should not be rescinded, made null and void, and the $40,000 of the bonds of said Sullivan County remaining in the hands of Warren McCullough, trustee as aforesaid, be redeliv' to said county for cancellation.

And afterwards, at the said July term, began and held on the 17th day of August, 1874, the following other proceedings were held and entered of record by said county court, to wit:

"Now, at this day, in the matter of the re'cission of the order or contract made by an entry on the records of this court at its May term, May 1, 1871, subscribing stock to the St. Joseph and
309½ Iowa Railroad Company in the name of and for the use of the Central North Missouri Branch of the St. Joseph and Iowa Railroad Company in the sum of two hundred thousand dollars in the bonds of Sullivan County upon the stipulations, conditions, and restrictions in such order or contract mentioned. This cause came on to be heard, and the said defendants (The Burlington and Southwestern Railroad Company and Warren McCullough) appeared by their attorney and filed their application for a continuance of this case until the next regular term of this court, which being heard and fully understood is by the court here overruled in part, and continued until the first day of September, 1874."

And afterwards, on the 1st day of September, 1874, the following other proceedings were had and entered of record on the records of said county court, to wit:

Rescinding order.

Now, at this day, in the matter of rescission of the order or contract made by an entry of record on the records of this court at its May term, May 1, 1871, subscribing stock to the St. Joseph & Iowa Railroad Company in the name and for the use of the Central North Missouri Branch of the St. Joseph & Iowa Railroad Company in the sum of two hundred thousand dollars in the bonds of Sullivan County upon the stipulations, conditions, and restrictions in such order or contract mentioned:
310 This cause came on to be heard, and the defendants, the Burlington and Southwestern Railroad Company and Warren McCullough, having failed to show any good and sufficient cause or reason why the order or contract of this court made at the May term, May 1, 1871, as aforesaid, should not be rescinded, made null and void, and the $40,000 of the bonds of said Sullivan County remaining in the hands of Warren McCullough, trustee, be redelivered to the county court of said county for cancellation; and it appearing to the court here that the said defendants have been duly summoned according to the order of this court, and it further appearing to the court here that the said

Burlington and Southwestern Railway Company have failed to prosecute the building of the last-mentioned railway to completion within the time limited in the order or contract subscribing stock, &c., made at the May term, May 1, 1871, viz, within twenty-seven months from the
311 first day of May, 1871, it is ordered and adjudged and decreed by the court here that the order or contract made and entered of record by this court at the May term, May 1, 1871, as aforesaid, in so far as the same remains unexecuted be rescinded, made null and void, and the said Warren McCullough, trustee as aforesaid, forthwith deliver to this court the remaining $40,000 in the bonds of said county for cancellation, and it is further ordered herein that the said defendants be each furnished with a certified copy of this order.

STATE OF MISSOURI,
County of Sullivan, ss:

I, James Morris, clerk of the county court within and for said county, hereby certify that the above and foregoing printed matter under head of Exhibit 2, purporting to be copies of orders of said county court of date July 6, 1874, August 17, 1874, and September 1, 1874, in relation to the recission of an order of this court of May 1, 1866, are true and correct copies of the original thereof as fully as the same appears of record in my office.

In witness whereof I have hereto set my hand and affixed the seal of said court, at office in Milan, in said county, this 30 day of January, 1877.

[SEAL.] JAMES MORRIS,
Clerk of the County Court.

312 The said Exhibit 3 is in words and figures following, to wit:

EXHIBIT 3.

Orders of the county court of date June 24, 1876, and October 18, 1876, rendered at the instance of Elijah Smith, receiver.

Whereas L. T. Hatfield has this day presented a petition to the county court of Sullivan County, Missouri, signed by more than sixteen hundred resident citizens of said county, praying said court to make the necessary order to carry out the proposition of Elijah Smith, receiver of the Burlington and Southwestern Railway Company, heretofore on the 20th day of June, 1876, submitted to this court in relation to the completion of the Linneus branch of said Burlington and Southwestern Railway; it is therefore ordered that if the said Elijah Smith as aforesaid, or his successors in office, shall on or before the first day of October, 1876, finish and complete said Linneus branch of said Burlington and Southwestern Railway in good order and condition, and permaneutly equip the same with the necessary rolling stock for the complete accommodation of shippers, freighters, and travellers, and shall erect a good and sufficient freight and passenger depot and station on
313 said branch within 800 yards of the court-house, in the town of Milan, in said Sullivan County, all according to the original order of subscription of May 1, 1871, moreover shall pay all costs and charges that have accrued, or that may hereafter accrue, in relation thereto or in any way touching a certain suit now pending in the supreme court of the State of Missouri, styled The State of Missouri ex. rel. Sullivan County against Warren McCullough, trustee of Sullivan County aforesaid, and the Burlington and Southwestern Railway Com-

pany, and shall also pay all the attorneys' fees who have been or who are now employed or retained by Sullivan County in said suit and shall file the proper vouchers with the clerk of this court, then an order shall be made and entered of record dismissing said suit, which shall be prosecuted no farther, and the forty bonds of one thousand dollars each, the subject matter of said suit, shall be left in the hands of said Warren McCullough, trustee as aforesaid, to be disposed of upon the terms and conditions and as stated in the original order of subscription of date May 1, 1871, and as though the said suit had never been insti-
314 tuted; but if the said Elijah Smith, receiver as aforesaid, or his successor in office, shall in any manner as to time or circumstance fail or neglect to do and perform each and all of the acts, matters, and things herein above mentioned and specified to be done by him, then this order shall become null and void as though it had never been made, without any further action of this court or any other party whatever, and said suit shall be prosecuted to final judgment as though this order had never been made. And upon the failure of Elijah Smith, receiver of the Burlington and Southwestern Railway Company, to complete said road according to the time and manner herein specified, or to pay the costs and attorneys' fees as above mentioned, the rights of the county under the original order subscribing stock to said railway made May 1, 1871, are to be entirely unprejudiced or in any manner affected by this order, and the court saves and reserves to itself the right to rescind this order at any time after the 1st day of October, 1876.

The road was completed by said Smith, receiver of said road, prior to October 1st, 1876. And afterwards, on the 13th day of October, 1876, said county court made and entered of record the following order, to wit:

Dismissal of railroad mandamus suit.

315 Whereas it has been shown to the court here that Elijah Smith, receiver of the Burlington and Southwestern Railway Company, has finished the Linneus branch of the Burlington and Southwestern Railway through Sullivan County, Missouri, and has equipped the same with the proper and sufficient rolling stock for freight and passengers, and has erected on said branch within 800 yds. of the court-house, in the town of Milan, in said county, a good and sufficient depot and station-house for freight and passengers, all according to the original order of May 1, 1871, subscribing $200,000 to the capital stock of the St. Joseph and Iowa Railroad, and also in accordance with an order of this court made and entered of record June 24th, 1876, in relation to the completion of said branch railroad through said county by said Elijah Smith, and that said Elijah Smith has paid all costs and attorneys' fees that have accrued in an action of mandamus by the State of Missouri ex rel. Sullivan County against Warren McCullough, trustee for the Burlington and Southwestern Railway Company and said Sullivan County, now pending in the supreme court of Missouri, it is or-
316 dered that the prosecuting attorney for said county dismiss said action of mandamus, and by leave of said supreme court withdraw the papers filed on the part of the relator in said action, and that said action of mandamus be no further prosecuted in said supreme court, and that the forty bonds of one thousand dollars each of said county yet remaining in the hands of said Warren McCullough, trustee as aforesaid, be left to be disposed of according to law as though said action of mandamus had never been commenced.

STATE OF MISSOURI,
County of Sullivan, ss:

I, James Morris, clerk of the county court within and for the said county, hereby certify that the above and foregoing printed matter, under head of Exhibit 3, purporting to be copies of orders of said county court, of date June 24th, 1876, and October 13, 1876, are true and correct copies of the originals thereof as fully as the same appears of record in my office. In witness whereof I have thereto set my hand and affixed the seal of said court at office in Milan, in said county, this 30th day of January, 1877.

[SEAL.]

JAMES MORRIS,
Clerk of the County Court.

317 The order rescinding the unexecuted portions of the order of Sullivan County subscribing stock as aforesaid in words and figures following, to wit:

SULLIVAN COUNTY, PLAINTIFF,
vs.
THE BURLINGTON AND SOUTHWESTERN RAILway Co. and Warren McCullough, trustee of said Sullivan County, and the said Railway Company, defendants.

Now at this day in the matter of the re'cission of the order or contract made by an entry of record on the records of this court at its May term, May 1, 1871, subscribing stock to the St. Joseph and Iowa Railroad Company, in the name and for the use of the Central North Missouri branch of the Saint Joseph and Iowa Railroad Company, in the sum of two hundred thousand dollars in the bonds of said Sullivan County, upon the stipulations, conditions, and restrictions in such order or contract mentioned. This cause came on to be heard, and the said defendants having failed to show any good or sufficient cause or reason why the order or contract of this court made at its May term, May 1, 1871, as aforesaid, should not be rescinded, made null and void
318 and the forty thousand dollars of the bonds of said Sullivan County remaining in the hands of Warren McCullough, trustee, be redelivered to the county court of said county for cancellation. And it appearing to the court here that the said defendants have been duly summoned according to the order of this court, and it further appearing to the court here that the said Burlington and Southwestern Railway Company have failed to prosecute the building of the last-mentioned railway to completion within the time limited in the order or contract subscribing stock, &c., made at the May term, May 1, 1871, viz, within twenty-seven months from the 1st day of May, 1871, it is ordered and adjudged and decreed by the court here that the order or contract made and entered of record by this court at the May term, May 1, 1871, as aforesaid in so far as the same remains unexecuted, be rescinded, made null and void, and the said Warren McCullough, trustee as aforesaid, forthwith deliver to this court the remaining forty thousand dollars in the bonds of said county for cancellation. And it is further ordered herein that the said defendants be each furnished with a certified copy of this order.

319 STATE OF MISSOURI,
Sullivan County, ss:

I, James Morris, clerk of the county court within and for said county, hereby certify that the above and foregoing is a true and perfect copy of an order of the county court of said county made and entered of record at the July adjourned term, September 1, 1874, in relation to the re'cission of the order of subscription or contract of date May 1, 1871, subscribing stock, &c., as fully as the same appears of record in my office.

In witness whereof I have thereto set my hand and the seal of said county court.

Done at office, in Milan, in said county, this 20th day of November, 1876.

[SEAL.] JAMES MORRIS,
Clerk Co. Court.

And afterwards, at the regular April term, A. D. 1877, of said circuit court of the United States in and for said district, begun and held on the 16th day of April, 1877, and on the 17th day of said month the following proceedings were entered of record, to wit:

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON AND SOUTHWESTERN RAILway Co. et al.

320 In the matter of the petition of Elijah Smith, receiver, against Warren McCullough, John Q. Boner, Edmund Ash, J. M. Stanley, Joseph Combs, Joel H. Wilkerson, Marion Cave, Henry C. Prewitt, John L. Reynolds, Gavon D. Burgess, Alexander W. Mullins, William Smick, Benjamin F. Northcott, John T. Heath, John Bradley, John H. Casperson, Enoch W. Van Wye, Ira Sears, Jonah D. Seamon, Lucinda Head, James T. Reynolds, John Hollon, Joseph W. Mairs, John Mairs, and Elihu E. Frazier.

The said petition and amended petition having been heretofore submitted to the court upon the pleadings, proofs, exhibits, and agreements on file, and argued by counsel, and the court being now fully advised, it is ordered and decreed that the said petition and amended petition of said Elijah Smith, receiver, be, and the same are hereby, dismissed, and the injunction heretofore granted be dissolved.

(Signed) JOHN F. DILLON, *Judge.*

And afterwards, on the same day, the following other proceedings were entered of record, to wit:

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON AND SOUTHWESTERN RAILroad Co. et al.

321 In the matter of petition of Elijah Smith, receiver, against Warren McCullough et al.

This day comes the receiver, Elijah Smith, by L. T. Hatfield, esq., his solicitor, and prays an appeal in the above matter to the Supreme Court of the United States, which is accordingly granted.

And afterwards, at the same term of said court, and on the 24th day of April, 1877, the following other proceedings were entered of record, to wit:

FARMERS' LOAN AND TRUST COMPANY
vs.
BURLINGTON AND SOUTHWESTERN R'Y CO. et al.

In the matter of the petition of Elijah Smith, receiver, against Warren McCullough et al.

This day there is received and filed a bond for appeal herein, which is approved by the court and is to act as a supersedeas of the decree in the above matter. It is further ordered that said bond be filed.

The said appeal bond is in words and figures as follows, to wit:

Know all men by these presents that we, Elijah Smith, receiver,
322 as principal, and as sure , are held and firmly bound unto J. Q. Boner, E. Ash, J. M. Stanley, W. M. McCullough, J. Combs, J. H. Wilkerson, M. Cave, H. C. Prewitt, J. L. Reynolds, G. D. Burgess, A. W. Mullins, William Smick, B. F. Northcott, J. T. Heath, John Bradley, John H. Casperson, E. W. Van Wye, Ira Sears, J. D. Seamon, L. Head, J. T. Reynolds, John Hollow, J. W. and John Mairs, and E. Frazier, in the full and just sum of five hundred dollars, to be paid to the said J. Q. Boner, E. Ash, J. M. Stanley, W. McCullough, J. Combs, I. H. Wilkerson, M. Cave, H. C. Prewitt, J. L. Reynolds, G. D. Burgess, A. W. Mullins, Wm. Smick, B. F. Northcott, J. T. Heath, J. Bradley, J. H. Casperson, E. W. Van Wye, Ira Sears, J. D. Seamon, L. Head, J. T. Reynolds, John Hollon, J. W. and John Mairs, and E. E. Frazier, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this 21st day of April, in the year of our Lord o e thousand eight hundred and seventy-seven.

Whereas lately, at the April term, A. D. 1877, of the circuit court of the United States for the western district of Missouri, in a suit
323 depending in said court between the Farmers' Loan and Trust Company, plaintiffs, and The Burlington and Southwestern Railway Company and Marion Cave, John Q. Boner, Edmund Ash, J. M. Stanley, Warren McCullough, Joseph Combs, Joel Wilkerson, Marion Cave, Henry C. Prewitt, John L. Reynolds, Gavon D. Burgess, Alexander W. Mullins, William Smick, B. F. Northcott, J. T. Heath, J. Bradley, J. H. Casperson, E. W. Van Wye, Ira Sears, J. D. Seamon, L. Head, J. T. Reynolds, J. Hollon, I. W. and John Mairs, and E. E. Frazier, defendants, and Elijah Smith, receiver of said railway, intervening petitioner, a decree was rendered against the said Elijah Smith, receiver, intervening petitioner, and the said Elijah Smith, receiver, intervening petitioner, having appealed from said decree to the Supreme Court of the United States, and a citation directed to the said John Q. Boner, E. Ash, J. M. Stanley, W. McCullough, J. Combs, J. N. Wilkerson, M. Cave, H. C. Prewitt, J. L Reynolds, G. D. Burgess, A. W. Mullins, William Smick, B. F. Northcott, J. T. Heath, J. Bradley, J. H. Casperson, E. W. Van Wye, Ira Sears, J. D. Seamon, L. Head, J. T. Reynolds, John Hollon,
324 J. W. and John Mairs, and E. E. Frazier, and the Burlington and Southwestern Railway Company, citing and admonishing them

to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Elijah Smith, intervening petitioner, shall prosecute said appeal to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

ELIJAH SMITH. [SEAL.]
C. E. PERKINS. [SEAL.]
LYMAN COOK. [SEAL.]

Sealed and delivered in the presence of—
JNO. W. SMITH.
Approved by—(To operate as a supersedeas.)
(Signed) JOHN F. DILLON,
Judge.

And afterwards, at the same term of said court and on the 3rd day of May, A. D. 1877, the following proceedings were entered of record in the said cause, to wit:

THE FARMERS' LOAN AND TRUST COMPANY
against
THE BURLINGTON AND SOUTHWESTERN RAILway Co. et al.

325 In the matter of the petition of Elijah Smith, receiver, for an injunction against Warren McCullough and others.

This day there is received by telegraph from the honorable John F. Dillon, judge, the following order, viz:

In the case of E. Smith, receiver, the supersedeas bond was intended to continue the injunction.

Send notice of this order to the parties and to Warren McCullough.
JOHN F. DILLON, *Judge.*

Upon a certified copy of said order the clerk made the following memorandum, to wit:

I certify that a copy of the within order was transmitted by mail to each of the following parties, viz: J. L. Reynolds, Laclede Co., Mo.; B. F. Northcott, Northcott, Mo.; John H. Casperson, Burlington, Ia.; Marion Cave, Meadville, Mo.; Jonah D. Seamon, Browning, Mo.; Grant and Smith, Davenport, Ia.; Warren McCullough, Ira Sears, Lucinda Head, Enoch W. Van Wye, James T. Reynolds, John Hollon, William Smick, John Q. Boner, Edmund Ash, J. M. Stanley, Joseph W. Mairs, John Mairs, Elihu E. Frazier, Jno. P. Butler, L. T. Hatfield, all of Milan,
326 Mo.; John Bradley, John F. Heath, Gavon D. Burgess, Joseph Combs, J. H. Wilkerson, and H. C. Prewitt, of Linneus, Mo., and a copy handed to A. W. Mullins, this 4th day of May, 1877.
H. C. GIESBERG, *Clerk.*

And afterwards, at the same term and on the 4th day of June, A. D. 1877, it being an adjourned day thereof, the following order, signed by the honorable John F. Dillon, judge, was filed in said cause, to wit:

In the circuit court of the United States for the western district of Missouri.

THE FARMERS' LOAN AND TRUST CO.
vs.
THE BURLINGTON & SOUTHWESTERN RAILway Co. et al.

AT CHAMBERS, DES MOINES, IOWA,
May 3rd, 1877.

In this cause, Elijah Smith, receiver, having appealed from a decree of this court to the Supreme Court of the United States from a decree dismissing a bill filed by him in relation to certain Sullivan County bonds, and said appeal being allowed and a bond filed to operate as a supersedeas, it is ordered that the said appeal bond do operate as a supersedeas of the said decree dismissing the said petition of the
327 said Elijah Smith, receiver, and dissolving the injunction therein.
(Signed) JOHN F. DILLON, *Judge*.

And afterwards, to wit, in vacation of said court on the 20th day of August, A. D. 1877, the following proceedings were entered of record in said cause, to wit:

FARMERS' LOAN AND TRUST CO.
vs.
BURLINGTON AND SOUTHWESTERN RAILWAY Co. et al.

In the matter of the petition of Elijah Smith, receiver, vs. Warren McCullough et al.

This day there is received by mail and filed herein a stipulation of counsel in regard to the transcript in the above matter.

The said stipulation is in words and figures following, to wit:

UNITED STATES OF AMERICA,
Western District of Missouri, set:

In the circuit court of the United States in and for said district.

THE FARMERS' LOAN AND TRUST CO.
against
THE BURLINGTON AND SOUTHWESTERN RAILway Company et al.

328 In the matter of the petition of Elijah Smith, receiver, etc., against Warren McCullough and others.

It is hereby agreed upon and stipulated by counsel for the respective parties that the transcript to be made out by the clerk, in the above matter, for the Supreme Court of the United States, in pursuance of the appeal allowed therein, shall contain the following described orders, decrees, record entries, pleadings, papers, process, evidence and exhibits, to wit:

1. Entry of bill filed and order for subpœna in chancery. (See Eg. A. A., p. 234.)
2. Bill of complaint.
3. Subpœna in chancery served in Missouri and return.
4. Subpœna in chancery served in Iowa and return.
5. Order for defendants to appear. (Eg. R. A., p. 35.)
6. Return of marshal to order.
7. Order appointing N. B. Baker receiver. (Eg. R., p. 249.)
8. Approval of receiver's bond. (Eg. R A., p. 300.)
9. Report of receiver.
10. Resignation of N. B. Baker, receiver.
11. Acceptance of resignation and appointment of Elijah Smith receiver. (Eg. R. A., p. 338.)
12. Bond of Elijah Smith, receiver.
13. Approval of bond. (Eg. R. A., p. 340.)

329 14. Decree of foreclosure. (Eg. R. A., p. 417.)

15. Entry of inventory, etc., filed. (Eg. R. A., p. 434.)
16. Inventory.
17. Proposition of receiver.
18. Order of Sullivan County court.
19. Entry of petition filed and order to show cause, etc. (Eg. R. A., p. 436.)
20. Petition of receiver.
21. Return on order.
22. Entry of answers filed. (Eg. R. A., p. 437.)
23. Joint and several answers of Boner, Stanley and Ash.
24. Exhibit A attached.
25. Separate answer of W. McCullough.
26. Exhibits B, C, D, E & F.
27. Entry of petition filed & order to show cause. (Eg. R. A., p. 441.)
28. Petition of receiver.
29. Return to order.
30. Entry of answers filed, etc. (Eg. R. A., p. 445.)
31. Answer of Gavon D. Burgess et al., & exhibit.
32. Transcript exhibited therewith.
33. Answer of E. W. Van Wye.
34. Answer of William Smick.
35. Separate answer of Warren McCullough.
36. Mortgage referred to in answer.
37. Amended answer of W. McCullough.
38. Exhibits A, B, C, D, E, & F, G.

330 39. Separate answer of John Q. Boner.

40. Exhibit A.
41. Answer of Ash.
42. Answer of J. M. Stanley.
43. Exceptions to answers.
44. Stipulations as to facts.
45. Affidavit of John W. Smith, & Ex. A.
46. Proposition of receiver.
47. Original order of subscription.
48. Cert. of engineer.
49. Application of receiver.
50. Entry of amended pet., etc., filed. (Eg. R. A., p. 451.)
51. Amended petition of receiver.
52. Reply of receiver to ans. of resp.

53. Stipulation No. 1 as to evidence.
54. Affidavit 1 & 2 of W. McCullough.
55. Affidavit of L. T. Hatfield.
56. Stipulation No. 2 as to evidence.
57. Order submitting cause, etc. (Eg. R. A., p. 451.)
58. Entry of answer filed. (Eg. R. A., p. 456.)
59. Answer of Boner & McCullough.
60. Entry of motion and petition filed. (Eg. R. B., p. 4.)
61. Motion for leave to file petition.
62. Petition of Sullivan County.
63. Decree overruling petition. (Eg. R. B., 16.)
64. Decree granting appeal. (Eg. R. B., 17.)
65. Entry bond app'd & filed. (Eg. R. B., p. 24.)
66. Bond for appeal.
331 67. Order as to supersedeas. (Eg. R. B., 30.)
68. Return to order.
69. Entry of petition filed and order to show cause. (Eg. R. B., p. 32.)
70. Petition of receiver.
71. Return to order.
72. Entry of answers filed and order to produce bonds, etc. (Eg. R. B., p. 36.)
73. Answer of W. H. Brownlee. (Ex. A, B, C.)
74. Answer of Coombs et al., and Ex. A, B & C.
75. Answer of Marion Cave et al.
76. Transcript from Linn Co. common pleas c't.
77. Affidavit of John P. Butler.
78. Affidavit of I. M. Swallon.
79. Answer and statement of A. W. Mullins.
80. Order as to supersedeas, together with such subsequent proceedings as relate to the matter aforesaid.

I agree to the above, except as to 69 to 79, both inclusive.

P. HENRY SMYTHE,
Attorney for the Receiver.

I agree to the above, except as to 69 to 79, both inclusive.

L. T. HATFIELD,
Solicitor for Receiver.

As one of counsel for Ash, Boner and Stanley, and sole counsel for Smick, Van Wye, Sears, Frazier, Hord, Head, Hallon, and Mairs & Mairs, and Sullivan County, I assent to items of the record from number
332 one to sixty-eight inclusive, if the same includes those matters, records, and papers which I have heretofore by letter directed the clerk to enter in such record.

JOHN P. BUTLER.

As counsel for attaching creditors Burgess, Cave, Northcott and Combs, I agree to all the items mentioned in the foregoing stipulation being put into the record on the appeal to the U. S. Supreme Court except those numbered from 69 to 79, both inclusive, this 16th Aug., 1877.

C. L. DOBSON.

As counsel for Warren McCullough, I agree to the same agreed to by C. L. Dobson, this 16 Aug., 1877.

S. P. HUSTON.

I agree to all the items except those numbered 69 to 79, both inclusive.

A. W. MULLINS,
Counsel for Ash & Others.

The following opinion of the court delivered in the above cause, to wit:

In the circuit court of the United States for the western district of Missouri, April term, 1877. In equity.

THE FARMERS' LOAN AND TRUST COMPANY, plaintiff, *vs.* THE BURLINGTON AND SOUTHWESTERN RAILway Company et al., defendants. } No. 297.

333 In the matter of the petition of Elijah Smith, as receiver of said defendants' railway co., against Warren McCullough, trustee, and John Q. Boner, Edmund Ash, Joseph M. Stanley, and others, judgment creditors, and Benjamin F. Northcott, Joseph Combs, and Marion Cave, interpleaders.

DILLON, *Circuit Judge:*

Without going at large into the facts of the present controversy, I am of the opinion that the petition of the receiver must be dismissed upon several grounds:

1st. The right of the receiver is based upon the proposition that the bonds of the county or the right to them were embraced in and conveyed by the mortgage of the railway company to the Farmers' Loan and Trust Co. When we look at the very general language in the mortgage claimed to have this effect in the light of the purpose for which that instrument was made, to raise money to build the road, it would seem improbable that it was intended to pledge county securities issued for the express purpose of negotiations and sale, and the language used in the instrument can all have effect without subjecting it to the strain necessary to make it cover these county bonds. It was not the purpose of the court to appoint a receiver in respect of any property not
334 embraced in the railway mortgage.

2. The proceedings in the State court and the judgments therein rendered against the railway co. and the trustee, McCullough, are under the circumstances conclusive against the receiver in this court until set aside or reversed. The trustee McCullough was garnishe'd before suit brought in this court the railway company was a party. The suits were pending when the receiver of this court was appointed. He knew of the suits in the State court and of the garnishment of the trustee. The order appointing him authorized him to defend for the company. As he must claim under the company (whose stock is the expressed consideration for the subscription of the county, although the substantial consideration is the building of the road) it would seem that under the circumstances the judgment of the State court against the company would bind the receiver, who can only come in under the company.

3. If we look to the equities of the parties it is not clear that they are with the receiver. It was a condition of the original subscription that the work of construction should be paid for by the railway com-
335 pany before it was to be entitled to the bonds. The debts of the

plaintiffs in the State courts (the garnishors) were for construction of the railway. The receiver never obtained from this court any authority to make the subsequent contract with the county; and under the legislation of January 30, 1872, this contract so far as it altered, changed, or modified the original subscription was without legal force, no vote of the people approving the change having been had. (Laws 1872, p. 78, sec. 2, 3.) If the bondholders' money went to complete the road under the order authorizing the receiver to build, they have the security provided by that order and they have the benefit of the materials supplied by the respondents which went into the construction of the road. Whether the receiver or the garnishors in a contest with the county could have compelled the delivery of the bonds by the trustee admits of question, but no such enquiry is here involved. Let a decree or order be entered dismissing the petition of the receiver.

*Ord*ered accordingly.

P. Henry Smythe & L. T. Hatfield, for the receiver.

Chas. L. Dobson, A. W. Mullins and John P. Butler, contra.

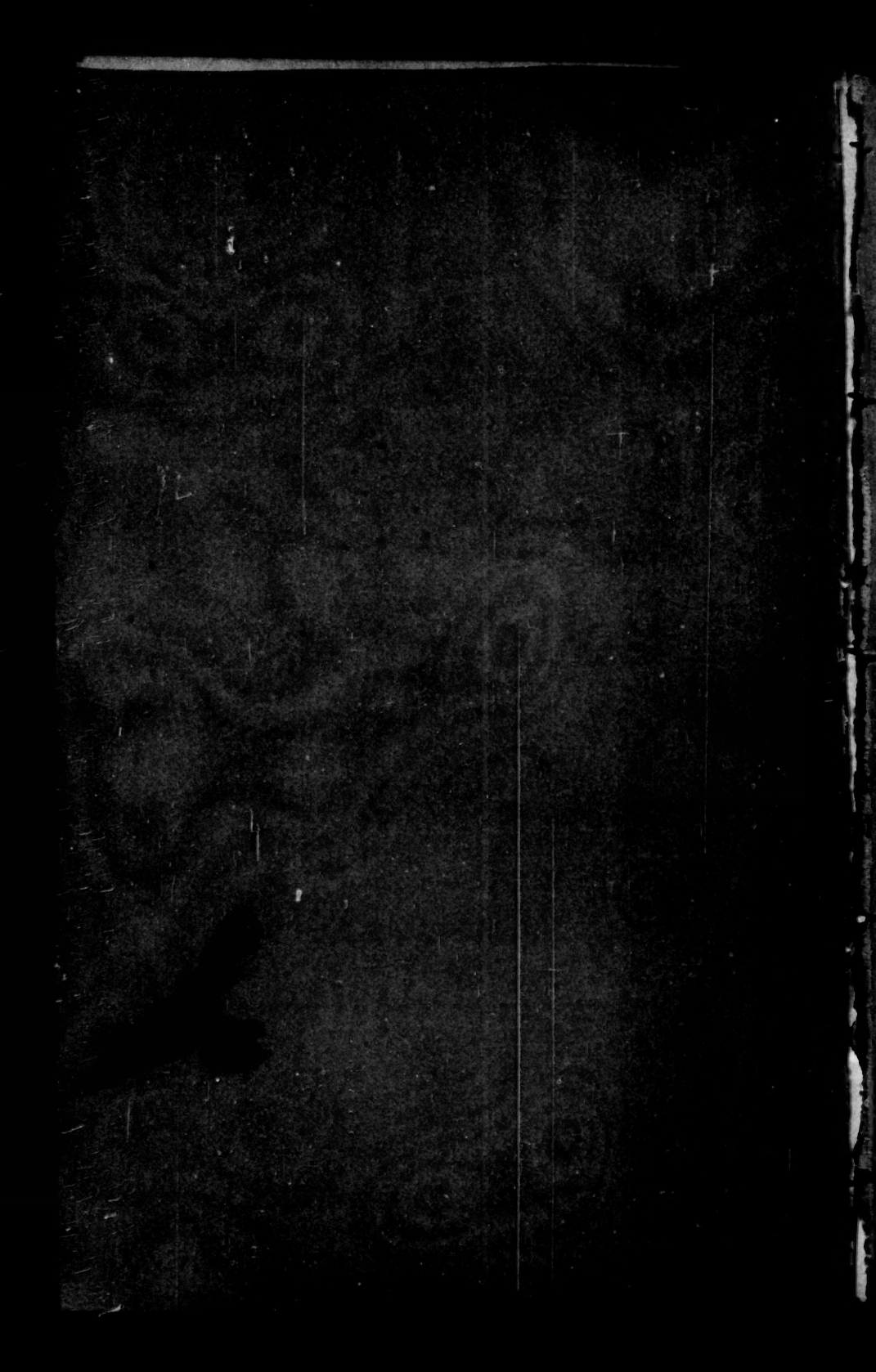
336 UNITED STATES OF AMERICA,
Western District of Missouri, set:

I, Henry C. Giesberg, clerk of the circuit court of the United States in and for said district, do hereby certify that the foregoing is a correct transcript of the orders, decrees, record entries, pleadings, papers, process, evidence, exhibits, and the opinion of the court in case No. 297 of the Farmers' Loan and Trust Company, of New York, against the Burlington and Southwestern Railway Company et al., and in the matter of the petition of Elijah Smith, receiver of said railway, against Warren McCullough and others, as fully as is required by the stipulation of counsel filed in said cause on August 20th, 1877, and recorded on page 348 and following of this transcript.

Witness my hand as clerk and the seal of said court. Done at office in Jefferson City, in said district, this 10th day of September, A. D. 1877.

[SEAL.]

H. C. GIESBERG,
Clerk of said Court,
By WARREN WATSON,
D. C.



OCT
JAMES

SUPREME COURT

OF THE

UNITED STATES

No. 85.

SUPREME COURT

—OF THE—

UNITED STATES,

NO. [redacted] 55

OCTOBER TERM, [redacted] 1880

ELIJAH SMITH, RECEIVER OF THE BURLINGTON & SOUTH-WESTERN RAILWAY, *Appellant*,

vs.

WARREN McCULLOUGH, *et. al.*, *Appellees.*

APPEAL FROM CIRCUIT COURT UNITED STATES, FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANTS,

—BY—

P. HENRY SMYTH,

OF COUNSEL.

STATEMENT OF THE CASE.

The facts of the case may be summarized thus:

Prior to the first day of May, 1871, the Burlington and Southwestern Railway Company, a corporation of Iowa—had succeeded by consolidation or purchase to the rights and franchises of the St. Joseph and Iowa Railroad company, a corporation of Missouri, which last mentioned corporation had projected and undertaken to build a branch, called the "Central North Missouri branch of the St. Joseph and Iowa Railroad company, through Sullivan county, Mo."

May 1st, 1871, the said county of Sullivan subscribed $200,000 to the stock of said branch, to be paid in the bonds of said county, which, by the terms of the subscription, were to be issued at once, and placed in the hands of Warren McCullough (respondent herein) as trustee for the county and the railway company, subject to certain conditions, among which were: That when one fourth of the work of building the said road through said county was completed, (to be ascertained by the certificates of the engineer of said company,) $40,000 of the bonds were to be delivered to the Burlington and Southwestern Railway Company—when half the work was done, then in like manner $40,000 more, and so on until the road was finally completed through the county, when the last installment were to be delivered.

This subscription recognized the fact that the Burlington and Southwestern had succeeded to the rights of

the St. Jo. and Iowa, in as much as the subscription provided for delivery of bonds to it, (see in full page 41, printed record). The validity of the subscription is not in controversy in this suit.

Subsequent to this subscription, the name of said branch road was changed to that of the "Linneus Branch of the Burlington and Southwestern Railway."

On the 1st. of April, 1872, the Burlington and Southwestern Railway Company, made to Farmers Loan and Trust Company, (complainants in original cause)—the mortgage set out in the record (page 4. printed record,) which was duly recorded in Sullivan and Linn counties, and the validity of which is not in controversy.

This mortgage conveyed to Trustees (page 7, printed record,) "all the present or in future to be acquired *property* of, or in any manner appertaining to said Branch Railroad, and all the right or title therein, whether of the company or stockholders, to wit: all of the line of railway, road bed, right of way, superstructure, iron, ties, supplies, etc., etc., and property purchased or to be purchased or otherwise acquired, all the revenue and income, and all the rights, privileges and franchises relating thereto, and property acquired by virtue thereof, etc."

Said mortgage contains this stipulation (see page 9, printed record): "It is also agreed and understood, that it shall be lawful for said Railway Company * * to dispose of the current net revenues of said road and premises hereby conveyed, as it or they shall elect, *until default be made* in payment of principal or interest of the bonds secured."

On the 1st day of April, 1873, the company defaulted in payment of interest and became insolvent.

Prior to this time the work had been performed to such extent that all of the bonds in the hands of McCullough, except $40,000, had been delivered to the Railroad Company. The work was not completed, there being some twenty miles of road to be finished and equipped before the company, under the terms of the agreement of subscription, would be entitled to the last installment in the hands of the trustee, Warren McCullough.

On the 8th day of August, 1874, the complainants, the Farmers Loan and Trust Company, filed their bill set out in the record, praying a decree of foreclosure, and asking for a receiver, (page 1, record) and on the 17th day of November, 1874, Baker was appointed receiver, with power to take possession of said road, and all of its property of every kind. (See page 14, printed record.)

On the 19th day of October, 1875, Baker resigned, and the court appointed Elijah Smith (present complainant) receiver of all the property of said Railway Company, situated in the Western District of Missouri, and of all *real and personal property, books, papers, vouchers, moneys and accounts* of said corporation, and empowered him to take the same, also to prosecute and defend all suits in law or equity in which the interests of the property or parties are involved.

He was also authorized to borrow money and complete the unfinished portion of said road in Sullivan county (page 26, record.)

Under this order the receiver proceeded to complete said unfinished portion of said road through said county, by which he claimed under the terms of the subscription, he as receiver became entitled to the remaining $40,000 of bonds in the hands of McCullough, the trustee.

But McCullough on demand refused to surrender the bonds to the receiver, upon the ground that garnishee process issuing from the State Courts of Sullivan and Linn counties had been served upon him, at the instance of Combs, Wilkerson, Cave, Prewitt, and others, who were also parties to the original bill of the Farmers Loan and Trust Company.

Whereupon the receiver, complainant herein, filed his bill in the main cause, October 11, 1878, (see page 36, printed record) which was amended November 10th, 1876, (see page 48, printed record,) against said McCullough and the other respondents, claiming that under the mortgage and the order of the court appointing him, and by reason of the completion of the road by which the right to the bonds became absolute, that he was entitled to them, and that his rights were not in any manner affected by any proceedings of the State Court; that as they were parties to original bill, any claims they had should have been asserted in this court, and that by decree they were barred; praying an order on McCullough, the trustee, to deliver them, and an injunction restraining him and other respondents from attempting to dispose of them, etc.

THE DEFENSE

Set up by McCullough, the trustee, was (see page 53, printed record) that the decree in this case did not cancel the judgment of State Courts, *that on the 22d day of June 1874*, he was summoned as garnishee in the case of Edmund Ash, J. M. Stanly and John Q. Boner, in their suits against the Burlington and Southwestern Railway Company, *and after several successive continuances* of said garnishee proceedings at the October term, 1876, of Circuit Court of Sullivan county, Missouri,

he filed his answer in said suits, and thereupon said court rendered judgment against him as garnishee, in favor of said Ash, Stanly, and Boner, for the sum set out and for costs amounting in the aggregate to $13,296,-39, that upon rendering said judgment the said Sullivan Circuit Court appointed him a receiver, to take charge of 18,000 said bonds and to receive the same from himself as trustee to himself, as receiver, and to sell them and pay the judgment recorded against him, which he did and which he paid, selling the said eighteen bonds and paying the judgments on October 10, 1876, and on same day reporting same to judge of said court in Linn county, and his doings were approved. Copies of proceedings all set out.

Also, that other parties (who are also respondents herein) had under process from said State Court issued prior to August, 1874, served upon him, summoned him as garnishee in divers causes which were still pending, and in which he had not yet answered, and were seeking to hold him liable on account of said bonds, and also other like proceedings commenced after August, 1874, but before the receiver's bill was filed, (see p 54-55 of printed record).

The same things are substantially repeated of him in an amended answer filed afterwards (pp. 75 to 80 inclusive printed record,) with the further claim that the mortgage of Farmers Loan and Trust Company had been foreclosed at April term 1876 of the Circuit Court for Western District of Missouri, and thereby had become inoperative, and asking to be allowed for fees, etc.

The answers of the other respondents, who were the plaintiffs in the State Court proceedings, were substantially the same as those of the trustee; reliance being

placed on the State Court process, to defeat the receiver's right to the relief prayed for. They claimed that receiver had knowledge of garnishee proceedings, and was bound to interplead in the State Court. The receiver, before completing the unfinished portion of said road, made some arrangements with the county court of Sullivan county, by which a condition of the subscription as to time was waived, and a suit of the county against Mc Cullough in the Supreme Court was to be dismissed, but the validity of the transaction is not in question, and it may be laid out of view. The rights of the parties here are independent of that (pp. 38 40 printed record).

After the action of McCullough in disposing of eighteen bonds to pay Stanly, Ash, and Boner, at the instance of Combs, Cave, Northcott, Burgess, and Prewitt, who had sued out attachments in the Common Pleas Court of Linn county, and caused McCullough to be summoned as garnishee (and who were parties to the original bill) upon the filing in said Linn county court of McCullough's answer, said court appointed one Brownlee receiver, to take and dispose of said twenty-two bonds remaining, in said McCullough's hands, and to sell the same and pay off the judgments of said parties; but this transaction was intercepted by the process of the United States Circuit Court herein, and said bonds were under its order delivered to the clerk of the court below, who still holds them. (pp. 89-92 printed record).

To these several answers the receiver filed his exception to their sufficiency, except as to notice of process, which was replied to, [p. 94.] The evidence taken and stipulations of the parties show the facts as stated.

It was established as a fact, that no attempt was made in the state court to bring in the receiver by process, but

through his attorney, he knew of the proceedings, and did not interplead, but he was in no sense a party.

Upon these facts, the court below found against the receiver and dismissed the bill, holding that the mortgage to Farmers Loan and Trust Company did not cover this property, and that the receiver was bound by State Court proceedings. The receiver appeals.

ASSIGNMENT OF ERRORS.

I.

The Court below erred in holding that the bonds in controversy were not included in, or covered by, the mortgage under which plaintiff claims.

II

It was error to hold and decree, that the State Court process relied upon, gave that Court jurisdiction, or the respondents a right to said bonds, prior or superior to complainants.

III.

Even if the State Court process had been sufficient, if the garnishee had been a debtor of the Railway Company, yet under the facts proved, the same gave no lien or right against property, as it was held in trust.

IV.

The Court erred in holding, that State Court proceedings relied upon, were binding in any respect on complainant, and that it was his duty to interplead in that Court, and in giving any effect whatever to said State Court proceedings, and in not holding complainant entitled to the bond.

V.

The Court below erred in dismissing complainant's bill and refusing the relief prayed for.

BRIEF.

I.

Before passing to the assignment of errors, it may be proper to notice the position of counsel in the case, who represents "Sullivan county." It appeared below and undertook to controvert the right of both parties to the securities in controversy.

But it cannot be heard now in this court, as it never appealed.

It is too well settled to require the citation of authorities to any great extent, that no one but an appellant can be heard against the action of the court below—So that the rights of Sullivan county as disposed of by the circuit court cannot be looked into here:

Avery *vs.* Merrill, 2 Curtis cc. R., p. 8.
Buckingham *vs.* McLean, 13 How, 150.
The William Bagley, 5 Wall, 412.
U. S. *vs.* Hickey, 17 Wall, 9.
Chittenden *vs.* Brewster, 2 Wall, 191.
The Stephen Morgan, 94 U. S., 599.
Marshall *vs.* Vicksburg, 15 Wall, 147.

II.

The complainant being receiver in a suit to foreclose the mortgage, is substituted to and represents all the rights of the trustees in the mortgage, and the order appointing him requires him to prosecute and defend all suits necessary to protect these rights.

High on Receivers, §205-207.

III.

Therefore if the mortgage covered the bonds in question, the receiver is entitled to them.

Is the language of the mortgage broad enough? "All "the present or in future to be acquired property of," "or in any manner appertaining to said railway, and all" "the right and title therein—all property purchased or" "to be purchased, or *otherwise* acquired, all revenue" "and income *rights*, privileges and franchises, and" "property acquired by virtue thereof."

This is the language.

These county bonds were in the hands of McCullough, respondent "*in trust*," to be delivered *when* the company completed the road through Sullivan county—till then the company had no title, no right to them. By the agreement, when that was done, then they acquired a right to them, and it became the duty of the trustee to deliver. The company failed to complete the road before it became insolvent, and thereby failed to acquire the right provided in the contract, to the bonds. The receiver was authorized to finish the road, and with the money of the mortgagees in his hands as receiver; and he did do the thing by which the right to the bonds became absolute. He under the order of the court, performed the condition of the contract, and acquired the immediate right of property in the bonds, either for the mortgagees or the corporation. As soon as this was done, the bonds became "acquired *property*."

This word PROPERTY is as broad and comprehensive as the dominion of man over external things, and in this mortgage it did and was intended to include every species of possession or right which this corporation could hold.

It includes things real and things personal.

Property in things personal or chattles (says Blackstone) may be in possession or in action.

Blackstone, vol. 2, p. 313.

One is that which a man has in possession and can enjoy, the other that which he has not in possession, but has a right to. But both things in possession and rights of action are included in the word *property*.

Webster, among other definitions of the word, says it means "an estate, whether in lands, goods or money."

Bouvier defines it to be "the right and interest which" "a man has in lands and chattels, to the exclusion of" "others;" and further he says: "Personal property is" "divided into property in possession and choses in" "action."

In Jackson *vs.* Housel, 17 Johnson, p. 283, the court says: "Property is defined to be the highest right a" "man can have to *any thing;* being used for that right" "which one hath to lands and tenements, goods or" "chattels which no way depend on another man's" "courtesy. The terms *all my property* are as exten-" "sive and comprehensive as *all my estate*, or *all my*" "*effects, real and personal.*"

This court in the case of Soulard *vs.* United States, 4 Pet., 511, says: "The term 'property,' as applied to" "lands, comprehends every species of title inchoate or" "complete." As applied to personal property, it must follow that it includes every specics of property not real in its character.

Pond *vs.* Bergh, 10 Paige. 140.

In the case of Wilson *vs.* Boyce, 2 Otto p. 324, this court passed upon the very question under discussion.

The court uses this language: "The question is, does "the word property create a valid lien on these lands? "The generality of its language forms no objection to "the validity of the mortgage. A deed of 'all my "estate' is sufficient, so a deed of all my lands, wherever "situated, is good to pass the title. A mortgage of all "my property, like the one we are considering, is suffi- "cient to transfer title."

To the same effect is the case of Whitehead *vs.* Vineyard, 50 Mo., 30.

So in the case of Scott *vs.* Clinton & Springfield R. R., 6 Bliss, 534, this doctrine was recognized and followed.

If, therefore, according to these authorities, these bonds became property when the receiver complied with the conditions of the subscription, then they at once became subject to the mortgage. If they did not become property, how could the attachment process relied upon by respondents take effect upon them? The mortgage having been executed in 1872, and the garnishee process not levied till 1874, there can be no controversy that the mortgage lien, if it exists at all, is prior to the attachments.

IV.

But it may be claimed that these bonds are in the nature of income, and that under the doctrine laid down in Gilman et al *vs.* Illinois and Mississippi Telegraph Co., 1 Otto, 603, they were liable to the claims of the general creditors.

To this there are two satisfactory answers —

1st, Default had been made in the payment of interest long before the attachments were served, and

2d, The receiver was appointed not only long before

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the right to the bonds accrued, but as before stated, it was by his act and the expenditure of money in his hands as receiver, that the right to the bonds was acquired. In this case the thing has been done, which the court held was the only thing necessary to give the mortgagees preference in the case referred to, to wit: The aid of a court of equity was invoked before any right to the bonds had accrued or matured. If it is income, it is income earned after appointment of receiver.

V.

But respondents claim that the state court got jurisdiction of the *res* before the appointment of the receiver.

It is very evident, however, that no proceedings by attachment on execution against the company to which the trustees in the mortgagee were not parties, could affect their rights, and it is not claimed that either the mortgagees or the receiver were in any manner parties to such proceedings. *

As to them the proceeding was void.

If respondents claimed any right to the mortgaged property, which they had acquired in any proceedings between them and the company, it was their duty to come into the court below and make it known.

High on Receivers, § 139..

The receiver is constructively entitled to the bonds, and his possesssion and right will be protected by the court appointing him.

High on Receivers, § 141.
Robinson *vs.* Atlantic and Globe Co , 66 Pa. St., 160.

And the state court proceeding can be of no avail, unless the court of the receiver shall hold that such pro-

* Doubly so by Myers 37 Mo 118

ceedings gave a lien prior to the mortgage By the bill of foreclosure this court acquired jurisdiction of the whole matter.

Corly *vs.* Bean, 44 Mo., 379.
Dolzen *vs.* McGowan, 15 Mo., 622.

VI.

McCullough, the custodian of the bonds, pleads as the reason why he should not be required to surrender them to the receiver, that the state court, in said proceedings, has required him to do otherwise, and he was proceeding, as the record discloses, with alacrity to obey that court, in the face of the receiver's demand; and although he knew full well that neither the trustees of the mortgage nor the receiver had been parties in any sense, which entitled that court to pass upon their rights to the property.

When the process was served on him, it is conceded on all hands that no right had accrued to the corporation to have these bonds; and therefore, there was nothing in his hands upon which it could operate, nor of which the state court could take jurisdiction; at any rate in such way as to impair the claim or right of the mortgagees or receiver.

It is well settled, that property in the hands of a trustee cannot be reached by a proceeding at law.

Sheedy *vs.* Second Nat. Bank, 62 Mo., p. 25.

The court says:—"The garnishment statute evidently "contemplated that in order to render a person liable as "garnishee, the debt which he owed the defendant "should be of such a character that upon *being served* "*with process* he might pay the amount, without being "compelled to await the determination of a chancery

"proceeding requiring the adjustment of accounts be-
"tween parties."

So thought the court in Lackland *vs.* Garesche, 56 Mo., 267, "where it is held that the statute of garnishment is "essentially legal, and not equitable, and that rights and "credits in hands of garnishee subject to attachment are "such as are not incumbered with *trusts*, and such as may "be delivered over under the direction by the court free "of incumbrance."

This is the doctrine of the Missouri courts.

It had long been settled upon general principles, that the process of garnishment could hold nothing except where there was absolute liability at the time *the process was served*, and that changing a contingency which existed at the service into a certainty afterwards, would not render a trustee or garnishee liable.

Williams *vs.* Andriscogin R. R. Co., 36 Maine, 201.

"The right of the parties depend upon the condition "of things, as they existed at the time of the service of "the original writ on the trustees, and could not be mod-"ified or changed by subsequent transactions. The fact "that the contract was finally completed cannot therefore "change the result."

Drake on Attachments, 550—553.

It is equally well settled, that if the indebtedness sought to be attached is of such a character that it may never become due, that a garnishee process will be of no avail.

Hearne *vs.* Keath 63 Mo., 89.

"The debt for which an attachment may issue must "possess an actual character, and not be merely possible "and depend upon a contingency which may never "happen. In this state the statute authorizes an attach-

" ment in some instances, where the debt is not due, yet " the provision plainly contemplates that to warrant the " proceeding there must be an actual subsisting debt " which will be due by the efflux of time."

In addition to this, under the decision of the sepreme court of Missouri, there was no service of any process that would give the court jurisdiction of McCullough, the garnishee.

The return is:—" *Served the within writ by declar-*" "*ing to the within named Warren McCullough, that*" "*I did summon him, as garnishee, to appear before our*" "*circuit court, &c.*—p. 62, printed record."

In Norvell *vs.* Porter, 62 Mo., 312, the court held that such a service was not an attachment, and *gave the court no jurisdiction* of the garnishee.

It is now apparent from these authorities, that the garnishee had the means of defeating any judgment against him in the state court, and it is equally apparent that only his neglect or his collusion with the attaching creditors, was or could be the cause of such judgment.

He had the means of defence complete and perfect, and it was his duty to use them. And the proceedings of the state court are no defence in this proceeding.

Dobyns et al *vs* Hyde et al, 37 Mo., 118

" It is a fundamental principle upon which all security " for private rights rests, and which never gives way to " any other, that no one is bound by a judicial proceed- " ing to which he is not a party."

" It was competent for the legislature to promise a " mode upon the attachment of debts to require all per- " sons interested to interpose their claims, but they have " not done so, and it is not in our power to remedy the

"omission, by declaring the *ex parte* condemnation "against the debtor, now allowed by law to be exclusive "upon the rights of strangers. The sentence binds the "parties to the proceedings; but we cannot allow it to "do more without violating a principle essential to the "preservation of private rights."

"The remedy of the party who pays, under such cir-"cumstances, is against the attached debtor."

That was a case where the same defence was ruled upon as in this.

To the same effect is Wilson *vs* Murphy et al, 43 Mo., 410.

VII.

The same authorities hold that it is not the duty of a third party to intervene and set up his rights.

It is possible that under the Missouri statute, the garnishee might have protected himself by requiring the trustees in the mortgage, or the receiver, to be made parties. This could not have been done as to receiver, without application to the circuit court, where he was appointed, and that would have resulted in transferring the proceedings to that forum, where all of the several rights would have been settled; but he did nothing of the kind. He took the responsibility, and must suffer the consequences.

The bonds in question, I submit, belong to the receiver, and the decree of the circuit court dismissing the bill should be reversed.

P. HENRY SMYTH,
Solicitor for Appellant.

OFFICE SUPREME COURT U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1880.

ELIJAH SMITH, RECEIVER OF THE BURLINGTON AND SOUTH-WESTERN RAILWAY COMPANY,
Appellant,
vs.
WARREN McCULLOUGH ET AL.,
Respondents.
} *No. 55.*

Appeal from the Circuit Court of the United States for the Western District of Missouri.

L. T. HATFIELD,
Solicitor for Elijah Smith, Receiver, Appellant.
H. M. POLLARD,
Of Counsel for Appellant.

St. Louis: Press of G. I. Jones & Company.

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Appeal from the Circuit Court of the United States for the Western District of Missouri.

Prior to the 1st day of May, 1871, the St. Joseph and Iowa Railroad Company was a corporation duly organized and existing under the laws of the State of Missouri, whose main line extended from the city of St. Joseph, in Buchanan

County, Missouri, in a north-easterly direction to the line between the States of Iowa add Missouri, at a point in Putman County, north of the town of Unionville in said county, and said company had projected a branch-line, known as the Central North Missouri, branch of the St. Joseph and Iowa, Railroad Company, beginning at a point on said main line at or near said town of Unionville, and extending thence south through Putnam, Sullivan, and Linn Counties, Missouri. And about said 1st day of May, 1871, said St. Joseph and Iowa Railroad Company was negotiating with the Burlington and South-Western Railway Company, a corporation organized and existing under the laws of the State of Iowa, and whose lines of road would connect at the State line; and at the same time said St. Joseph and Iowa Railroad Company was negotiating with Sullivan County, Missouri, to obtain a subscription to its capital stock by said county in the sum of $200,000. And on said 1st day of May, 1871, said county of Sullivan did subscribe the sum of $200,000 to the capital stock of the St. Joseph and Iowa Railroad Company, for the use of said Central North Missouri branch thereof, such subscription being payable in the bonds of said county at par, each bond of the denomination of $1,000, said bonds to be issued and placed in the hands of Warren McCullough, as trustee of said county and the railway company, said bonds were issued and placed in the hands of said McCullough, trustee. And the St. Joseph and Iowa and Burlington and South-Western Railway Companies did consolidate, under the name of the Burlington and South-Western Railway Company, and the name of the Central North Missouri Branch of the St. Joseph and Iowa Railroad Company was changed to that of the Linneus Branch of the Burlington and South-Western Railway Company.

The subscription of Sullivan County was payable in instalments, as follows: Whenever one-fourth of the work or building said branch-line through Sullivan County, Missouri, in point of cost was done and paid for, as shown by

the report and certificate of the engineer in charge of the work, then said county, by said trustee, was to deliver $40,000, in the bonds of said county, to the Burlington and South-Western Railway Company; and, in like manner, $40,000 in bonds when one-half the work was done and paid for, and so on until the road was completed, $40,000 to remain in the hands of said trustee until it was completed and the rolling stock thereon. After such consolidation was fully consummated, said Burlington and South-Western Railway Company began the construction of said branch-line, and so far succeeded as to complete the branch-line northward from Laclede, on the Hannibal and St. Joseph Railroad, to a point about three miles north of the south line of Sullivan County, and also from Unionville southward to a point about one and one-half miles south of the north line of Sullivan County, and to be entitled to and receive all of the bonds of said county but the last instalment of $40,000. There being about twenty-one miles in Sullivan County not ironed when, to wit, about April 1, 1873, the company became insolvent, and made default in the payment of the interest on the bonds of said Linneus branch, secured by a mortgage executed and delivered April 1, 1872, to the Farmers' Loan and Trust Company, as trustees, which said mortgage covered all the property of said branch-line, "including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station-houses, depots, viaducts, bridges, timber, and material, and property purchased and to be purchased, or otherwise acquired for the construction and maintenance of said branch railroad, and all engines, tenders, cars, and machinery, and all kinds of rolling stock now owned or hereafter to be purchased for and on account of said branch railroad; all the revenue and income, and all the *rights*, *privileges*, and *franchises* relating thereto, and property acquired by virtue thereof."

Said company, being so insolvent, abandoned work on said branch-line, and did not again resume work thereon.

But afterwards, to wit, on the eighth day of August, 1874, the Farmers Loan and Trust Company, trustees in said mortgage, began an action against said railway company to foreclose said mortgage, by suit in equity in the Circuit Court of the United States, within and for the Western District of Missouri; and in pursuance of the object of such action, said court, on the seventeenth day of November, 1874, appointed N. B. Baker receiver of said branch-line, directing him to take possession thereof, with everything pertaining thereto; and said Baker, duly qualified as receiver, and took possession of said branch-line and appurtenances, and retained the same until the 19th day of November, 1875, when he resigned, and Elijah Smith, appellant, was appointed receiver of said branch-line, with orders to take possession thereof, with all the property, real and personal, books, papers, vouchers, moneys, and accounts of the company, and authority to complete the unfinished portion of the road in Sullivan County, etc., and for that purpose borrow money, issue debentures, etc.

And said Smith, in the month of June, 1876, acting within the scope of his authority as receiver of said branch-line, and for the purpose of availing himself of the assets of the corporation, entered into negotiations with the officers of Sullivan County, Missouri, for the purpose of securing the payment of the last instalment of its subscription. (The time within which the road was to be built having expired, and the county had commenced proceeding to annul the subscription as to such last instalment.) And to that end made said county a proposition in writing, offering to pay certain charges against said bonds, arising from litigation between the railway company and county in relation thereto, and also complete the road through the county, with the rolling stock thereon, on or before the 1st day of October, 1876. And such proposition being accepted, said receiver proceeded to and did complete, and pay for said road within the time prescribed. And having paid all charges required by the county, on the 13th day of Oc-

tober, 1876, made application to said county for an order for the delivery of said bonds, and accompanied his application with the certificate of H. A. Sumner, chief engineer in charge of the work of construction, showing that it had been completed and paid for. And the County Court of said county made the necessary orders, relinquishing all claims to said bonds in the hands of McCullough, trustee.

The accompanying map will show fully the relative positions of the main line and branch, and the portion remaining unfinished at the time the company became insolvent, and which was subsequently built by the receiver.

Previous to the appointment of a receiver of said branch-line, to wit, June 20, 1874, Edmund Ash, J. M. Stanley, and J. Q. Boner, holders of promissory notes of the Burlington and South-Western Railway Company, separately instituted suits against said company in the Circuit Court of Sullivan County, Missouri, by attachment, and caused process of garnishment to be served on McCullough, trustee (for the purpose of this suit the transcript and pleadings in case of E. Ash are to be taken for all, — the orders in his case binding all), and at the October term, 1874, of said court, recovered judgment on said notes, and after filing interrogatories to McCullough, garnishers gave him until the next term to answer; and at the April term, 1875, he was given until the next term to answer; and at the October term, 1875, he was given until the next term to answer; and at the April term, 1876, he was given until the next term to answer; and at the October term, 1876, to wit, October 7, 1876, without any notice to appellant, he filed his answer to the interrogatories, and set forth the number of bonds he held and the purpose for which they were held, and that the road had been completed and paid for, etc. Whereupon said Circuit Court of Sullivan County rendered judgment against said McCullough, and appointed McCullough, receiver of said bonds, with orders to sell the same at public or private sale. And on the 10th day of October, 1876, said McCullough, acting under the

orders of said court, sold eighteen of said bonds at private sale to Edmund Ash, for seventy-five cents on the dollar, and paid off the demands of Ash, Boner, and Stanley, and made report thereof to the judge of said court on the same day, and the same was approved, — thus disposing of a large amount of the assets of the corporation without the knowledge or consent of the Circuit Court of the United tates, within and for the Western District of Missouri, in whose custody such property properly belonged. And on the 11th day of October, 1876, complainant, without any knowledge of the sale of said bonds by McCullough, but having knowledge of the judgments, and fearing an improper disposition of the bonds, made application to the Hon. Arnold Krekel, one of the judges of said United States Circuit Court, at Chambers, by petition, asking that said McCullough, Ash, Boner, and Stanley be restrained from further action in the premises, and that the bonds be delivered to the receiver, subject to the orders of said court, which petition is in words and figures following: —

The said Elijah Smith, appointed by this court receiver, with certain right, powers and duties, as will appear by reference to the orders of appointment and decree of foreclosure, now states to the court the following facts: That prior to the commencement of the proceedings in this cause in this court, to wit, May 1, 1871, the county of Sullivan, in the State of Missouri, subscribed in proper and legal form to the capital stock of the Burlington and South-Western Railway Company the sum of two hundred thousand dollars ($200,000), to be paid in the seven per cent. coupon bonds of said county in certain *in certain* instalments of forty thousand dollars each as set forth in the contract of subscription; that the last instalment was not to be paid or delivered until the road was built and trains running thereon through said county. That prior to the appointment of petitioner all of said bonds had been de-

livered to said company in pursuance of the agreement, except forty thousand dollars, and to which the company, by the contract, had no right until the road was built and finished through the county; and that prior to the appointment of your petitioner the said railway company had become insolvent and was unable to complete said road and become entitled to said bonds, there then being a gap of twenty-three miles in said county of Sullivan of unfinished road. That after the appointment of your petitioner, for the purpose of saving said subscription and finishing said railroad, he applied to the County Court of said county (a copy of which said application is herewith filed, marked Exhibit A) to waive the question of time mentioned in the original order of subscription and to enter into an agreement with him whereby he should complete said road and the bonds be delivered to him under said contract as part of the assets of said railway company, and an arrangement was perfected and entered into (a copy of which is herewith filed, marked Exhibit B). Previous to this your petitioner was authorized to purchase the necessary material and complete said unfinished part of said road by an order of this court. Before said railway company become insolvent, and before the appointment of petitioner as receiver, said county of Sullivan had issued all of said bonds and placed them in the hands of Warren McCullough as trustee for all the parties, to be delivered to said railway company on the compliance by it with the terms of said subscription. Your petitioner further shows that the mortgage to plaintiffs in this cause conveyed all of the property of said Burlington and South-Western Railway Company of every kind, real, personal, and mixed, acquired, and to be acquired, and that your petitioner by the order of this appointment was authorized to take receive and hold all property in any manner belonging to said company or to which it was or might be entitled, subject to the order of this court. That in the year 1874, and after the execution, delivery, and recording of the mortgage to plaintiffs in this cause, Edmund Ash,

John Q. Boner, and Joseph M. Stanley recovered judgments against said Burlington and South-Western Railroad Company in the Circuit Court of Sullivan County, Missouri, for large sums of money; and that afterwards, to wit, in said year 1874, said several judgment-creditors caused executions to be issued on said judgments and levies to be made on certain property of said company, and among other things caused garnishee process to be served on said Warren McCullough, trustee, claiming to hold said bonds by virtue of said process; that said several parties were made parties to the bill in this cause, and properly brought into court and their levies set aside.

That your petitioner, under the orders of this court, has completed said road through said county, and by virtue of said original contract and the arrangement with the county court of said county hereinbefore referred, has become entitled to receive from said McCullough the said forty bonds of one thousand dollars each. That said judgment creditors, notwithstanding the proceedings in this court, have required said McCullough to appear and answer said garnishee process in the State court of Sullivan County, Mo., and he has appeared in said court and made answer to said process (a copy of which is hereto annexed and marked Exhibit C).

That said Circuit Court of Sullivan County has undertaken by its judgment to order said McCullough to hold said bonds to satisfy the judgments of that court, notwithstanding the proceedings herein, has made an order, and said several judgments creditors threaten to cause said order and judgment to be enforced, and cause said McCullough to sell and dispose of said bonds and pay over the money received from said sales on said judgments, to the great injury of the plaintiffs in this cause, and in contempt of this court.

Your petitioner therefore prays that said Warren McCullough be required to appear and show cause, if any he have, why said bonds should not be delivered to your petitioner to be disposed of as this court may adjudge proper, and that said Edmund Ash, J. M. Stanley, and John Q. Boner

be required to appear at the next rule day and show cause why they should not be punished for contempt for interfering with the property in the custody of this court; and that the court here do issue an order enjoining and restraining each and every of said judgment creditors from proceeding in any manner on the order or judgment of said Circuit Court of said Sullivan County, and said McCullough be restrained and enjoined from delivering or selling or paying over any of said bonds or their proceeds upon any of said judgments in said State court, and that said Warren McCullough be required to surrender said bonds to petitioner, and that upon a final hearing of all of said injunctions be made perpetual.

ELIJAH SMITH,
Receiver of the Burlington and South-Western R'y Co.,
Under the orders of the Circuit Court of the U. S.
for the West. Dist. of Mo.
Pr. L. T. HATFIELD,
Attorney.

In this 11th day of October, 1876, L. T. Hatfield, on his oath, states that the matters and allegations set forth in the foregoing petition are true.

[Signed] L. T. HATFIELD.

And, upon a hearing, Judge Krekel granted the order prayed for, as follows:—

This day comes Elijah Smith, the receiver heretofore appointed by this court in this cause, by his solicitor, L. T. Hatfield, Esq., and files herein a petition and affidavit for a restraining order against Warren McCullough, Edmund Ash, John Q. Boner and J. M. Stanley, and said petition and affidavit having been submitted to the honorable Arnold Krekel, Judge, upon consideration thereof, and having fully advised in the premises, it is ordered that said Warren McCullough be enjoined and restrained from delivering, selling

or paying over any of the bonds mentioned and described in said petition, and from delivering or paying over their proceeds upon any of the judgments set out in said petition. It is further ordered that said Warren McCullough deliver said bonds to said receiver under the contract and agreement set forth in the petition aforesaid. It is further ordered that the said Edmund Ash, John Q. Boner, and J. M. Stanley, and each and every of them, be enjoined and restrained from proceeding in any manner to enforce the judgment or order of the Sullivan Circuit Court recited in said petition or that said parties appear before the Honorable Arnold Krekel, Judge, at chambers, in the city of Jefferson, on the 25th day of October, 1876, and show cause, if any they have, why said orders have not been obeyed. It is further ordered that a copy hereof, together with a copy of said petition, be served on the above-named parties.

But by agreement the trial of the matters in controversy was postponed until the regular November term, 1876, of said court.

Also, there was a state of affairs in Linn County, Missouri, touching the same bonds, somewhat similar to the foregoing, in this, that in the year 1874, Joseph Combs, Joel H. Wilkerson, B. F. Northcott, Marion Cave, and Henry C. Prewitt obtained judgments against the Burlington and South-Western Railway Company, in the Common Pleas Court of said county, and without any evidence of summons to McCullough, as garnishee, filed interrogatories to him touching the possession of the bonds, and by agreement between McCullough and the parties plaintiff, he was allowed term after term in which to answer until the November term 1876, when he filed his answer in the different causes in said Common Pleas Court; and the said Combs, Prewitt, Northcott, and Cave filed an interplea asking for twelve of the bonds on account of commissions claimed to be due them for obtaining the subscription originally, but before any action could be had thereon, appellant, on the 10th day of November, 1876, made a further application to the Hon. Arnold

Krekel, Judge, as aforesaid, asking that they be restrained, etc., and that they show cause why they should not be attached for contempt and the bonds delivered to said receiver, which petition is in words and figures following: —

The said Elijah Smith, heretofore appointed by this court receiver of the Burlington and South-Western Railway, with certain rights, powers, and duties, as will appear by reference to the orders of appointment and decree of foreclosure, now states to this court that prior to the commencement of proceedings in this cause, Sullivan County, in the western district of the State of Missouri, subscribed two hundred thousand dollars to the capital stock of the Burlington and South-Western Railway Company, payable in instalments, as will appear from a certified copy of the order of the County Court of said county in subscribing said sum of two hundred thousand dollars, on file in this cause in this court. That the last instalment was not to be paid until the road was built and trains running thereon through said county. That prior to appointment of petitioner all of said bonds had been delivered to said company in pursuance of said order of subscription except forty thousand dollars, and to which the company had no right until the road was completed through said county. And that prior to the appointment of your petitioner said railway company had become insolvent and was unable to complete said road and become entitled to said bonds, there then being a gap of twenty-three miles in said county of Sullivan of unfinished road. That after the appointment of petitioner, for the purpose of saving said subscription and finishing said railroad he applied to the County Court of said county (a copy of which said application is on file with the papers in this cause) to waive the question of time mentioned in the original order of subscription, and to enter into an agreement with him whereby he should complete said road and said bonds be delivered to him under said contract as part of the assets of said railway company; and an arrangement was made and entered into (a copy of

over any of said bonds or their proceeds, or any said judgments in said State courts; and that said Warren McCullough be required to surrender said bonds to petitioner; and that upon a final hearing all of said injunctions be made perpetual.

ELIJAH SMITH,
Receiver of Burlington & South-Western Railway Co.,

Pr. L. T. HATFIELD,
Attorney.

On this 10th day of November, 1876, L. T. Hatfield, on his oath, states that the matters and allegations set forth in the foregoing petition are true.

L. T. HATFIELD.

Subscribed and sworn to this 10th day of November, 1876.

H. C. GEISBERG, *Clerk.*

And upon a hearing Judge Krekel granted the order prayed for as follows: (In this connection it was agreed that the transcript and record in case of Joseph Combs, should answer for all, and order made therein should be binding upon all.)

This day comes Elijah Smith, receiver of the Burlington and South-Western Railway Company, under the order of this court, by his solicitor, L. T. Hatfield, Esq., and files herein a petition supported by proper affidavit, praying for a rule against Warren McCullough, Joseph Combs, Joel H. Wilkinson, Marion Cave, Henry C. Prewitt, John L. Reynolds, Gavon D. Burgess, Alexander W. Millins, William Smick, Benjamin F. Northcutt, John T. Heath, John Bradley, Enoch W. Van Wye, Ira Sears, Jonah D. Seamon, Lucinda Head, James T. Reynolds, John Hollon, Joseph W. Mairs, John Mairs, Elihu E. Frazier, and John H. Casperson, requiring each and every of said parties to appear before the Circuit Court of the United States for the Western District of Missouri, and show cause why they should not be

restrained and enjoined from proceeding in any manner on the order or judgment of the Circuit Court of Sullivan County and the Circuit and Common Pleas Courts of Linn County, Missouri, set forth in said petition, and that said Warren McCullough, as trustee of the bonds in said petition mentioned, show cause why he should not be enjoined and restrained from delivering, or selling, or paying over any of said bonds or their proceeds upon any of the judgments of the said Circuit Court of Sullivan and Linn County and the Common Pleas Court of said Linn County in said petition mentioned, and also requiring the said Warren McCullough, as trustee of said bonds, to show cause why he should not deliver the said bonds to petitioner subject to the disposition of this court. And said petition having been submitted to the honorable Arnold Krekel, Judge, it is now ordered that the said parties, to wit, Warren McCullough, Joseph Combs, Joel H. Wilkinson, Marion Cove, Henry C. Prewitt, John L. Reynolds, Gavon D. Burgess, Alexander W. Mullins, William Smick, Benjamin F. Northcutt, John T. Heath, John Bradley, Enoch W. Van Wye, Ira Sears, Jonah D. Seamon, Lucinda Head, James T. Reynolds, John Hollon, Joseph W. Mairs, John Mairs, Elihu E. Frazier, and John H. Casperson, and each and every of them, be and appear before said Circuit Court on Tuesday, the 21st day of November, A. D. 1876, and show cause why they should not be enjoined and restrained from proceeding in any manner to enforce the said order or judgment of said Circuit Court of Sullivan County, and also the Circuit and Common Pleas Courts of Linn County, and that said Warren McCullough, as trustee of said bonds, show cause why he should not be enjoined and restrained from delivering, or selling, or paying over any of said bonds, or their proceeds, upon any of the said judgments; and that the said Warren McCullough, as trustee of said bonds, show cause why he should not deliver the same to the said Elijah Smith, receiver, subject to the order and disposition of this court. It is further ordered that a copy hereof, together with a

copy of the petition filed as aforesaid, be served on each and all of the above-named parties.

At the regular November term, 1876, of said United States Circuit Court, appellant, having learned of the sale of the eighteen bonds to Ash, for the use of himself, Boner, and Stanly, amended his petition asking that they be required to return the bonds or account for the proceeds, which petition is as follows: —

Said receiver amends the petition heretofore filed herein, by leave of court, and says that as it appears from the answer of said McCullough, trustee, and J. Q. Boner, filed herein, that before the service of the process herein on them the said McCullough sold eighteen of the bonds in controversy, and paid over the proceeds thereof, amounting to $13,296, to said Boner, as plaintiff in one of the judgments of said Circuit Court of Sullivan County, and as assignee of the judgments of Ash and Stanley. Petitioners say that said acts were wrongful, and that they ought to be now required to pay over said proceeds to said receiver or procure and return said bonds, and he asks for an order on them severally, requiring them so to do, and prays the court to adjudge him entitled to the said property or its value, and for such other relief as he may be entitled to under the circumstances.

P. HENRY SMYTHE, AND
L. T. HATFIELD,
For Petitioner.

And the various respondents filed their answers, to wit: Warren McCullough, trustee, as follows: —

Now comes Warren McCullough, one of the defendants, and for his separate answer to the petition of Elijah Smith filed herein on the 11th day of October, 1876, says that as to whether the said Smith has so complied with the orders

of the County Court of said Sullivan County as to entitle him as such receiver to the possession of the bonds mentioned in plaintiff's petition, or any of them, he has no knowledge or information whereof sufficient to form a belief.

This defendant, for further answer herein, denies that any levy or garnishment in relation to the property now sought to be brought into controversy, in either of the suits mentioned in these proceedings, viz., Edmund Ash, John Q. Boner, and Joseph M. Stanley against said Burlington and South-Western Railway Company, were set aside by this or any other court, or in any manner interfered with; this defendant further denies that the plaintiff Smith is injured by any act or proceeding of this defendant in the sale of the bonds hereinafter mentioned.

This defendant, for further answer, says that on the 22d day of June, 1874, he was duly summoned as a garnishee in the case of Edmund Ash against said Burlington and South-Western Railway Company, defendant; also, at the same time on the same day, he was further served as garnishee in the case of J. M. Stanley against the same defendant; also, at the same time on the same day, he was further served as garnishee in the case of John Q. Boner against the same defendant; and after several successive continuances of said garnishee proceedings at the October term of the Circuit Court in and for Sullivan County, Missouri, begun and held at the court-house in the town of Milan in said county on the 1st Monday of October, 1876, on the 5th day of said term he filed his answer as garnishee in said suits of said Ash, Boner, and Stanley before mentioned, and after the filing of said answers (certified copies of which are herewith filed, marked Ex. A, B, & C, and made a part of this answer), on the 6th day of said term of said Sullivan Circuit Court, on the 7th day of October, 1876, the said court then and there rendered judgment against said McCullough as garnishee, in favor of said Ash in the sum of $5,945.00, in favor of said Stanley and against said McCul-

lough as garnishee in the sum of $2,889.74, in favor of said Boner and against said McCullough as garnishee in the sum of $4,225.16. Also for costs in favor of said Ash, amounting to the sum of $29.39; also for costs in favor of said Stanley, amounting to the sum of $25.05; also in favor of said Boner, amounting to $25.24; and this garnishee was therein allowed $50 in each of said cases for his answers filed therein (duly certified copies of which said several judgments are herewith filed, marked Exhibits D, E, & F), and made a part of this answer, which said sums adjudged and allowed against and in favor of this garnishee amounted to a total aggregate sum of $13,296.39; that by the terms of each of said judgments in favor of said Ash, Stanley, & Boner, this defendant was authorized and required within thirty days to make execution and deliver bonds to the State of Missouri conditioned for the faithful performance of his duties as such receiver; that on the 9th day of October, 1876, he duly executed said bonds as required by said several judgments, which were duly approved, and that he then and there entered upon the discharge of his duties as such receiver in each of said cases and took charge and control of 18 of said Sullivan County bonds; as such, that pursuant to and in further obedience of said orders and judgments of the Sullivan Circuit Court made in the premises aforesaid, this defendant, as receiver, offered for sale at private sale the said 18 Sullivan County bonds, numbered from 161 to 178, both inclusive, of the denomination of one thousand dollars, bearing interest at 7% per annum from the 1st day of November, 1876, and Mr. Edmund Ash offering for each of said bonds the sum of $750, and a total aggregate sum of $13,500 for all of said bonds, and this being a higher price offered for said bonds than was offered by any one else, and more than the market value thereof, I did on the 10th day of October, A. D. 1876, pursuant to the order and judgment of said Sullivan Circuit Court, sell and deliver to said Edmund Ash the bonds before mentioned at and for said sum of $13,500, which said sum the said Edmund Ash

then and there paid and satisfied to me; and after the said sale of said bonds to said Ash as aforesaid, to wit, on the same day, October 10, 1876, as such receiver he paid off and discharged the said several judgments of Ash, Boner, and Stanley, and as well as the garnishee's fee for answering them, amounting to the sum of $13,296.39, retained as his compensation as receiver the further sum of $130.60; and afterwards on the same day, to wit, October 10th, 1876, he made and exhibited to the judge of said Sullivan circuit court his report of his doings as receiver (a duly certified copy of which is herewith filed, made a part of this answer, and marked Exhibit G), at chambers of said judge in Linneus, Linn County, Missouri, which said report was by said judge then and there approved, and after the approval thereof on said 10th day of October, 1876, the same was by me duly filed in the office of the clerk of the Circuit Court within and for Sullivan County aforesaid.

Defendant further says that said judgments against this defendant as garnishee as aforesaid, the sale of said bonds, the payment of the proceeds of said sale, were all rendered, had, and done, as well as the approval of my actions as receiver were all had, rendered, done, and performed prior to the filing of the bill or petition of said Smith in this court on the 11th day of October, 1876, and that at the time of filing of said bill or petition of said Smith, as last aforesaid, this defendant had in his hands as trustee 24 of said Sullivan County bonds.

This defendant, further answering, says that on the day of March, 1874, he was garnished by a writ of garnishment issuing out of the circuit court of Sullivan County, Missouri, in favor of William Smick and against defendant railway company, and, further, that prior to the first day of August, 1874, he had been duly served with garnishee process in the following cases, to wit, B. F. Northcutt *v.* B. & S. W. R'y Co., G. D. Burgess *v.* B. & S. W. R'y Co., also Joseph Combs *v.* B. & S. W. R'y Co., also Marion Cave *v.* B. & S. W. R'y Co., which last several suits are

and were pending in the court of common pleas in the county of Linn, in the State of Missouri; that in all of said suits of said Burgess, Northcutt, Combs, and Cave this defendant, prior to the filing of the petition of said Smith as aforesaid, had filed his answer as garnishee substantially the same as that filed in the several cases of Ash, Boner, and Stanley, and the same as well as the case of said Smick are still pending in said courts and undetermined.

And, further, that after the first day of August, 1874, and prior to the commencement of this action by said Smith, the following other writs of garnishment have been duly served upon this defendant, to wit, in the case of J. H. Wilkerson *v.* B. & S. W. R'y Co., also J. F. Heath *v.* B. & S. W. R'y Co.; also J. L. Reynolds *v.* B. & S. W. R'y Co.; also Edwards *v.* B. & S. W. R'y Co., returnable to the Circuit Court of Linn County, Missouri, and now pending in said court, but this defendant has not yet filed his answer in said suits last aforesaid. There has also been further garnishment proceedings instituted in the case of Casperson & Combs *v.* The B. & S. W. R'y Co., and also Cave *v.* Prewitt and Combs and Wilkerson against the same defendant railway, now pending in the Circuit Court of Linn County, Missouri, as well as other causes of a like nature, and which this defendant has been summoned as garnishee, but has not as yet filed any answers as such garnishee in regard thereto. This defendant further says that on the 10th day of October, 1876, he was duly served with writs of garnishment in the following other cases in the Circuit Court of Sullivan County, Missouri, to wit, Thos. Hard *v.* The B. & S. W. R'y Co.; also M. J. Reynolds et al. *v.* B. & S. W. R'y Co.; also Joseph and John Mairs *v.* B. & S. W. R'y Co.; also Ira Sears *v.* B. & S. W. R'y Co.; also John Hollen *v.* B. & S. W. R'y Co.; also E. E. Frazier *v.* B. & S. W. R'y Co., and that answers in said last mentioned cases are required to be filed at the April term of the Circuit Court of Sullivan County, Missouri, 1877.

This defendant further says that he ought not to be re-

strained herein, nor compelled to deliver said bonds, nor any of them, as prayed in said petition or bill filed by said Smith.

This defendant further says that the bill or petition of said Smith, so filed as aforesaid, is insufficient in law and equity to entitle him to any relief whatever.

Wherefore this defendant prays that the bill or petition filed by said Smith be dismissed, and for naught held, in so far as concerns this defendant, and that he go hence without day, with his reasonable costs which he hath so wrongfully sustained.

[Signed] W. McCULLOUGH.

Warren McCullough, one of the defendants herein, being duly sworn, upon his oath states that the matters and things hereinbefore alleged are true to the best knowledge and belief of affiant.

[Signed] W. McCULLOUGH.

Subscribed and sworn to before me this 23d day of October, 1876.

H. T. McCLANAHAN,
Circuit Court Clerk.

And defendants Ash, Boner, and Stanley answered as follows: —

Now comes Edmund Ash, J. M. Stanley, and John Q. Boner, and for plea and answer unto that part of the petition of said Smith which they are advised by counsel as proper and material to be answered, saving and reserving unto themselves and each of them all benefits and rights of exception to the many manifest errors contained in said petition of said Smith as aforesaid, say that as to whether said Smith as receiver was or is authorized to take, receive, or hold any or all property in any manner belonging to said company or to which it was or might be entitled, subject to the order of this or any other court, they nor

any of them have sufficient knowledge or information thereof to form a belief. But the defendants here answering deny that the property in controversy, the bonds in said petition of said Smith mentioned, was or is included in the mortgage therein mentioned.

Defendants Ash, Boner, and Stanley, here answering, further allege that they and each of them as separate plaintiffs against the Burlington and South-Western Railway Company, defendant, on the 20th day of June, 1874, instituted their said several suits by attachment in the Circuit Court of Sullivan County, Missouri; that in each of said several suits of the parties here answering on the 22nd day of June, 1874, Warren McCullough was summoned as garnishee in each of said actions; and afterwards, on the 23rd day of June, 1874, in each of said suits, the defendant, the Burlington and South-Western Railway Company, was duly served with process to be and appear in said Circuit Court of Sullivan County, Missouri, and answer the respective actions of the parties here answering, at the October term, 1874, of said court. That afterwards, on the 2nd day of the October term, 1874, of the said Sullivan Circuit Court, the respective parties here answering caused separate interrogations to be filed and exhibited against the said Warren McCullough, garnishee; and afterwards, at the same term of the said Sullivan Circuit Court, the said Boner, Ash, and Stanley recovered judgments in each of their said actions against the said Burlington and South-Western Railway Company for the amounts claimed by each of them respectively; that the proceedings against said garnishee were by successive continuances continued until the October term, 1876, when the said judgments of said parties respectively remained due and unpaid, and at which last term the said garnishee appeared before the said Circuit Court of Sullivan County, Missouri, on the 7th day of October, 1876, and filed his answer as such garnishee; also, on the 5th day of October, 1876, during said term, appeared the defendant's railway, by L. T. Hatfield, and moved the

court to strike out plaintiffs' interrogations, which motion was afterwards by the court overruled; that at the same term, after the filing of said garnishee's answers, the said Sullivan Circuit Court rendered judgment against the said Warren McCullough, as garnishee, in each of said cases respectively for a sufficient amount of money to pay off and satisfy the claims of the parties here answering, and in each of said judgments the said Warren McCullough was by the Circuit Court of Sullivan County aforesaid appointed receiver to take charge of the bonds in his hands, as such receiver to sell and dispose of a sufficient number thereof to pay and satisfy the judgments of the parties here answering; that pursuant to and in obedience to the order and judgment of the said Sullivan Circuit Court the said Warren McCullough, on the 9th day of October, 1876, duly qualified as such receiver, and on the 10th day of October, 1876, as such receiver the said Warren McCullough sold 18 of the bonds in his hands as such receiver at and for the sum of seven hundred and fifty dollars each, and a total aggregate sum of $13,500; that the said Warren McCullough, on said 10th day of October, 1876, with the proceeds of said sale as aforesaid, paid and satisfied the respective judgments of the parties here answering, amounting in the aggregate to the sum of $13,426.99; that afterwards, to wit, on said 10th day of October, 1876, the said Warren McCullough, as receiver, made to the judge of the said Sullivan Circuit Court a report of his doings as such receiver, which said report was on said 10th day of October, 1876, duly approved by said judge (all of which will more fully appear by a duly certified copy of the records of the said Sullivan Circuit Court filed herewith and marked Exhibit A).

The parties here answering deny that they or any of them were ever parties in any court to any bill or petition in which the bonds in the hands of Warren McCullough were in controversy, or in any manner referred to, and further deny that any levy or process by them, or either of them,

made in regard to said bonds were ever set aside or interfered with by any court or courts. Wherefore the parties here answering say that it is not true, as in the petition of said Smith stated, nor otherwise that is stated by the parties here answering.

The parties here answering deny that said Smith is entitled to receive from said McCullough the said forty bonds of one thousand dollars each because of the premises before stated. And they admit that said Warren McCullough made answer in manner and form as shown by Exhibit A, filed herewith, and not otherwise. And the parties here answering say that long prior to the filing of the original bill in this cause, the Sullivan Circuit Court had acquired first and prior jurisdiction of the matters sought to be brought into controversy herein, and in pursuance of such first and prior jurisdiction, so acquired as aforesaid, the said Sullivan Circuit Court proceeded, as it had full power and authority of law to do, to finally enforce its judgments and orders in the premises, and all of its said orders and judgments being enforced and approved prior to the 11th day of October, 1876, as will more fully appear by Exhibit A filed herewith; wherefore the parties here answering say that the matters and things herein sought to be brought into controversy are res adjudicata, and said Smith and all other persons whomsoever are estopped from relitigating the same; nor are the parties here answering in contempt of this or any other court, nor has the said Smith nor any other person whomsoever been in any way injured by any act or acts of the parties here answering, nor ought they nor any of them to be required to show cause as in the petition of said Smith prayed, nor ought they or any of them to be in any manner punished for contempt, for that, because, by reason of the premises before stated, the property here sought to be brought into controversy has never been and is not now in the custody of this court or any of its officers.

And the parties here answering further say that the said petition of said Smith is insufficient in law and equity to en-

title him to any relief whatever. Wherefore they, and each of them, pray that they be allowed to go hence without day, that the bill or petition of said Smith be dismissed, and for judgment for their costs which they and each of them have most wrongfully sustained by reason of said Smith's wrongful bringing of said suit against them, and for all other proper relief.

A. W. MULLINS &
JNO. P. BUTLER,
Solicitors for Ash, Boner & Stanley.

And defendants Combs, Cave, Prewitt, Northcutt, Burgess, and Wilkerson answered as follows: —

Now, at this day comes Joseph Combs, Marion Cave, Benjamin F. Northcutt, and Gavon D. Burgess, also Henry C. Prewitt and the said Marion Cave, as joint judgment-creditors of the said Burlington and S. W. Railway Co., who have been made parties to the above-entitled cause, and who have been ordered by this court to appear on this day and show cause why they should not be enjoined and restrained from proceeding to enforce their judgments and garnishee process against the defendant Warren McCullough, as garnishee of the said Burlington & South-Western R. W. Co., rendered in the Linn Co. Court of Common Pleas, in the State of Missouri. In obedience to the said order, the said parties in answer to the petition of Elijah Smith, receiver, and to show cause why these defendants here answering should not be enjoined and restrained as aforesaid, state the following: They admit the subscription of $200,000 stock of Sullivan County, Missouri, but they say that said subscription was made to the capital stock of the St. Joseph and Iowa Railroad Company instead of to the Burlington & South-Western Railway Company, as stated in the petition, and that such subscription was afterwards in some way transferred from the said St. Joseph and Iowa

Railroad Co. to the said Burlington and Southwestern R. R. Co. They admit that all of said subscription has been paid by Sullivan County to the said B. & S. W. R'y. Co., except the sum of forty thousand dollars thereof.

The said defendants deny that after the appointment of said petitioner by this court, he, for the purpose of saving said subscription and finishing said railroad, applied to the County Court of Sullivan County to waive the question of time mentioned in the original order of subscription, and to enter into an agreement with him, whereby he should complete said road, and said forty bonds of $1,000 each be delivered to him under said contract as part of the assets of said railway company, and they deny that such an arrangement was entered into; on the contrary, they allege that such application was made to said County Court by the citizens of Sullivan County. That as to whether or not, previous to the presenting of said application to said court, the said petitioner was authorized to purchase the necessary material and complete the unfinished part of said railroad by an order of this court, these defendants say they do not know, nor have they any knowledge or information thereof sufficient to form a belief. But they say that if the petitioner was so authorized by this court, he was not in any way or manner authorized to use or receive the forty bonds of Sullivan County, now in question, or any part thereof for that purpose.

Said defendants deny that the mortgage to the plaintiff mentioned in the petition conveyed all of the property of said Burlington and South-Western Railway Company, real, personal and mixed, acquired and to be acquired. They deny that said mortgage in any manner included or conveyed the said forty bonds of Sullivan County aforesaid, or any of them.

These defendants admit that they were made parties to the bills in this cause to foreclose said mortgage, but they deny that their rights were adjudicated, or that their

judgments or attachments were set aside. They deny that this court had any power or authority to set aside said judgment or attachments.

Said defendants admit that said road is now complete through said Sullivan County, but they deny that the petitioner herein has become entitled to receive from said McCullough said 40 bonds of $1,000 each, or any of them; and on the contrary said defendants aver that they and their co-defendants, as judgment creditors of said Burlington & South-Western Railway Company, and by virtue of their judgments against Warren McCullough as garnishee of said company, are entitled to receive said bonds from said McCullough; said defendants further show to this court that heretofore, to wit, on the 16th day of June, 1874, the said Burlington & South-Western Railway Company being jointly indebted to each of these defendants in large sums of money, they did on said day commence suits against said railway company by attachment in the Linn County Court of Common Pleas, which said court then and there had full power and authority and jurisdiction to hear and determine said suits, and to render *each* judgments, and make such others as it afterwards did render and make, and that writs of attachment were thereupon duly issued by the clerk of said court directed against the property of the said Burlington & South-Western Railway Company, and were on said day duly and regularly served upon said Warren McCullough as garnishee in said suits under and by virtue of the laws of the State of Missouri, and that the said forty bonds of said Sullivan County now in controversy were thereby duly levied upon and attached in the hands of said McCullough, as the property of said Burlington and South-Western Railway Company; that said several suits came on regularly for trial in the said Common Pleas Court, and duly answered and defended by the said Burlington & Southwestern Railway Company, and the said court rendered judgment in favor of the said defendant Joseph Combs for the sum of $2,825 on the 5th day of October, 1875, and in favor of said defend-

ant Burgess for the sum of $1,100 on the 6th day of November, 1874, and in favor of said Marion Cave for the sum of $2,925, dated Feb'y 5th, 1875, and in favor of the defendant B. F. Northcutt in the sum of $4,050, dated December 29, 1874, and in favor of the said defendants Cave & Prewitt jointly, in the sum of $3,111.13 on the 5th day of Feb'y, 1875. That interrogatories were duly filed by the plaintiffs in said several suits, and exhibited to the said McCullough as garnishee as aforesaid, and that afterwards, to wit, on the * * day of November, 1876, the said McCullough duly filed his answer in said several suits, a copy of which said answer is herewith filed, and on the day of November, 1876, the said several causes coming on to be heard on the issues presented by the answers of the garnishee, and the other pleadings in said suits, and the court, after being fully advised in the premises, rendered judgment in each of said causes in favor of the plaintiffs in said several suits, and ordering and directing the said garnishee, McCullough, to deliver all of said 40 bonds then remaining in his hands to W. H. Brownlee, who was duly appointed receiver in said causes under and by virtue of the laws of the State of Missouri. And said Brownlee was ordered to sell said bonds except 12 of them, and pay $2,500 to the said garnishee, and next to pay the costs and allowances to the garnishee, and next to distribute the balance of the proceeds of such sale of said bonds among these defendants in proportion to the amount of their respective judgments. Said Brownlee was duly required by said judgment to give a good and sufficient bond conditioned for the faithful performance of his duties as such receiver. (That a certified copy of said judgment is herewith filed.) That prior to the rendition of said judgments the said Benjamin F. Northcutt, Marion Cave, and Joseph Combs filed their interplea in said causes, claiming twelve of said Sullivan County bonds as their own property, a certified copy of which said interplea is herewith filed, and after issue duly joined, on the trial of the same the court gave judgment

against said McCullough and the parties to the original attachment suits, and in favor of the said interpleaders, for twelve of said one-thousand-dollar bonds, a copy of which said judgment on said interplea is herewith filed.

Said defendants say that all of said judgments and proceedings in said Common Pleas Court remain in full force and effect, and that said court has now finally adjourned until the regular court in course in Feb'y, 1877. That said W. H. Brownlee, who was appointed receiver as aforesaid, has duly qualified and given bond as required by law and the order of said court (which said bond or a copy thereof is herewith filed), and the said Brownlee has demanded the said bonds from the said McCullough in accordance with the provisions of said judgments. That the said suits of these defendants in said Common Pleas Court were the first suits commenced against the said Burlington and South-Western Railroad and the first attachments served on the said McCullough, and these defendants therefore have a prior and subsisting lien upon the said bonds in the hands of said McCullough. That the said suits were commenced and the said attachments served upon the said McCullough before the appointment of the petitioner as receiver in said cause, and before his qualification as such receiver, and before the appoint*ed* or qualification of any other receiver in said cause.

These defendants deny that they have at any time acted in contempt of the orders or judgments or process of this court in any manner, but on the contrary allege that they have at all times endeavored to act, and they believe they have acted, in obedience and conformity to the directions of this and all other courts exercising any jurisdiction over them in any manner pertaining to the bonds in controversy.

And said defendants allege that there is no equity in the petitioner's bill, and that he is not entitled to any relief from this court upon the facts as stated. Said defendants further say they have acted in utmost good faith in all of the proceedings herein stated, and upon the advice of their counsel, and they ask the court to protect them in their just

rights as creditors of the Burlington and South-Western Railway Company.

Wherefore they pray that the petitioner's bill may be dismissed, and that they may be allowed to go hence with their costs in this cause.

CHARLES L. DOBSON,
Of Counsel for said Defendants Answering.

STATE OF MISSOURI,
County of Linn, ss.

Joseph Combs, one of the defendants in the above-entitled cause, answering herein, first being duly sworn, on his oath says the facts and allegations in the attached and foregoing answer to the petition are true as therein stated, as he verily believes.

JOSEPH COMBS.

Subscribed and sworn to before me, a notary public within and for said county, at my office in Linneus, this 18th day of November, 1876.

In witness whereof I hereto set my hand and notarial seal the day and year aforesaid.

[SEAL.] C. L. DOBSON,
Notary Public (qualified 28 Dec., '71, office expires 17 Dec., '76.)

Subsequently Warren McCullough, trustee, filed an amended answer as follows:—

Now comes Warren McCullough, and for his separate amended answer, by leave of the court first had and obtained, says that, now and at all times hereafter saving and and reserving to himself all benefit and advantages of exceptions which can or may be had or taken to the many errors, uncertainties, and other imperfections in the petition or complaint of the said Elijah Smith, receiver, filed in this court on the 11th day of October, 1876, for answer thereunto, or unto so much or such parts thereof as this defend-

ant is advised is or are material or necessary for him to make answer unto, says, that as to whether the said Smith has so complied with the orders of the County Court of said Sullivan County as to entitle him as such receiver to the possession of the bonds mentioned in the petition of said Smith, or any of them, he does not know, but is informed and believes that the judgment rendered in the Circuit Court of Sullivan County, Missouri, in favor of Edmund Ash, John Q. Boner, and Joseph M. Stanley, and against The Burlington and South-Western Railway Company, were rendered upon demands accruing solely to each of said parties for work and labor done, materials and labor furnished, in the building of said railway in and through Sullivan County aforesaid, and that under and by virtue of the contract, that before said railway company should become entitled to said bonds (the bonds in controversy here) that said railway should not only be completed in and through Sullivan County, aforesaid, but that the building and completing thereof should be paid for; and this defendant is informed and believes that the said railway company, the said receiver, nor any one for them or either of them, have ever in any manner paid or satisfied the said judgments of said Ash, Boner, and Stanley accruing solely for work and labor done, materials and money furnished, to aid in the building of said railway in and through Sullivan County aforesaid, as this defendant is informed and believes.

This defendant, for further answer herein, denies that any levy or garnishment in relation to the property now sought to be brought into controversy in either of the suits mentioned in this proceedings, viz., Edmund Ash, John Q. Boner, and Joseph M. Stanley against said Burlington and South-Western Railway Company, were set aside by this or any other court, or in any manner interfered with; this defendant further denies that the complainant Smith is injured by any act or proceeding of this defendant in the sale of the bonds hereinafter mentioned.

This defendant, for further answer, says that on the 22nd

day of June, 1874, he was duly summoned as garnishee in the case of Edmund Ash against the Burlington and South-Western Railway Company, defendant; also at the same time, on the same day, he was further served as garnishee in the case of J. M. Stanley against the same defendant; also at the same time, on the same day, he was further served as garnishee in the case of John Q. Boner against the same defendant; that after several successive continuances of said garnishee proceedings, at the October term of the Circuit Court in and for Sullivan County, Missouri, begun and held at the court-house at the town of Milan in said county, on the first Monday of October, 1876, and on the 6th day of said term, he filed his answer as garnishee in said suits of said Ash, Boner, and Stanley, before mentioned; and after the filing of said answer (certified copies of which are herewith filed, marked Exhibits A, B, & C, and made a part of this answer), on the 6th day of said term of said Sullivan County Circuit Court, on the 7th day of October, 1876, the said court then and there rendered judgment against said McCullough as garnishee, in favor of said Ash, in the sum of $5,945.03; in favor of said Stanley, in the sum of $2,889.74; in favor of said Boner, in the sum of $4,225.16; also for costs, in favor of said Ash, in the sum of $29.39; also for costs, in favor of said Stanley, in the sum of $25.05; also for costs, in favor of said Boner, in the sum of $25.24; and this garnishee was therein allowed $50 in each of said cases, for his answer filed therein (duly certified copies of which said several judgments are herewith filed, marked Exhibits D, E, & F), and made a part of this answer; which said several sums *were* adjudged and allowed against and in favor of this garnishee amounted to a total aggregate sum of $13,296.39; that by the terms of each of said judgments in favor of said Ash, Stanley, and Boner this defendant was authorized and required within 30 days to make, execute, and deliver bonds to the State of Missouri, conditioned for the faithful performance of his duties as such receiver; that on the 9th day of October, 1876, he duly

executed said bonds as required by said several judgments, which were duly approved, and that he then and there entered upon the discharge of his duties as such receiver in each of said cases, and took charge and control of 18 of said Sullivan County bonds as such; that pursuant to and in further obedience of said orders and judgments of said Sullivan Circuit Court, made in the premises aforesaid, this defendant, as receiver, offered for sale, at private sale, the said 18 Sullivan County bonds, numbered from 161 to 178, both inclusive, of the denomination of one thousand dollars each, bearing interest at 7% per annum from the 1st day of November, 1876, and one Edmund Ash offering for each of said bonds the sum of $750, and a total aggregate sum of $13,500 for all of said bonds, and this being a higher price offered for said bonds than was offered by any one else, and more than the market value thereof, I did on the 10th day of October, 1876, pursuant to the orders and judgments of said Sullivan Circuit Court, sell and deljver to said Edmund Ash the bonds before mentioned *at* for said sum of $13,500, which said sum the said Edmund Ash then and there paid and satisfied to me. And after the sale of said bonds to said Ash as aforesaid, to wit, on the same day, October 10, 1876, as such receiver he paid off and discharged the said several judgments of Ash, Boner, and Stanley, and as well the garnishee's fees for answering therein, amounting to the sum of $13,296.39, retained as his compensation as receiver the further sum of $130.60; and afterwards on the same day, to wit, October 10, 1876, he made and exhibited to the judge of said Sullivan Circuit Court his report of his doings as receiver (a duly certified copy of which is herewith filed, marked Exhibit G), at chambers of said judge, in Linneus, Linn County, Missouri, which report was by said judge then and there approved; and after the approval thereof on said 10th day of October, 1876, the same was by me duly filed in the office of the clerk of the Circuit Court within and for Sullivan County aforesaid.

Defendant further says that the said judgments against

this defendant, as garnishee as aforesaid, the sale of said bonds, the payment of the proceeds of said sale, were all rendered, had, and done, as well as the approval of the actions of this defendant as receiver, were all had, rendered, done, and performed, prior to the filing of the bill, petition, or complaint of said Smith in this court on the 11th day of October, 1876, and that at the time of filing of said bill, petition, or complaint as last aforesaid, this defendant had in his hands, as trustee, 22 of said Sullivan County bonds.

This defendant, further answering, says that on the 17th day of March, A. D. 1874, he was garnished by a writ of garnishment issued out the Circuit Court of Sullivan County, Missouri, in favor of William Smick, and against defendant railway company; and further, that prior to the 1st day of August, 1874, he had been duly served with garnishee process in the following cases, to wit: B. F. Northcutt *v.* The Burlington and South-Western Railway Company; G. D. Burgess against the same defendant; Joseph Combs against same; Marion Cave against same, which last several suits were pending in the Court of Common Pleas in the county of Linn in the State of Missouri; that in all of said suits of said Northcutt, Burgess, Combs, and Cave, this defendant, prior to the filing of the bill, petition, or complaint of said Smith as aforesaid, had filed his answer as garnishee, substantially the same as that filed in the said several cases of Ash, Boner, and Stanley; that at the April term, 1874, this defendant filed his answer in the case of said Smick in said Sullivan Circuit Court, and the same is yet pending and undetermined in said court. And further, that after the 1st day of August, 1874, and prior to the commencement of this action by said Smith, the following other writs of garnishment have been duly served upon this defendant, to wit: In the case of J. H. Wilkerson against the Burlington and South-Western Railway Company; J. T. Heath against same; J. L. Reynolds against same; — Edwards against same, returnable to the Circuit Court of Linn County, Missouri, and now pending in said court; but

this defendant has not yet filed his answers in said suits last aforesaid. There has also been further garnishment proceedings instituted in the case of Casperson & Combs *v.* The B. and S. W. R'y Co., also Cave & Prewitt and Combs and Wilkerson against the same defendant railway, now pending in the Circuit Court of Linn County, Missouri, as well as other causes of a like nature, and in which this defendant has been summoned as garnishee, but has not as yet filed any answers as such garnishee in regard thereto.

This defendant further says that on the 10th day of October, 1876, he was duly served with garnishee process in the following other cases in the Circuit Court of Sullivan County, Missouri, to wit: Thomas J. Hood against the Burlington and South-Western Railway Company; May J. Reynolds et al. against same; Joseph W. & John Mairs against same; Ira Sears against same; John Hollon against same; E. E. Frazier against same defendant; and that answers in said last-mentioned suits are required to be filed at the April term, 1877, of the Circuit Court of Sullivan County, Missouri. That on the 17th day of October, 1876, he was duly served with garnishee process in the following other cases pending in the circuit court of Sullivan County, Missouri, to wit: E. W. Van Wye *v.* The Burlington and South-Western Railway Company, defendant, and G. D. Burgess against same; and that he is required to answer such garnishments at the April term. 1877, of said Sullivan Circuit Court.

This defendant, further answering, says that he ought not to be restrained herein nor compelled to deliver said bonds, nor any of them, as prayed in said petition of said Smith, for that because in the said several suits of John Q. Boner, Edmund Ash, and Joseph M. Stanley, against the Burlington and South-Western Railway Company and Warren McCullough, defendant, the said railway company had due and legal notice, as had also Elijah Smith, receiver, and all other persons whomsoever, due and ample notice of the pendency of said garnishee proceedings, and they and each of them failed and refused to assert their title, if any, at

law, by filing their interplea, and claiming the bonds garnisheed in the hands of this defendant, and having so failed and refused to interplead and claim said bonds, they, and each of them, ought to be forever debarred and estopped from asserting any right, title, or interest in or to said bonds, or any of them, in a court of equity.

This defendant, further answering, says that he ought not to be enjoined or restrained, for that because said bonds, and all of them, since the date of their issue on the 1st day of November, 1871, have ever been in the possession and under the control of this defendant, and have never at any time been in the possession or under the control of the Burlington and South-Western Railway Company, Elijah Smith, receiver, nor any of its officers, agents, or servants; that the mortgage under which said Smith pretends to claim said bonds was foreclosed, and the decree of foreclosure made and entered of record at the last April term of this court, 1876, wherefore the said mortgage was inoperative after such foreclosure and could not include said bonds nor any of them; that this defendant is not in contempt of this court, by reason of the premises aforesaid, and for the reason that he did but obey the orders and judgments of the Sullivan Circuit Court, which was then and there a court of competent and prior jurisdiction in said matters.

This defendant further says that the bill, petition, or complaint of said Smith, so filed as aforesaid, is insufficient in law or equity to entitle complainant to the relief prayed, or to any relief whatever.

Wherefore the defendant prays that the bill, petition, or complaint of said Smith, filed herein October 11, 1876, be dismissed and for naught held, and that this defendant go hence without day with the reasonable costs and charges which he has most wrongfully sustained.

W. McCULLOUGH.

Subscribed and sworn to before me this 21st day of November, 1876.

WARREN WATSON,
U. S. Com'r West. Dist. Mo.

And also defendant Ash filed an amended answer, as follows: —

Now comes the said Edmund Ash, and, by leave of the court first had and obtained, for his first amended and separate answer to the petition of Elijah Smith, filed herein October 11, 1876, says, that as to the truth of the petition of said Smith he has no knowledge or information thereof sufficient to form a belief; and said Ash further says, that although he, at the October term, 1874, recovered judgment for a large sum of money against said railway company, and had also caused Warren McCullough to be summoned as garnishee in said cause, that on the 12th day of October, 1874, for value and in writing, he assigned his said judgment to John Q. Boner; that in addition thereto he authorized John Q. Boner to continue such garnishee proceedings against said McCullough and said railway company in the name of said Ash.

Wherefore he prays that he go hence without day and that he be allowed his reasonable costs and charges.

EDMUND ASH.

Subscribed and sworn to before me this 16th day of November, 1876.

[SEAL.] H. T. McCLANAHAN,
Clerk Circuit Court.

To the sufficiency of all of which appellant excepted as follows: —

Said Smith excepts to the answers of the several respondents filed herein, because the same show no sufficient answer to the rule on them, nor any reason in law or fact why the orders prayed for against said several respondents should not be granted with the injunctions made perpetual.

ELIJAH SMITH, *Rec.*,
By L. T. HATFIELD,
Attorney.

Which exceptions are by the court overruled, and therefore appellant filed his replication to the answers of defendants, as follows: —

Elijah Smith, receiver of the Burlington and South-Western Railway Company, under this court's orders, for reply to the answer of respondents to rules issued by Hon. A. Krekel, associate judge, at chambers, in vacation, returnable October 25, 1876, and November 21, 1876, denies that he had notice of the garnishments of defendants, or that he should have interpleaded in the respective courts and proceedings; that no authority of this court was ever obtained by either of the parties to prosecute said proceedings in the State courts, and he was not bound either by law or the orders of this court to interplead in said proceedings.

ELIJAH SMITH,
Receiver,
By L. T. HATFIELD,
Attorney.

And, thereupon, to wit: November 22, 1876, said cause coming on to be heard was submitted to the court, and appellant to sustain the issues on his part read in evidence the following: —

1st. Mortgage of branch line. (Page 4 printed record, side pages 10 to 31 inclusive.)

2d. Bill in equity to foreclose mortgage. (Page 1 printed record, side pages 1 to 9 inclusive.)

3d. Appointment, and order approving appointment, of N. B. Baker receiver. (Page 14 *ibid.*, side pages 38 and 39.)

4th. Resignation of N. B. Baker, appointment and bond of Elijah Smith, receiver. (Page 25 *ibid.*, side pages 67 to 74 inclusive.)

5th. Proposition of Elijah Smith, receiver, asking Sullivan County, Mo., to release claim to bonds. (Page 38 *ibid.*, side pages 101 to 103 inclusive.)

6th. Order of Sullivan County, Mo., touching such proposition. (Page 40 *ibid.*, side pages 104 to 106 inclusive.)

7th. Original order of subscription of Sullivan County, Mo. (Page 41 *ibid.*, side pages 107 to 110 inclusive.)

8th. Application of Elijah Smith, receiver, to county court of Sullivan County, Mo., and certificate of H. A. Sumner, chief engineer. (Page 45 *ibid.*, side pages 120 to 122 inclusive.)

9th. Order of County Court of Sullivan County touching the bonds. (Page 46 *ibid.*, side pages 123 and 124.)

10th. Affidavit of Jno. W. Smith and exhibit treated as a deposition. (Page 47 *ibid.*, side page 125.)

11th. Answer of Warren McCullough, trustee, as garnishee in Circuit Court of Sullivan County, Mo. (Page 42 *ibid.*, side pages 112 to 119 inclusive.)

12th. Stipulation as to transcript in cases of Ash, Boner, and Stanley. (Page 99 *ibid.*, side pages 257 and 258.)

13th. Stipulation as to record of Combs, Burgess, Northcutt, Cave, and Prewitt. (Page 100 *ibid.*, side pages 258 and 259.

14th. Decree of foreclosure. (Page 32 *ibid.*, side pages 82 to 93.)

The appellees, to support the issues on their part, read in evidence the following: —

1st. Record of circuit court of Sullivan County, Mo., in case of Edmund Ash *v.* The Burlington and South-Western Railway Company. (Page 60 *ibid.*, side pages 158 to 184 inclusive.)

2d. Record of Common Pleas Court Linn County, Mo., in case of Joseph Combs. (Page 101 *ibid.*, side pages 260 to 285 inclusive.)

3d. Affidavit of Warren McCullough, treated as deposition. (Page 111 *ibid.*, side pages 286 to 288.)

4th. Affidavit of Warren McCullough, treated as deposition. (Page 113 *ibid.*, side pages 290 and 291.)

In rebuttal of testimony of Warren McCullough, appellant read the affidavit of L. T. Hatfield, treated as a deposition. (Page 113 *ibid.*, side page 289.)

Whereupon the cause was submitted to the court for disposition by stipulation. (Page 31 *ibid.*, side pages 80 and 81.) And after hearing arguments of counsel and examination of briefs, etc., the court dismissed appellant's bill by the following decree, to which appellant duly excepted and brings his case here by appeal: —

The said petition and amended petition having been heretofore submitted to the court upon the pleadings, proofs, exhibits, and agreements on file, and argued by counsel, and the court being now fully advised, it is ordered and decreed that the said petition and amended petition of said Elijah Smith, receiver, be, and the same are hereby, dismissed, and the injunction heretofore granted be dissolved.

[Signed] JOHN F. DILLON, *Judge*.

ASSIGNMENT OF ERRORS.

1. The court erred in not entertaining the petition of appellant against respondents, for the reason that all the property rights and interests of the railway company were in its custody, and all controversies touching the same should have been adjudicated in that forum.

2. The court erred in holding that McCullough, being the trustee of an express trust, was subject to garnishment.

3. The court erred in holding that the receiver had no right to arrange for the payment of the subscription of Sullivan County, for it was an indebtedness contingently due the corporation, and payable when the road, which was covered by the mortgages, was built.

4. The court erred in holding that the garnishers' claims were liens upon the road, for the reason that there was no evidence to support such conclusion, and because the evidence does show their claims were based upon promissory notes of The Burlington and South-Western Railway Company, and the only claim that they were liens is found in the gratuitous statements of McCullough, garnishee, who, in saying so, stultified himself, in view of the fact that he had delivered all the former instalments, which was implied proof of payment of all claims.

5. The court erred in holding that the receiver could not legally arrange for said bonds because a vote was required by act of 1872, when the evidence showed that the bonds had been actually issued long prior to the year 1872.

6. The court erred in holding that the receiver had no standing in court because the money furnished to complete the road, and for which debentures were issued, was furnished by the mortgage bondholders, and was secured by such debentures, when there was no evidence of any such

state of affairs; and if true, it was immaterial, for the issuing of debentures was an entirely independent transaction, and the debentures, for the time being, held all other interests in abeyance.

7. The court erred in holding that the judgments in the State court precluded any action on the part of the receiver in any other forum. Because there were no judgments against McCullough, as garnishee or otherwise, until long after the appointment of appellant as receiver, and the answers of respondents admit that the bonds were not subject to levy at the time they summoned McCullough as garnishee, and they took no action to obtain judgment until after the receiver had made the contingency certain, and then they relied upon process issued before such contingency was made certain.

8. The court erred in holding that the State courts had jurisdiction of the *res* in McCullough's custody, as the evidence, as shown by the return of the officers, shows that he did not *attach* anything in McCullough's hands, and the garnishee could not confer jurisdiction by voluntary appearance and answer.

BRIEF.

On this record, appellant insists that the whole question should have been tried *de novo* in the United States Circuit Court and the priorities of the parties determined there, and the proceedings in the State court should have been disregarded, for the reason that the United States court had the custody of the branch line and was entitled to the control of all the assets belonging to it, while the proceedings in the State court were without authority of law and in derogation of the true interests of the property. Those courts having no *legitimate* power to act in the premises, nor jurisdiction of the *res*, therefore the giving of credit to the State court judgments was wrong. In support of this doctrine appellant makes the following points, and relies upon the following authorities: —

I.

The Burlington and South-Western Railway Company had ample power to mortgage its property and franchises, both by virtue of the special charter of the St. Joseph and Iowa Railroad Company and the general laws of the State of Missouri, as follows: "From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purpose aforesaid." (Ninth paragraph, sect. 2, chap. 63, p. 333, Gen. Stats. of Mo. 1865.) Also, "For the purpose of further enabling said company to construct, equip, and operate said road, they are hereby authorized to pledge the said road, rolling stock, depots, depot houses,

and any other property they may possess, together with the franchises of said road, for the liquidation of any indebtedness said railroad company may incur in the construction of said road." (Sect. 3 of "An act to amend the charter of the St. Joseph and Iowa Railroad Company," p. 73, Sess. Laws 1857.)

II.

The Circuit Court of the United States within and for the Western District of Missouri, having jurisdiction of the original action to foreclose the mortgage, had power to appoint a receiver; and having appointed a receiver, his possession of the property, rights, and interests of the corporation dated from such appointment.

Rutter *v.* Tallis, 5 Sandf. 610;
Edwards on Receivers, p. 98 *et seq.*;
Steele *v* Sturges, 5 Ab. Pr. 442;
Levy *v.* Cavanaugh, 2 Bosw. (N. Y.) 100;
Wilson *v.* Allen, 6 Barb. 545;
Crowley *v.* Wallace, 12 Mo. 147;
~~Alexander *v.* Morry, 9 *id.* 524;~~
Weil *v.* Tyler, 38 *id.* 545;
Maynard *v.* Bond, 67 *id.* 315.

III.

A receiver has full power to collect all indebtedness due the company, including unpaid stock subscriptions, and hold the proceeds subject to the order of the court having custody of the property. The receiver being the hand of the court, is practically an equitable executor.

7 Cent. L. J. 201;
Calkins *v.* Atkinson, 2 Lansing (N. Y.), 12;

Rankin *v.* Elliott, 16 N. Y. 377;
Osgood *v.* Laytin, 48 Barb. 463;
Hightower *v.* Thornton, 8 Ga. 486;
Pentz *v.* Hawley, 1 Barb. Ch. 122;
Mann *v.* Currie, 2 Barb. 294;
Renyon *v.* Farmers & Mech. Bk., 3 Green's Ch. 480;
Van Rensselaer *v.* Emery, 9 How. Pr. 135;
Williamson *v.* Wilson, 1 Bland, 418;
Elliott *v.* Warford, 4 Md. 80;
Beverly *v.* Brooks, 4 Gratt. 187;
Ellis *v.* Boston, Hartford & Erie R. R. Co., 107 Mass. 1.

IV.

By the bill of foreclosure and the possession of the receiver the United States Circuit Court acquired jurisdiction, and could administer complete relief to all the parties; and that jurisdiction cannot be affected by the act of any other tribunal.

Dobyn *v.* McGowan, 15 Mo. ~~622~~ 662;
Corby *v.* Bean, 44 *id.* 379;
Real Estate Savings Inst. *v.* Collonious, 63 *id.* 290.

V.

A receiver exercises all the functions of the corporation, representing stockholders and creditors, having all corporate power, and controversies over assets must be adjudicated on the theory that he is *the corporation*, and he as effectu-

ally takes its place as if it had never existed in any other way.

Curtis *v.* Leavitt *et al.*, 15 N. Y. 42.

VI.

Therefore, having shown that the receiver of the United States Court was the proper person to collect and hold the amount due from Sullivan County, we will now endeavor to show why the respondents have no standing in the case, and that the proceedings of the State courts were without jurisdiction, and so far as the case at bar is concerned are *void*. McCullough was a trustee of an express trust and held the bonds subject to certain conditions, and one holding property, money, or effects subject to conditions cannot be held as a garnishee. The interest of the execution or attachment defendant must be certain and unhampered with *trusts*, *liens*, or incumbrance.

Sect. 7, chap. 65, p. 665, Wag. Mo. Stats: —

"Whenever any property, effects, money, or debts belonging or owing to the defendant shall be confessed or found by the court or jury to be in the hands of the garnishee, he may, at any time before final judgment, discharge himself by paying or delivering the same, or so much thereof as the court shall order, to the sheriff, from all further liability on account of the property, money, or debts so paid or delivered."

Gates *v.* Kirby, 13 Mo. 157;
Lee *v.* Faber, 8 *id.* 322;
Van Winkle *et al. v.* McKee, 7 *id.* 435;
How *v.* Edger, 13 *id.* 451;
Pratt *v.* Scott, 19 *id.* ~~625~~ 626;
Scales *v.* Southern Hotel, 37 *id.* 520;

Weil *v.* Tyler, 38 *id.* 545;
Weil *v.* Tyler, 43 *id.* 581;
Sheedy *v.* Second Nat. Bank, 62 *id.* 17.
Lackland v. Garesche 56 id. 267

VII.

To charge one acting in a fiduciary capacity, he must be sued in equity, and cannot be reached by a proceeding at law.

Curling *v.* Hyde, 10 Mo. 374;
McIlvane *v.* Lancaster, 42 *id.* 96;
Lacland v. Garesché, 56 *id.* 267;
Sheedy *v.* Bank, *supra*.

VIII.

The changing of a *contingency* which existed when the *process was served, into a certainty* afterwards, will not render a trustee liable.

Williams *v.* Androscoggin R. Co., 36 Maine, 201;
Drake on Attachments, sects. 550–553;
Galena and Chicago Union Ry. Co. *v* Menzies, 26 Ill. 121;
Holbrook *v.* Baker, 5 Me. 309.

IX.

In this case there was no certainty that the indebtedness of Sullivan County would ever become due; and attachment will not be for a debt that may never become due.

Glass *v.* Bullen, 6 Barb. 346;
Dennison *v.* Soper, 33 Ia. 183;

Moore *v.* Dickerson, 44 Ala. 485;
Blanchard *v.* Grousatt, 1 La. Ann. 96;
Read *v.* Ware, 2 *id.* 498;
Taylor *v.* Drane, 13 *id.* 62;
Herrod *v.* Burgess, 5 Robinson (La.), 449;
Drake on Attachment, 4th ed., sect. 24, p. —;
Hearne *et al. v.* Keath *et al.*, 63 Mo. 86.

X.

Another reason why the State courts had no right to act was that they never in any case had jurisdiction of the *res*, because the bonds in the hands of McCullough, trustee, were never *attached at all*. The following being *all the law* on the subject: "When goods and chattels, money, or evidences of debt are to be attached, the officer shall take the same and keep them in his custody, if accessible; and if not accessible, he shall declare to the person in possession thereof that he attaches the same in his hand, and summon such person as garnishee." (*Vide* 4th subdiv., sect. 23, chap. 141, p. 564, Gen. Stat. Mo. 1865.) Construing the foregoing,

Norvell *v.* Porter, 62 Mo. 310.

In the case at bar in the Sullivan County cases the officer's return shows that he did not attach, etc. (*vide* summons to garnishee, page 62 printed record, side page 164), and in the Linn County cases there is nothing to show that he was ever summoned.

XI.

If the State courts acquired no jurisdiction originally for want of sufficient service, the voluntary appearance of the

garnishee gave them no jurisdiction over the *res*, and it was his duty to see that the court had jurisdiction.

Drake on Attach., 3d ed., sects. 84 and 694;
Oldham *v.* Ledfelter, 1 How. (Miss.) 43;
Berry *v.* Anderson, 2 *id.* 649;
Ford *v.* Woodward, 2 Smed. & M. 260.

XII.

There is no claim made by any of the respondents that there was any service by them of any process whatever upon McCullough after the road was finished by the receiver; and at that time, and long prior thereto, he had qualified as receiver, and he alone was entitled to the bonds.

Maynard *v.* Bond, 67 Mo. 315.

XIII.

McCullough shows no defence by his answer here, for he should have disclosed in any court, seeking to charge him, every fact known to him, and which would have been available as a defence. This he has not done, or else judgment could not have been gotten against him; and if he has neglected to protect himself, he cannot expect this court to protect him at the expense of other parties.

Dobbins *v.* Hyde, 37 Mo. 114;
Wilson *v.* Murphy, 45 *id.* 409;
McKitterick *v.* Clews, 52 *id.* 160.

McCullough has in no place shown good faith in this matter, but in all the proceedings has disregarded his plain duty to act disinterestedly and with a view to a fair disposition of the property. In the first place, he voluntarily permitted the matter of his answer to be continued for two years, as the record shows; and finally when he does answer, it is wholly in the interests of the State court plaintiffs; he interjects a clause into his answer to the effect that their claims were for money and material furnished the road, etc., a statement not justified by the record or the evidence in the case, and by making such a statement he belies his former action, inasmuch as he had delivered one hundred and sixty of the bonds when one of the conditions was that the work should be done and *paid for;* and, further, his answer was filed on the 7th day of October, 1876, which the court will take judicial notice was Saturday. On Tuesday, the 10th of October, 1876, he had qualified, and *privately* sold the bonds at a discount to pay the Sullivan County creditors, and taken his report to the judge at Linneus, Linn County, Missouri, a distance of twenty-five miles, which a reference to the map in this brief will verify, and the truth of which will not be denied; and on the same day he returned his report to the clerk of the court of Sullivan County, which, in view of the fact that the order gave him six months, was unseemly haste, for all of which *vide* report of McCullough to Judge of Sullivan County Circuit Court, pages 69 and 70 printed record; and as to the allegation that the claims of the attaching creditors were for money and material, etc., the truth of that allegation was put in issue in the United States Circuit Court, and they made no effort to prove anything of the kind.

The law of Missouri then and now provides that those claiming a lien for work or labor done or material furnished shall, within ninety days next after such work is done or material furnished, file account, etc., with clerk of the Circuit

Court of any county through which the road runs, etc., and within ninety days thereafter institute suit.

Sect. 3, p. 59, Laws of Mo. 1873.

And in such lien law it is provided that no lien under it shall have priority over mortgages existing prior to its passage (sect. 2, p. 59, Laws Mo. 1873), and in cases where a railway is insolvent and unable to pay its mortgage indebtedness and is placed in the hands of a receiver for that purpose, creditors who have furnished material and supplies will not be paid until prior liens are disposed of.

Denniston *v.* C. & A. Ry. Co., 4 Bissell 414.

XIV.

In this connection we desire to say further that in no event should the State court proceeding avail the respondents in this action, for the reason that their demands were based upon the notes of the original Burlington and South-Western Railway Company, while the bonds were assets of the Linneus branch, and the law of Missouri authorizing the construction of branch lines expressly provides that no branch line shall be held for the debts of the main line, and *vice versa*, which law is as follows: "Any branch road so constructed shall not be holden for any debt, lien, or liability of the main line, nor shall the main line be holden for any debt, lien, or liability of such branch. Any dividend of profits arising out of the business of such branch road shall be divided among the stockholders in said branch, and in all respects the interests of the stockholders

in the branch shall be kept separate and distinct from the interests of the stockholders of the main line."

Vide Sess. Laws Mo. 1868, sect. 3, p. 91.

XV.

It was not the duty of appellant to interplead in the State court, for it is not the duty of a party who claims property sought to be subjected to garnishee process to interplead and set up his rights. It is the duty of the garnishee to protect himself by setting up all the facts and asking that they be made parties, and it was not the duty of the receiver in this case to interplead, nor could he have been compelled to do so unless leave to make him a party had been obtained from the United States court.

Wilson *v.* Murphy, 45 Mo. 409;
McKitterick *v.* Clews, 52 *id.* 160;
Dobbins *v.* Hyde, 37 *id.* 114;
T. W. & W. Ry. Co. *v.* Biggs, 85 Ill. 80;
Mercantile Ins. Co. *v.* Jayne, 87 *id.* 199.

XVI.

In reference to the respondents, Ash, Boner, and Stanley, having bought the bonds from McCullough, acting as receiver of the bonds held by him, it is only necessary to say that they took them with notice of all the facts, and are entitled to no protection as they were parties to the whole proceeding; and as the State court had no authority to appoint a receiver in such a case to sell anything whatever, the action of McCullough is without authority. If the garnishee had

been subject to garnishment he should have turned the bonds over to the sheriff (sect. 18, chap. 65, p. 667 Wag. Stat. Mo.), and he by virtue of an execution could have sold them, but only at public sale, after advertisement for at least ten days. (Sect. 32, chap. 55, p. 608 Wag. Stat. Mo.)

XVII.

What has been said in regard to garnishee process in the Sullivan County cases applies as well to the proceedings in Linn County, for theirs is in the nature of an original proceeding commenced about the time the proceedings in the case at bar were commenced (*vide* record in case of Joseph Combs, pp. 89 to 96 printed record), and of which the receiver had no notice, and was an attempt to get a lien or claim upon the property after the receiver had been entitled to it. They could not establish any claim in that way, and the proceedings of that court, and relied upon by them, are void in so far as the rights of the receiver and mortgagees are concerned. The only legitimate way they could set up such a claim was by applying to the United States court for leave, etc., and when that is done we shall be prepared to meet them.

We therefore submit that, in any view of the case, the answers of the several respondents state no facts sufficient to constitute any defence to the relief asked by the receiver, and the evidence adduced by them, instead of adding to the strength of their claims, affirmatively establishes the fact that their claims are inferior to appellant's, and that their proceedings were not in good faith; and in view of all that has been so submitted, we respectfully suggest that the judgment of the court below is erroneous, and should be reversed and remanded.

L. T. HATFIELD,
Solicitor for Elijah Smith, Receiver, Appellant.
H. M. POLLARD,
of Counsel for Appellant.

OFFICE SUPREME COURT U. S.
FILED
OCT 10 1881
JAMES H. McKENNEY, Clerk.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1881.

ELIJAH SMITH, RECEIVER OF THE B. & S. W. R'Y CO.,
vs. *APPELLANT,*
WARREN McCULLOUGH, ET AL., *APPELLEES.*

Appeal from the Circuit Court of the United States for the Western Dist. of Missouri.

REPLY TO BRIEF FIELD IN BEHALF OF ASHE BONER ET AL.,

BY P. HENRY SMYTH, OF COUNSEL FOR APPELLANT.

I.

The respondents ground their rights upon the proposition that by the service of their process, (such as the record discloses,) the Circuit Court of Sullivan County obtained jurisdiction of the subject matter and the *res* in controversy, and, therefore, it could hold the same till a final adjudication, against all other courts of concurrent jurisdiction; several authorities are cited, to-wit, among others: *High on Receivers*, § 50, 348, 388, 440; but we venture to remark, that upon an examination, there will be no difficulty in

arriving at the conclusion that they utterly fail to sustain the position in the case at bar. The general proposition, that in a case where a conflict arises between two courts, as to the *actual custody* and control of property, the court first obtaining such custody will hold it to the end of the litigation, cannot be denied.

But, in this case two things are overlooked by counsel:

1st. That the facts disclosed by the record (as we maintain) show that the Sullivan County court obtained no jurisdiction whatever of the *res* by the attempted service of process. *Sheedy vs. Second National Bank*, 62 Mo., p. 25; *Lockland vs. Garresche*, 56 Mo., p. 267; *Williams vs. Androscoggin R. R. Co.*, 36 Maine, p. 201; *Drake on Attachments*, 550, 553; *Hearn vs. Keith*, 63, Mo., 89; *Norvele vs. Porter*, 62, Mo., 312.

2d. That even if it were otherwise, it was a proceeding at law, to which the trustee and receiver were not a party, and that any claim or lien which the trustee had under the mortgage could not be affected by such a proceeding. *Dobyns vs. Hyde*, 37 Mo., 118; *Wilson vs. Murphy*, 43 Mo., 410.

II.

Counsel next assume that the receiver is *estopped* from denying the validity of their judgments, and the jurisdiction of the court, and they reach this conclusion by a process of reasoning, which we think is quite fallacious.

That a receiver appointed at the instance of the mortgagees, by a court of equity, and for the protection of such mortgagees against the corporation, has no higher or different rights than the corporation, needs only to be stated to be disproved. The receiver is substituted to the rights of the mortgagees, and if they have a right to property as against either the corporation or its creditors, such right can be asserted by the receiver, although the corporation could not set up the rights of the mortgagees as against its creditors. For instance, if, while the railroad company was in possession of its property, a creditor on legal process had seized one of its locomotives—covered by the mortgage to trustees—it could not come

into court and defeat the creditor by setting up the lien of the mortgagees. But how can it be claimed that the trustees might not, either in that proceeding or an independent one, assert their rights as being superior to the attaching creditor?

The authorities cited do not go to the length claimed by counsel, nor support the doctrine contended for. *High on Receivers*, 209, 245, 247, 259. There is no estopple in the case.

The receiver represents not only the corporation but all parties interested in the property. *High on Receivers*, § 650.

As neither the levy of an attachment nor the appointment of a receiver affects any valid previously acquired lien, and as the appointment of a receiver amounts to the sequestration of the property, it must follow in this case:

1st. That if the attachment process of respondents are void, and that by it they acquired no lien, that the receiver in this case became entitled to the property in controversy independent of the question whether it was included in the mortgage or not.

2d. If these bonds are included in the mortgage (as we contend), then the lien of the mortgagee is unaffected by the attachment proceedings, whether they were valid or not, and the receiver is entitled to them as the representative of the mortgagees.

We think on both propositions the law is with us, and that the decree should be reversed.

P. HENRY SMYTH,
Of Counsel.

OCT 11 1881
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1881.

ELIJAH SMITH, RECEIVER OF THE BURLINGTON AND SOUTH-WESTERN RAILWAY COMPANY,
Appellant,
vs.
WARREN McCULLOUGH ET AL.,
Respondents.
No. 13.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

L. T. HATFIELD,
Solicitor for Elijah Smith, Receiver, Appellant.
H. M. POLLARD,
Of Counsel for Appellant.

SUPPLEMENTAL ARGUMENT AND BRIEF.

In response to argument of counsel for respondent, to the effect that garnishment will lie in the case at bar, we have to submit the following:

A stockholder in a corporation is never liable to garnishment.

Sec. 13, Wagner's Statute of Mo., 1872, as follows:

"If any execution shall have been issued against the property or effects of a corporation, and if there can not be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; *provided*, always, That no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceeding, shall have been brought or instituted, made upon motion in open court after sufficient notice in writing to the person sought to be charged; and, upon such motion, such court may order execution to issue accordingly."

Construing the same:

Hannah *vs.* Moberly Bank; 67 Mo., 678.

Simpson *vs.* Reynolds; 71 *id.*, 594.

Discussing the question generally:

McClaren *et al. vs.* Franciscus; 43 Mo., 452.

And as McCullough was the representative of the County in the matter of the stock subscription of Sullivan County,

it naturally follows that garnishment could not lie against him.

L. T. HATFIELD,

Solicitor for E. Smith, Reciever, Appellant.

H. M. POLLARD,

of Counsel.

it naturally follows that garnishment could not lie against him.

L. T. HATFIELD,
Solicitor for E. Smith, Reciever, Appellant.

H. M. POLLARD,
of Counsel.

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IN THE

Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1880.

ELIJAH SMITH, RECEIVER OF THE BURLINGTON AND SOUTH-WESTERN RAILWAY COMPANY,
Appellant,

vs.

WARREN McCULLOUGH ET ALS.,
Respondents.

No. 55.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

STATEMENT, BRIEF AND ARGUMENT FOR RESPONDENTS.

JOHN P. BUTLER,
Solicitor for Ash, Boner, Stanly and Sullivan Counties.

F. M. COCKRELL,
Of Counsel for said Respondents.

QUINCY, ILL.:
CADOGAN & GARDNER, PRINTERS AND BINDERS.
1880.

IN THE

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UNITED STATES.

OCTOBER TERM, 1880.

ELIJAH SMITH, RECEIVER OF THE BURLINGTON AND SOUTH-WESTERN RAILWAY COMPANY,
Appellant,
vs.
WARREN McCULLOUGH ET ALS.,
Respondents.
No. 55.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

STATEMENT OF THE CASE ON THE PART OF RESPONDENTS.

The Respondents during the appellant's statement of the case, not full, in part not true, and insufficient to enable this court to fully understand the merits of the issues in controversy, submit the following statement:

In the years 1869 and 1870 certain persons in the town of Linneus, Linn County, Missouri, under the General Rialroad laws of Missouri, in force at that time, organized a corporation under and

by the name of the "North Missouri Central Railroad Company," having for its object the building of a railway from Stanley City, in Chariton County, Missouri, north through the counties of Sullivan and Putnam to some convenient and desirable point on the Iowa State line.

The said North Missouri Central Company had no power under its charter to receive subscriptions to its capital stock from counties, cities and towns, without acquiring the assent of two-thirds of the qualified voters of such county, city or town as a condition precedent to such subscription. The said North Missouri Central R. R. Co. began work under their charter in Linn and Chariton counties, but being unable to procure the assent of the people of Sullivan County to any municipal aid from said county, suspened work on their said road in the latter part of the year 1870.

In said year of 1870 and the early part of 1871 the Burlington and Southwestern Railway Company, organized under the laws of Iowa, was being projected and built southwesterly from Burlington, Iowa, having for its intended terminus some undefined point in Missouri.

The North Missouri Central Railroad Company, being unable to proceed with their enterprise as before stated, entered into stipulation with the Burlington and Southwestern Railway Company that said Burlington and Southwestern Railway should be completed over and along the line of the North Missouri Central Railway in Missouri, upon condition that the parties controlling the said North Missouri Central Railroad Company would procure certain subscriptions from the Counties of Sullivan and Putnam. The Legislature of the State of Missouri, by an act approved January 22, 1857, incorporated "The St. Joseph and Iowa Railroad Company;" under this charter the last said Company had the power to build branches and to receive subscriptions of stock from Counties, Cities or Towns, without any vote or assent of the people whatever. The St. Joseph and Iowa Railroad Company had never perfected or built their main line nor any branches thereto, but the officers and agents of the "North Missouri Central Railroad Company," wishing to avail themselves of the St. Joseph and Iowa charter, procured the assent of the corporators under said charter, to obtain subscriptions from the counties of Putnam, Sullivan and other counties in Missouri, to the capital

stock of the said "St. Joseph and Iowa Railroad Company," with the understanding that any such subscriptions so procured were to be delivered to the "Burlington and South-Western Railway Company." This was the condition of matters when, on the first day of May, 1871, the County Court of Sullivan County made and entered of record, an order in words and figures following, to-wit:

ORIGINAL ORDER OF SUBSCRIPTION—MAY 1, 1871.

"It is ordered by the Court here, that the County of Sullivan subscribe, and the Court does hereby, for and in behalf of said county, subscribe Two Hundred Thousand Dollars to the capital stock of the St. Joseph and Iowa Railroad Company, in the name and for the use of the Central North Missouri Branch of the St. Joseph and Iowa Railroad Company, to aid in the construction of said branch railroad through the County of Sullivan, and that the subscription hereby made shall be paid by said County by issuing and delivering upon the terms and conditions hereinafter specified, the bonds of said County, made by its County Court, and duly signed by the Presiding Justice of said Court, and attested by the Clerk thereof, with the seal of said Court affixed, which said bonds are to be of the denomination of One Thousand Dollars each, and to become due and payable twenty years after the date thereof, bearing interest at the rate of seven per cent. per annum from date, payable semi-annually, with coupons for interest attached or annexed to said bonds; said bonds, when issued, are to be placed in the hands of Warren McCullough, as trustee for said county and the Burlington and South-Western Railway Company, which said bonds are to be delivered to said Burlington and South-Western Railway Company, subject to the conditions and in the manner following, to-wit: *That the work of constructing said Branch Railroad in the County of Sullivan shall be begun by said Burlington and South-Western Railway Company within six months from the* 1st *day of May*, 1871, *and the construction thereof complete, with the rolling stock thereon, through said county within twenty-one months from the time of commencing the work*, and that as soon as the work of grading on said road shall be commenced in said county, then the bonds in payment of said subscription are to be issued and placed in the hands of said trustee, *and as soon as one-fourth*

in cost of said work in said county is complete, as shown by the report and certificate of the engineer in charge of the work, AND SAID WORK PAID FOR BY SAID COMPANY, *then the said county, through said Trustee, shall deliver to said Burlington and South-Western Railway Company, Forty Thousand Dollars of said bonds, and when one-half of said work is completed* AND PAID FOR BY SAID BURLINGTON AND SOUTH-WESTERN RAILWAY COMPANY, *then the said County in like manner to deliver Forty Thousand Dollars more of said bonds, and so on until the road is completed through the county,* AND PAID FOR BY SAID COMPANY, *with the iron and rolling stock thereon, when the last installment of the Two Hundred Thousand Dollars in bonds is to be delivered to said Company.* Provided, however, that the said bonds are not to be delivered to said Company with overdue or half matured coupons attached thereto, but such coupons are to be detached from said bonds and retained by said Trustee for cancellation. And it is further hereby provided, said subscription is made upon condition that said Railroad shall be permanently located and constructed so as to pass within a distance of not exceeding eight hundred yards of the court house in the town of Milan, in said county; and that there shall be within the distance above named from said court house, a general freight and passenger depot built and maintained by said Company, as soon as said road is ironed and operated through said county, *and that in the event the said Burlington and South-Western Railway Company fail to commence said work and prosecute the same to completion, within the time limited, then this Court shall be authorized to rescind this order and make the same null and void.* It is further ordered that said county will waive its right by reason of the stock herein subscribed, to vote for directors in the said St. Joseph and Iowa Railroad Company."

See printed Record, page 41.

See original Record, page 107.

SUBSEQUENT EVENTS.

On the 23d day of May, 1871, the Saint Joseph and Iowa Railroad Company never having projected or built any portion of either main line or any branches, and never having availed

itself of the privileges of its charter, except as before stated, attempted by an instrument of writing of that date, to convey all the rights, privileges and franchises of said St. Joseph and Iowa Railroad Company to the Burlington and South-Western Railway Company.

On the first Monday of October, 1871, the Burlington and South-Western Railway Company commenced the work of building said road, and on the first day of November, 1871, the bonds were issued and placed in the hands of Warren McCullough, under the terms of said order of subscription.

The work of building the road progressed until some time in the early part of the year 1873.

In the meantime the St. Joseph and Iowa Railroad Company having never availed itself the privileges of its charter, and never having built or projected any portion of either main line or branches, the Legislature of the State of Missouri, by an act "approved January 30, 1872," enacted as follows:

That section (6) six of an act to incorporate the Saint Joseph and Iowa Railroad Company, "approved January 22, 1857," be, and is hereby repealed.

Said Section 6 referred to, is as follows:

"SEC. 6. It shall be lawful for the County Court of any County, in which any part of the route of said Road may be, or for the County Court of any County adjoining or near the same, to subscribe to the stock of said Company, or invest its three per cent. fund or other internal improvement fund, or swamp lands, or proceeds thereof belonging to the County, as stock in said Road; and for the stock subscribed in behalf of the County, may issue the bonds of the County to raise the funds to pay the same, and to take proper steps to protect the interests and credit of the County," &c.

Section (2) two of said act of January 30, 1872, provides that "The County Court of any County in this State shall not alter, change or modify the conditions of any order of such Court authorizing a subscription to the stock of any railroad company without first having obtained a two-thirds vote of the County interested, at a special election held for that purpose, authorizing such alteration, change or modification.

During the progress of the work of building said Road in and through Sullivan County, the defendants in this suit, as well as other persons relying solely upon the conditions of the contract between Sullivan County and the Railway Company, that said Railway Company could not obtain the last installment of Sullivan County bonds (which, according to the terms of the contract, was $80,000 instead of $40,000,) until the work of building said Road had been completed AND PAID FOR, advanced large sums of money and large amounts of material to aid the construction of said Road in and through said County—(which said money and material afterwards became the subject matter of the judgment of defendant Boner et als)—afterwards, in the early part of 1873, the Company ceased work upon said Railway, and did comparatively nothing more until the Road was completed by the Receiver.

On the 20th day of June, 1874, the defendant Boner and his assignors, Ash and Stanley, instituted their several suits by attachment, in the Circuit Court of Sullivan County, Missouri, against said Railway Company; and ON THE 22D DAY OF JUNE, 1874, Warren McCullough, as holder of said bonds, was garnisheed in several suits; and on the next day, JUNE 23, 1874, SAID RAILWAY COMPANY WAS DULY SUMMONED to answer the actions of said parties at the following October Term of said Sullivan Circuit Court.

After these proceedings had been instituted by said Boner, Ash and Stanley, on the 6th day of July, 1874, the said Railway Company having failed to complete said Burlington and South-Western Railway within the time limited in the order of the County Court subscribing the stock of May 1, 1871, the County Court of Sullivan County made and entered of record an order of said Court, in words and figures following:

PROCEEDINGS TO RESCIND ORDER OF MAY 1, 1871, BY THE COUNTY COURT.

"Whereas, on the first day of May, 1871, at the May Term of the County Court of Sullivan County, Missouri, the said Court, by its proper order, made and entered of record on the Records of said Court, in words and figures following, viz:" [Here follows order of County Court of May 1, 1871, as heretofore stated, and after reciting said order proceeds as follows:] "And whereas,

the said 'St. Joseph and Iowa Railroad Company' to the use of the 'Central North Missouri' branch thereof, and the 'Burlington and South-Western Railway Company' severally accepted the terms, limitations and conditions in the aforesaid order contained, and in pursuance of said order of said Court subscribing stock to said 'St. Joseph and Iowa Railroad Company,' in the name of, and for the use of the Central North Missouri branch of said Railroad last aforesaid, Sullivan County aforesaid, by its proper officers, fully complied with the terms of said order or contract, made and entered into as aforesaid. But whereas, the said Burlington and South-Western Railway Company has failed and refused to comply with the terms, limitations and conditions in said order or contract aforesaid contained, and still fails and refuses to complete or pay for the building of said Railroad according to the time and terms, limitations and conditions in said order or contract contained as aforesaid, in this, to-wit: That the said Burlington and South-Western Railway Company has wholly failed to complete said Railway as mentioned in the order of the said Court subscribing stock to said St. Joseph and Iowa Railroad Company, to the use aforesaid, within the time limited in said order aforesaid, viz: within twenty-seven months from the first day of May, 1871, as they were legally bound to do by the order or contract aforesaid; that the twenty-seven months mentioned in said order or contract has long since expired, viz: on the first day of August, 1873; and whereas, a large amount in the bonds of said County, issued under the aforesaid order or contract, subscribing stock, to-wit: the sum of $40,000, yet remains in the hands of Warren McCullough, trustee as aforesaid: Therefore, it is ordered that the Burlington and South-Western Railway Company and Warren McCullough be each summonded to be and appear before this Court on the third Monday of August, 1874, at the July Term thereof, to be begun and held at the Court House in the town of Milan, in the County of Sullivan aforesaid, on the third Monday of July, 1874, then and there to show cause why the order of this Court, made at the May Term, 1871, as herein set forth, should not be rescinded, made null and void, and the $40,000 of the bonds of said Sullivan County remaining in the hands of Warren McCullough, trustee as aforesaid, be redelivered to said County for cancellation."

See printed Record, page 120.
See original Record, pages 307-309½.

FURTHER PROCEEDINGS OF THE COUNTY COURT.

And afterwards, at the August Term, on the 17th day of August, 1874, the following other proceedings were had and entered of record by said County Court, to-wit:

"Now at this day, in the matter of the rescission of the order or contract, made by entry of the record on the Records of this Court at its May Term, May 1, 1871, subscribing stock to the St. Joseph and Iowa Railroad Company, in the name of, and for the use of, the Central North Missouri branch of the St. Joseph and Iowa Railroad Company, in the sum of $200,000 in the bonds of said Sullivan County, upon the stipulations, conditions and restrictions in such order or contract mentioned."

This cause came on to be heard, and the said defendants (the Burlington and South-Western Railway Company and Warren McCullough) appeared by their attorney and filed their application for a continuance of this case until the next regular Term of this Court, which being heard and fully understood, is by the Court here overruled in part and continued until the first day of September, 1874.

And afterwards, on the first day of September, 1874, the following other proceedings were had and entered of record on the Records of said County Court, to-wit: [After entitling the case.]

See printed Record, page 121.

See original Record, page 309½.

RESCINDING ORDER.

"Now at this day, in the matter of the rescission of the order or contract, made by an entry of record on the Records of this Court at its May Term, May 1, 1871, subscribing stock to the Saint Joseph and Iowa Railroad Company, in the name and for the use of the Central North Missouri branch of the Saint Joseph and Iowa Railroad Company, in the sum of Two Hundred Thousand Dollars in the bonds of said Sullivan County, upon the stipulations, conditions and restrictions in such order or contract mentioned. This cause came on to be heard, and the said defendants (The Burlington and South-Western Railway Company and Warren McCullough) having failed to show any good and suffici-

ent cause or reason why the order or contract of this Court, made at its May Term, May 1, 1871, as aforesaid, should not be rescinded, made null and void, and the $40,000 of the bonds of said Sullivan County remaining in the hands of Warren McCullough, trustee, be redelivered to the County Court of said County for cancellation; and it appearing to the Court here that the said defendants have been duly summoned according to the order of this Court; and it further appearing to the Court here that the said Burlington and South-Western Railway Company have failed to prosecute the building of the last mentioned Railway to completion within the time limited in the order or contract subscribing the stock, etc., made at the May Term, May 1, 1871, viz: within 27 months from the first day of May, 1871, it is ordered and adjudged and decreed by the Court here, that the order or contract, made and entered of record by this Court at the May Term, May 1, 1871, as aforesaid, in so far as the same remains unexecuted, be rescinded, made null and void, and the said Warren McCullough, trustee, as aforesaid, forthwith deliver to this Court the remaing $40,000 in the bonds of said County for cancellation; and it is further ordered herein, that the said defendants be each furnished with a certified copy of this order."

See printed Record, pages 121-122.

See original Record, pages 309½-311.

NOTICE OF THE RESCINDING ORDER GIVEN.

The said parties were each furnished with a copy of said rescinding order and demand made by Sullivan County upon Warren McCullough for the surrender of the remainder of the bonds that they be delivered up to said county for cancellation which the said Warren McCullough refused to do. Immediately thereafter Sullivan County instituted suit by mandamus in the Supreme Court of Missouri, in the name of "The State of Missouri *ex rel.* Sullivan County, Plaintiff, against Warren McCullough, Defendant, to compel said Warren McCullough to redeliver said bonds to Sullivan County for concellation. This suit was still pending in said Supreme Court of Missouri at the time that Elijah Smith, Receiver of said Railway, made his proposition to the County Court. And afterwards, on the 25th day of June, 1876, the County Court of said Sullivan County made and entered of record an order (a copy of which has been filed as an exhibit in this suit) in words and figures following, to-wit:

PROPOSITION OF ELIJAH SMITH TO COUNTY COURT—ORDER OF COURT.

"Whereas L. T. Hatfield has this day presented a petition to the County Court of Sullivan County, Missouri, signed by more than sixteen hundred resident citizens of said county, praying said Court to make the necessary order to carry out the proposition of Elijah Smith, Receiver of the Burlington and South-Western Railway Company, heretofore on the 20th day of June, 1876, submitted to this Court in relation to the completion of the Linneus Branch of said Burlington and South-Western Railway.

"It is therefore ordered that if the said Elijah Smith as aforesaid, or his successor in office, shall on or before the 1st day of October, 1876, finish and complete said Linneus Branch of said Burlington and South-Western Railway in good order and condition, and permanently equip the same, with the necessary rolling stock for the complete accommodation of all shippers, freighters and travellers, and shall erect a good and sufficient freight and passenger depot and station on said Branch within 800 yards of the Court House in the town of Milan in said Sullivan county, all according to the original order of subscription of May 1, 1871, moreover shall pay all costs and charges that have accrued or that may hereafter accrue in relation to, or in any way touching a certain suit now pending in the Supreme Court of the State of Missouri, styled The State of Missouri, *ex rel.* Sullivan County, against Warren McCullough, Trustee of Sullivan County and the Burlington and South-Western Railway Company, and shall also pay all the attorneys' fees, who have been, or are now employed or retained by Sullivan County, in said suit, and shall file the proper vouchers with the Clerk of this Court. Then an order shall be made and entered of record dismissing said suit, which shall be prosecuted no further, and the forty bonds of one thousand dollars each, the subject matter of said suit, shall be left in the hands of said Warren McCullough, Trustee as aforesaid, to be disposed of upon the terms and conditions and as stated in the original order of subscription of date May 1, 1871, and as though said suit had never been instituted, but if the said Elijah Smith, Receiver as aforesaid, or his successor in office, shall in any manner, as to time or circumstance, fail or neglect to do and perform each and all of the acts, matters and things herein above mentioned and specified to be done by him, then this order shall

become null and void, as though it had never been made, without any further action of this Court, or any other party whatever, and said suit shall be prosecuted to final judgment as though this order had never been made. And upon the failure of Elijah Smith, Receiver of the Burlington and South-Western Railway Company, to complete said road, according to the time and manner herein specified, or to pay the costs and attorneys' fees, as above mentioned, the rights of the County under the original order subscribing stock to said Railway, made May 1, 1871, are to be entirely unprejudiced or in any manner affected by this order, and the Court saves and reserves to itself the right to rescind this order at any time after the 1st day of October, 1876.

See Printed Record, pages 122–123.

See Original Record, pages 312–314.

The Road was completed by said Smith, Receiver of said Road, prior to October 1, 1876; and afterwards, on the 13th day of October, 1876, said County Court made and entered of record the following order, to-wit:

DISMISSAL OF RAILROAD MANDAMUS SUIT.

"Whereas, it has been shown to the Court here that Elijah Smith, Receiver of the Burlington and South-Western Railway Company, has finished the Linneus Branch of the Burlington and South-Western Railway through Sullivan County, Missouri, and has equipped the same with the proper and sufficient rolling stock for freight and passengers, and has erected on said Branch, within 800 yards of the Court House in the Town of Milan, in said County, a good and sufficient depot and station house for freight and passengers, all according to the original order of May 1, 1871, subscribing $200,000 to the capital stock of the Saint Joseph and Iowa Railroad Company, for the use of the Linneus Branch of said Saint Joseph and Iowa Railroad, and also in accordance with an order of this Court, made and entered of Record, June 24th, 1876, in relation to the completion of said Branch Railroad through said county by said Elijah Smith, and that said Elijah Smith has paid all costs and attorneys' fees, that have accrued in an action of Mandamus by the State of Missouri, *ex. rel.* Sullivan County, against Warren McCullough, Trustee

for the Burlington and South-Western Railway Company and said Sullivan County, now pending in the Supreme Court of Missouri.

It is ordered that the Prosecuting Attorney for said County dismiss said action of Mandamus, and by leave of said Supreme Court, withdraw the papers filed on the part of the Relator in said action, and that said action of Mandamus be no further prosecuted in said Supreme Court, and that the forty bonds of $1,000 each of said county, yet remaining in the hands of said Warren McCullough, Trustee as aforesaid, BE LEFT TO BE DISPOSED OF ACCORDING TO LAW AS THOUGH SAID ACTION OF MANDAMUS HAD NEVER BEEN COMMENCED." (a certified copy of which last order is filed as an exhibit in this suit.)

ATTACHMENT SUITS OF BONER, ASH AND STANLEY.

By reference to Printed Record, pages 60 to 71; Original Record, pages 157 to 185, will be found the certified copy of the Record of the Sullivan Circuit Court in the case of Edmund Ash against the Burlington and South-Western Railway Company, (which by agreement of counsel is to be taken as the Record in the case of Stanley and Boner, inasmuch as they were all instituted on the same day, the garnishee was served on the same day, the Railway Company was served on the same day, and judgments rendered on the same day, and are only different as to the amounts of said judgments, and that there were also the same proceedings had against the garnishee in each of said cases at the same time and terms). It will be found that said suits were instituted on June 20, 1874, the garnishee served with process June 22, 1874, and the Railway Company June 23, 1874; that judgment was rendered in favor of said Ash, Stanley and Boner, and against said Burlington and Southwestern Railway Company, October 9th, 1874. The garnishee process was continued at said October Term, 1874, and was again continued at the April Term, 1875. Such proceedings were also continued at the October Term, 1875, and also at the April Term, 1876. (The Burlington and South-Western Railway Company being a party defendant to the Record and regularly in Court all the time.) At the October Term, October 6th, 1876, the defendant, Warren McCullough, appeared in said Court and filed his answer as gar-

nishee (which will be found as a part of the record in the case of Edmund Ash), which said answer is in words and figures following:

ANSWER OF GARNISHEE.

Now at this day comes Warren McCullough, Garnishee, in the cause wherein Edmund Ash is plaintiff, and the Burlington and South-Western Railway Company, defendant, and by leave of the Court first had and obtained, for answer to the interrogatories exhibited to him by the plaintiff, says:

First, that he is not indebted to the defendant in any sum, or on any account whatever now, nor was he at the time of the service of garnishment upon him in this cause, nor at any time since said term.

And for answer to plaintiff's second interrogatory, says: that heretofore, to-wit: on the 1st day of May, 1871, the County Court of Sullivan County, Missouri, made and entered of record, on the records of said Court, an order of said Court, in words and figures as follows, to-wit: (Here follows copy of order of County Court subscribing stock of date May 1st, 1871, heretofore set out, and after setting out said order, said garnishee proceeds as follows:) "That on or about the 1st day of November, 1871, in pursuance of said order of said Court, the bonds mentioned in the aforesaid order, were issued by said Court and placed in the hands of this garnishee; that in further pursuance of said order, this garnishee, at various times, prior to the service of garnishment upon him in this cause, delivered to the said Burlington and South-Western Railway Company, 160 of said bonds; that at the time of the service of garnishment herein, this garnishee had, pursuant to the terms of the aforesaid order, in his possession and under his control, the remaining forty bonds of the denominatian aforesaid; that afterwards, to-wit: on the 24th day of June, 1876, the County Court of said County of Sullivan, made and entered of record on the records of said County Court, a further and additional order in relation thereto in words and figures as follows, to-wit: (Here follows order of County Court heretofore set out, beginning, whereas, L. T. Hatfield, &c., and after reciting said order, said garnishee proceeds as follows:) 'And this garnishee further says that the said Railroad or Rail-

way, in both said orders mentioned, is now, and was on the 1st day of October, 1876, completed through the County of Sullivan, aforesaid, and is being operated, trains running daily over the same through said County of Sullivan; and further, that in pursuance of the terms of the order first aforesaid, a freight and passenger depot has been built on the line of said Railway or Railroad, near the town of Milan, in said County, and within 800 yards of the Court House, in said town; but as to whether the other conditions of said order have been complied with he has no knowledge or information.

And this garnishee further says that he is still in the possession of the remaining 40 of said bonds of the denomination aforesaid, and this garnishee further says that under and pursuant to his duties as such Trustee as aforesaid he has incurred large expenses and rendered a large amount of services reasonably worth ——— ———dollars, and that he has never received any compensation therefor. And this garnishee further says that he is informed and believes that plaintiff's judgment was rendered upon demands accruing solely for work and labor done, materials and money furnished in the building of said Railway or Railroad in and through Sullivan County aforesaid.

Wherefore this garnishee submits to the Court here, whether or not said 40 bonds of the denomination aforesaid, are subject to plaintiff's garnishment as well as to other garnishments of a like nature, or whether or not said bonds should be delivered to the Receiver of said Railway.

(Signed) WARREN McCULLOUGH.

Subscribed and sworn to, &c.

JUDGMENT AGAINST THE GARNISHEE.

After the filing of said answer, on the 7th day of October, 1876, the Court proceeded to render judgment against said garnishee in form following, to-wit:

"Be it ordered and decreed by the Court here that Warren McCullough, the garnishee herein, be appointed Receiver in this cause, who shall execute bonds within 30 days, to the State of Missouri, in the sum of ten thousand dollars, with good and sufficient securities, conditioned for the faithful performance of his duties as such Receiver, to be approved by the Clerk of this

Court. The said Warren McCullough, shall, as such Receiver, on or before the 1st day of the next term of this Court, at public or private sale, sell and dispose of a sufficient number of the bonds shown by said garnishee's answer to be in his hands and under his control, as garnishee or trustee, to pay off and satisfy the amount of plaintiff's indebtedness, to-wit: The sum of five thousand nine hundred and forty-five dollars and three cents and costs, to bear interest at the rate of ten per cent. per annum from this date, for which said sum judgment is by the Court, here rendered in favor of said plaintiff and against the defendant garnishee, to be paid and satisfied out of the sale of said bonds. It is further adjudged that said garnishee be allowed the sum of fifty dollars for his answer filed herein.

RECEIVER OF THE STATE COURT—HIS PROCEEDINGS.

By further reference to said record, it will be found that said garnishee took charge of 18 of said bonds as Receiver, after having qualified as such, and on the 10th day of October, 1876, sold said 18 bonds at 75 cents on the dollar to Edmund Ash, amounting in the aggregate to $13,500, and that he applied the same to the payment of the judgments of Boner, rendered in his own name and as assignee of Ash and Stanley; and that after having made said sale, he reported his doings to the Judge of the said Court, on said 10th day of October, 1876, and the said Judge then and there approved the same.

The Affidavit of Warren McCullough.

It will appear by reference to the affidavit of Warren McCullough, filed herein, that the Receiver had actual notice of the pendency of said attachments, and that the attorney for the Receiver assisted in preparing the garnishee's answers, and said Receiver was informed by McCullough that he would not deliver said bonds to him by reason of said attachments, as well as for other reasons.

THE ORIGINAL BILL AND DECREE OF FORECLOSURE.

It will further appear by an examination of the Record herein, that the original bill for foreclosure was filed on the 8th day of August, 1874. By reference to the decree of foreclosure, the property mortgaged is described as follows:

"All the real and personal property of said Burlington and South-Western Railway Company, in said Linneus Branch Railroad, owned at the date of said mortgage and since acquired, in any manner appertaining to said Branch, and all the right, title and equity of redemption therein, whether of said Company or the stockholders thereof, in said Branch or any premises leased therewith; all the branch Railroad, including the premises leased, named in said mortgage, extending from the main line of said Burlington and South-Western Railway Company, at or near Unionville, in the County of Putnam in the State of Missouri, by the way of Linneus and Lexington to Kansas City; and by the line of said leased premises from Lexington to Butler, in Bates County, Missouri, and to such other points in south-western Missouri, as was determined upon by the Board of Directors of said Company, or however said branch line of said Railroad may be described or built, including the right of way therefor, road bed, superstructure, iron, ties, splices, chains, bolts, nuts, spikes, and all the lands and depot grounds, station houses, depot viaducts, bridges, timbers and materials and property, purchased and to be purchased, or otherwise acquired, after the date of said mortgage, for the construction and maintenance of said Railroad, and all the engines, tenders, cars and machinery, and all kinds of rolling stock, owned at the date of said mortgage or thereafter purchased for and on account of said branch; all the resources and income of said branch and inclusive of said branch, and all the rights and privileges and franchises relating thereto, and property acquired in virtue thereof, in the possession or thereafter acquired, including machine shops, tools, implements, personal property and thereon or along the line of said branch Railroad, together with all the property acquired by said Burlington and South-Western Railway Company by virtue of its lease of said Lexington, Lake and Gulf Railroad, and which branch line of said leased Road and premises, extending from Unionville by the way of Linneus to Kansas City and south-western Missouri, is known and designated as the Linneus Branch of the Burlington and South-Western Railway."

This decree was entered of record at the April Term, 1876, of the Court below.

The same property is described in the mortgage and original bill in the same manner.

APPOINTMENT OF RECEIVER—HIS POWERS AND DUTIES.

By the decree entered in the Court below, October 19, 1875, appointing Elijah Smith, Receiver, said Smith, as Receiver, is authorized and required to prosecute and defend all suits in law or in equity in which the interest of the property or parties are involved.

By the same decree of October 19, 1875, said Smith is authorized to issue $200,000 debentures or Receiver's certificates to complete the gap of twenty-three miles.

INVENTORY OF PROPERTY IN POSSESSION OF RECEIVER.

On September 25, 1876, Elijah Smith, Receiver, filed an inventory of the property of said branch, as follows:

LINNEUS BRANCH—IN MISSOURI.

33 miles of track.
22 miles graded, not tied or ironed.
90,000 cross ties.
6 kegs of spikes.
40 bundles splices, or 240 pairs.
768 bars of iron, 30 feet, 50 per yard.
2 iron cars.
1 rubble car.
1 locomotive, worn out.

The bonds are not inventoried here, neither is there any allusion to or memoranda of any present, future or possible interest therein.

For further statement the Respondent, Sullivan County, says, that in the year 1873, Hugh M. Cooper, and other tax-payers of Sullivan County, Missouri, for themselves and all other tax-payers of said county, instituted a suit in the Circuit Court of Sullivan County, Missouri, against Warren McCullough, the Burlington and South-Western Railway Company, and others, to enjoin the delivery of the bonds in controversy in this suit, and to compel said McCullough, as Trustee, to deliver up said bonds for cancellation, on the ground of a forfeiture of said contract or order of subscription heretofore set out, and a rescission thereof by

the County of Sullivan. This case was tried in the Circuit Court of Sullivan County, Missouri, and defendants had judgment. Plaintiffs appealed, and upon the hearing the Supreme Court of Missouri reversed and remanded said cause.

Cooper et. als., Appellants vs. Sullivan County et. als., 65 Mo. Reports, page 542.

And said cause is now pending undetermined in the Circuit Court of Sullivan County, Missouri, the same bonds in controversy there, being in controversy here.

After the trial of this cause before Judge Dillon, and while he had this cause under submission, Sullivan County, by her special counsel and solicitor, obtained leave from Judge Dillon to file its intervening petition, making all other parties save Boner, Ash and Stanley parties defendant, claiming and asserting her rights to the bonds in controversy, accompanied by proof of the rescission of her contract of subscription.

See Printed Record, pages 114–122.

See Original Record, pages 291–312.

and praying that said bonds be delivered up to her for cancellation, and for an injunction against said parties hereto, to prevent them from further litigating the same.

The Court below in rendering judgment dismissing petitioners bill does not seem to have considered the county's petition, filed by leave, &c., as aforesaid.

Pending this suit, by and under some process, procured by Appellant from one of the Judges in the Court below, the twenty-two bonds referred to in the record as being in the hands of Warren McCullough, trustee, &c., were transferred to H. C. Geisbery, then and now Clerk of the Circuit Court, within and for the Western District of Missouri, in whose care, custody and keeping, as Clerk of said Court, said bonds now are.

BRIEF AND ARGUMENT.

I

It is submitted that the Court below did not commit the errors complained of by appellant, and the only error committed by the Court below was by not entering a decree in favor of the county on her intervening petition, which can be readily corrected by the entry of the the proper judgment in this Court.

II.

AS TO THE JURISDICTION.

I. The Circuit Court of Sullivan County having been first put in motion, and having acquired first and prior jurisdiction of the parties and of the property, rightfully retained its jurisdiction and control until the rights of the parties were established and finally enforced.

To sustain said proposition it is submitted that the evidence adduced on the part of defendant Boner, for himself and as assignee of Ash and Stanley, and not denied by the Receiver, that the Sullivan Circuit Court properly acquired jurisdiction of the parties and of the property; that is to say, the Burlington and South-Western Railway Company, Warren McCullough, and the bonds which are the subject matter of this suit, by the service of its legal process on and prior to the 23d day of June, 1874, and that the original bill for the foreclosure of the mortgage was not filed in this Court until the 8th day of August, 1874, nearly two months afterward.

This, then, was first and prior jurisdiction lawfully acquired by the Sullivan Circuit Court, and it therefore rightfully took such jurisdiction, retained it to the end of the litigation; took possession and control of the property by its Receiver to the exclusion of all interference from other courts of concurrent jurisdiction.

Metzner vs. Graham, 57 Mo., 404.

Freeman vs. Howe, 24 How. U. S., 450.

Taylor vs. Carryl, 20 How. U. S., 583.

High on Receivers, §§ 50, 348, 388, 440, and authorities there cited.

Federal Courts have generally recognized and uniformly conceded the jurisdiction of the State tribunals, where such State Courts have first acquired control over the subject matter and the parties, or where the Receiver of the State Court has first acquired possession of the assets.

High, on Receivers, § 52, and authorities there cited.

Even had the claims of defendant Boner not been culminated in the judgments and satisfaction thereof, were they still in embryo, existing only as attachment liens, it has been held on authority that Courts would protect the liens thus acquired, and that the appointment of a Receiver does not operate to divest liens previously acquired on the property of the debtor by a creditor acting in good faith.

High, on Receivers, § § 47-440.

Van Alstyne vs. Cook, 25 N. Y., 489.

Danvenport vs. Kelly, 42 N. Y., 193.

Becker vs. Torrance, 31 N. Y., 631.

Hubbard vs. Hamilton Bank, 7 Met., (Mass.) 340.

In this case the defendants acquired their attachment liens in a Court of competent general jurisdiction, anterior to the time of the filing of the original bill in this cause; they not only did this, but with commendable diligence, prosecuted such suits to final judgment against the Railway Company. And when the garnishee answered, setting up the authority under which he held the bonds, and submitted the question as to whether said bonds were subject to the payment of said judgments, the said Court then and there adjudged and decreed that said bonds were subject to the payment of said judgments, and by its decree appointed a Receiver, who took charge of said bonds, sold them, and applied the proceeds to the payment of said judgments and costs. The action of such Receiver was approved by the Court; *and all this took place prior to any attempt on the part of the Receiver of this Court to obtain possession of said bonds* In the absence of fraud, (and none is alleged and none exists,) these judgments and proceedings are final; are conclusive of this case, and will preclude the Receiver's right of recovery herein.

THE ESTOPPEL OF THE RECEIVER.

II. The Railway Company being regularly a party to the record in the Sullivan Circuit Court, is estopped from denying the validity or force of said judgments, or that said bonds were not subject to the payment thereof. The Receiver standing in the same situation, is himself estopped by the estoppel of the corporation.

In support of the foregoing proposition, the defendants upon authority maintain:

That the appointment of a Receiver does not have the effect of changing any rights of action, or changing the contract relations existing between the original parties against whom the Receiver is appointed, and the debtors and creditors.

High, on Receivers, § 204, and authorities there cited.

That for the purpose of actions and suits connected with the receivership, Receivers occupy substantially the same relation which was occupied by the original parties against whom, or over whose estate they were first appointed.

That a Receiver can only sue in the name of the original party, or if a corporation, in the name of such corporation.

That these parties may urge any matter of defence in an action brought by the Receiver, which might have been urged as a matter of defense against the Railway Company.

That the appointment of the Receiver constituted no bar to the continuance of defendant's suits, in the Sullivan Circuit Court, against the Railway Company; and,

That for the purpose of litigation, the Receiver takes only the rights of the corporation, such as could be asserted by it in its own name.

McCullough vs. Norwood, 36 N. Y., S. C., 180.

Curtis vs. Leavitt, 15 N. Y., 41.

High, on Receivers, § § 209, 245, 247, 259, and authorities there cited.

It may therefore be declared to be a settled law of this country that, *the estoppel of the corporation is the estoppel of the Receiver.*

It will not be for one moment seriously contended that in the case at bar, the Burlington and South-Western Railway Company are possessed of any action, or right of action, legal or equitable, against these defendants arising out of the said suits and judgments. The Receiver occupies no better position, but stands in the same situation, and is unable to assert any action or right of action, that could not be asserted or sustained by the Railway Company. Is he not therefore estopped? The Railway Company was a party to the record in the Sullivan Circuit Court, in which the question as to whether said bonds were subject to payment of defendant's judgment, was directly passed upon by said Court. That matter is, therefore, *Res Adjudicata*, in so far as the Railway Company is concerned; and if being thereby estopped from relitigating between the same parties the questions passed upon in those suits, as we have already seen, the Receiver is estopped by the estoppel of the corporation.

If anything further was necessary to fully establish the position assumed by the defendants, it might be added, that the decree of the Circuit Court entered in the cause, and dated October 19, 1875, appointing said Receiver, authorized and required him to defend all suits to which the Railway Company was a party, without reference to where such suits were pending. And further, as will appear by reference to the evidence of Warren McCullough. (See printed Record, pages 111 and 112, and original Record, pages 286-288.) Nor is it denied by the Receiver, that said Receiver had not only that actual or constructive notice of defendant's suits in the Sullivan Circuit Court, which must be recognized or presumed against him, as standing in the place of, or as the successor of said Railway Company, possessed of its archives, books, papers and effects, but that in addition thereto, he had actual notice of such pending suits, to subject the bonds in controversy to the payment of defendant's debts; in this, said Warren McCullough informed said Receiver some time prior to the rendition of such judgment that said bonds would not be delivered to him, giving as one reason for such refusal the pendency of defendant's attachment suits; and further, that the attorney for the Receiver actually assisted in preparing and dictating what answer said McCullough should make in such suits. Under these circumstances it was the duty of the Receiver, under the decree of the Circuit Court, of date October 19, 1875, if

he desired to contest the rights of the attaching creditors to subject said bonds to the payment of their judgments, to appear in the Sullivan Circuit Court, and there file his intervening petition, asking to be made a party to such proceedings and claiming and asserting his right and title, if any, to said bonds (High on Receivers, §258); having proceeded thus far, if he was not then satisfied to allow the Sullivan Circuit Court to decide the issues thus raised, how easy it would have been for him to have changed the forum to the Circuit Court of the United States. This the Receiver negligently failed and refused to do. The attaching creditors had no authority of law to make him a party thereto without his consent. To have done so would have been in contempt of the Court in which he was Receiver. The Receiver having therefore negligently failed and refused to maintain or assert his rights, if any he had at law, equity will not now grant him relief, it is now too late for *him* to complain, and if others are injured by his laches, whom it was his duty to protect, and did not, their remedy is upon his bond as Receiver.

And the Court below in delivering its opinion well said: "The proceedings in the State Court, and the judgments therein rendered against the Railway Company, and the Trustee, McCullough, are, under the circumstances, conclusive against the Receiver in this Court, until set aside or reversed. The Trustee, McCullough, was garnisheed before suit was brought in this Court. The Railway Company was a party. The suits were pending when the Receiver of this Court was appointed. He knew of the suits in the State Court, and of the garnishment of the Trustee. The order appointing him authorized him to defend for the Company. As he must claim under the Company it would seem that, under the circumstances, the judgment of the State Court against the Company would bind the Receiver."

Undoubtedly the defendant's judgments, and the satisfaction thereof, are binding upon all the world, and they are entitled to that repose, from vexatious litigation, which with success ought to come, in the enjoyment of their own means so long wrongfully withheld from them.

THE PRIOR EQUITIES OF THE DEFENDANTS.

These defendants have pre-existing equities which Courts of Equity will recognize and protect.

Under the original contract set out in the statement of this case, it was a condition precedent that before the Railway Company should receive the bonds, that the work of building said road in and through Sullivan County, must be paid for by said Company.

It may now become material to inquire what object the county had in view in requiring the performance of any such condition.

Undoubtedly the County had a right to make such a provision, and the Railway Company having assented thereto are bound thereby. This, then, was a valid and binding provision of that contract. There could have been but one object on the part of the County in requiring it, and that, to protect the citizens of Sullivan County, who might do work or furnish money and materials in the building of said road, in and through said County, from the ravages of soulless corporations, rapacious mortgagees and swindling contractors.

The contract was accepted by the Company in its entirety. In that contract they agreed to pay for the building and completion of the road before they should receive the bonds thereunder. There was a good and valuable consideration furnished by the County. The Railway Company and all other persons in privity with them are bound.

The defendant, Boner, and his assignors relying upon that contract, as they had a right to do, furnished money and materials in the building of said road in and through Sullivan County to the amount of more than $13,000. This was the subject matter of their attachment suits, and it so appears from the evidence on file in this case.

Even the subsequent rescission of the contract would neither debar or estop these defendants of their equitable right to have either payment of their judgments from the Railway Company, or to subject the bonds in controversy to the payment thereof.

The reason for this position, as contended by the defendants, that it was the duty of the County before delivering any of the prior bonds to the Railway Company to ascertain whether or not, the building of said road had been paid for according to the terms of the contract.

The County having negligently failed to do this, is estopped from asserting its rights to the bonds after the rescission of the contract, as against the intervening rights of innocent third parties like defendant Boner, and his assignors, whose equities arose, under said contract while it was yet in force, prior to the rescission thereof.

The contract was not rescinded until July, 1874, subsequent to the institution of defendant, Boner's, and his assignors attachment suits.

These defendants are therefore entitled to the satisfaction of their judgments in any event.

It can make no difference whether the defendants pursued the proper remedy or not, their judgments have been paid and satisfied, tardy justice and equity has bean done, and this Court will not interfere.

The foregoing principle would apply to all attaching creditors, who, in good faith relied upon the contract between the County and the Railway Company, whose claims accrued in the building of the Road in and through the County, prior to the recission of the contract.

But it is submitted as an independent proposition that although Sullivan County could furnish a valid consideration for a contract of the character stated, to protect its own citizens, that such contract would not be binding in favor of citizens of other counties unless for work and labor done on said road in said County, nor would citizens of other counties otherwise have a right to rely thereupon.

It was suggested on the trial of this cause that the defendants, Boner and his assignors, having subjected these bonds to the satisfaction of their judgments, as the property of the Railway Comvany, they might now be estopped from denying the rights of the Railway Company thereto. While this proposition may be ordinarily true, as between these defendants and others not parties nor in privy with parties to the record, it is not true as applied to this case, for the reason that the Circuit Court of Sullivan County is a Court of general jurisdiction, being a law and equity Court combined, with neither a law nor a chancery side to its docket, with power and authority of law, when once possessed of

the jurisdiction and control of the parties and property, to do substantial justice, according to the merits of each particular case, between the parties litigant without reference to whether the party is attempting to assert his rights in law or in equity. Every liberal intendment is made in favor of judgments of such Courts and such judgments will not be disturbed, even on appeal, although error appears, where the judgment has been for the right party and substantial justice done. Is it not, then, a sufficient answer to such query to say that the court having jurisdiction and control of the parties and property, and the defendants equitable rights to said bonds under the original contract, being one of the issues properly raised, that said Court may have disregarded the rights of the defendants under the garnishments and placed their right of recovery upon the higher equity arising out of the original contract.

The inquiry was made on the trial of this cause as to who furnished the consideration in the completion of the road, so as to entitle any one, if they are so entitled, to the bonds in controversy. To this it is replied that defendant Boner and his assignors, furnished over $13,000 of such consideration, and that the owners, mortgagees, Receiver, and all other persons interested in said road, received the benefit thereof. Hence it was well declared by the Court in this case in the Court below, "that if we look to the equities of the parties, it is not clear that they are with the Receiver. It was a condition of the original subscription that the work of construction should be paid for by the Railway Company before it was to be entitled to the bonds.

The debts of the plaintiffs in the State Courts (the garnishers) were for construction of the Railway. If the bondholder's money went to complete the road under the order authorizing the Receiver to build, they have the security provided by that order and they have the benefit of the materials supplied by the Respondents, which went into the construction of the road."

WHAT IS CONVEYED BY THE MORTGAGE.

The Sullivan County bonds are not included in the mortgage.

To sustain said proposition it is submitted: That the mortgage was foreclosed long before the Railway Company, the Receiver, or anybody else, was entitled to said bonds (save and except the equitable rights of the defendants); and after such

foreclosure it ceased to have any continuing or binding force or effect or any property except that in existence at the time of such foreclosure. The language of the decree itself will admit of no other construction; and defendants further contend that the parties interested as beneficiaries therein, by foreclosing said mortgage, chose to rely for the payment of their mortgage debt, upon the property then in existence owned by the Railway Company, and that said Railway Company, at the date of such foreclosure, having neither possession nor the right to the possession of said bonds, the Receiver and all other persons are estopped from asserting any right or title to said bonds under said mortgage.

That in the descriptive part of said mortgage, or in any part thereof, describing the property conveyed, said bonds are not named or designated.

These bonds are negotiable securities, payable to bearer, and being such are not, and cannot under any circumstances, be the subject of any mortgage, unless specifically named and designated in such mortgage, and then only when the possession of such negotiable securities be delivered to the mortgagee or to some other person for his use.

The Railway Company, the Receiver, the mortgagees, nor any one for them, were ever in possession, nor did they or any of them, ever at any time, have the right of possession to such bonds, and such bonds being neither named nor designated in said mortgage, nor the possession thereof delivered to them, or to any one for their use, the proposition of the Receiver that said bonds are conveyed by and included in such mortgage, is wholly precluded.

Said bonds are neither expressly nor impliedly conveyed or included in said mortgage. There is no language used in the mortgage which can be construed or tortured into a construction which would convey or include such bonds; then let us look further; let us determine, if we can, the intention of the parties at the time of the execution of the mortgage by the surrounding circumstances, and from that additional light ascertain, if we can, what was intended to be conveyed thereby.

Certain persons of the city of Burlington and elsewhere had organized the defendant corporation. They had invested all the individual means which they were willing to hazard in such an enterprise They went on with the building of said Railway until their own means were exhausted, and still the road remained incomplete and unfinised. The next step, as men of business and energy, was to raise money to carry on the enterprise. This they expected to do in every conceivable and legitmate manner. As in the case at bar, we see the Railway Company seizing upon the rights and benefits of the "The St. Joseph and Iowa Railway Company" to obtain from Sullivan County a subscription to the capital stock of the last named Company, and shrewdly providing for the delivery of the bonds thus subscribed to the Burlington and South-Western Railway Company, upon conditions to be performed by it. What did they intend to do with those bonds? Can it be for one moment doubted that they intended to sell and dispose of them, and apply the proceeds to such purpose as to them might seem best, whether in the building of the Road, the payment of expenses, or in the payment of its debts.

The primary object is to raise money; for that purpose they execute their own mortgage securing certain of their own bonds, and offer them for sale; they sell them, and apply the proceeds in like manner as the proceeds of the county bonds were applied. The object in both cases is the same. It can scarcely be said in serious contemplation of all the facts and surrounding circumstances, always attendant upon such enterprises, that the Railway Company intended to do any such foolish thing as to mortgage saleable and valuable Sullivan County bonds in order to secure their own unsaleable and almost worthless ones. Even had said bonds been in a condition to have been mortgaged—which they were not—we must accredit the Railway Company with at least ordinary business capacity, and in doing so, we can but believe they will do no such thing.

As an additional circumstance, tending to prove that said bonds are not included in said mortgage, it is respectfully submitted that the inventory of the Receiver, set out in the statement of this case *and filed in this Court on the 25th day of September*, 1876, makes no allusion, however remote, to any present, future or contingent interest in the bonds in controversy.

Again, the Circuit Court of the United States, by its Receiver, being in possession of all the archives, books, papers, effects, etc., of, or belonging to the Railway Company, rightfully took judicial notice, were it not established by extrinsic evidence, which it is however, that the prior part of the subscription of Sullivan County, to-wit: $160,000 being a part of these same bonds, were delivered by the trustee to the Railway Company, and that the Railway Company sold all of said bonds and applied the proceeds arising therefrom, in the building of the road, in the payment of expenses, and partly in the payment of its debts.

From these circumstances it must be conclusively inferred that the Railway Company and the mortgagees did not consider said bonds conveyed or included in said mortgage.

Under this state of facts, *they* are estopped from asserting that the bonds were included in the mortgage; the Receiver is likewise estopped, and his right of recovery in this action barred thereby, and the Court below, in rendering its opinion in this cause, rightfully held that,

"When we look at the very general language in the mortgage, claimed to have this effect in the light of the purpose for which that instrument was made, to raise money to build the road, it would seem improbable that it was intended to pledge County securities, issued for the express purpose of negotiation and sale, and the language in the instrument can all have effect without subjecting it to the strain necessary to make it cover these County bonds."

Further declaring that

"It was not the purpose of the Court to appoint a Receiver in respect of any property not embraced in the Railway mortgage."

THE OLD CONTRACT—WAS IT RESCINDED?

Under the old contract or order of subscription, set out in the statement of this case, it was provided "*That the work of constructing said Branch Railroad in the County of Sullivan, shall be begun by said Burlington and South-Western Railway Company within six months from the* 1st *day of May*, 1871, *and the construction thereof complete, with the rolling stock thereon, through said County, within twenty-one months from the time of commencing the work.*"

Certain persons of the city of Burlington and elsewhere had organized the defendant corporation. They had invested all the individual means which they were willing to hazard in such an enterprise They went on with the building of said Railway until their own means were exhausted, and still the road remained incomplete and unfinised. The next step, as men of business and energy, was to raise money to carry on the enterprise. This they expected to do in every conceivable and legitmate manner. As in the case at bar, we see the Railway Company seizing upon the rights and benefits of the "The St. Joseph and Iowa Railway Company" to obtain from Sullivan County a subscription to the capital stock of the last named Company, and shrewdly providing for the delivery of the bonds thus subscribed to the Burlington and South-Western Railway Company, upon conditions to be performed by it. What did they intend to do with those bonds? Can it be for one moment doubted that they intended to sell and dispose of them, and apply the proceeds to such purpose as to them might seem best, whether in the building of the Road, the payment of expenses, or in the payment of its debts.

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And it was further provided "*That in the event the said Burlington and South-Western Railway Company fails to commence said work and prosecute the same to completion, within the time limited*, THEN THIS COURT SHALL BE AUTHORIZED TO RESCIND THIS ORDER AND MAKE THE SAME NULL AND VOID."

It appears from the Record in this case that the Burlington and South-Western Railway Company, nor any one for them, completed the said road through said county within the time limited in the contract or order of subscription.

It further appears from the record in this case that the County, in compliance with the terms of the contract or order of subscription providing therefor, rescinded said order or contract of subscription, and made the same null and void.

Respondent, Sullivan County, affirms that such rescission was proper and lawful, and that she alone is entitled to the remaining twenty-two bonds in controversy, now in the hands of the Clerk of the U. S. C. C., and in support thereof says:

Parties may by mutual assent and agreement (as in the case at bar) reserve to themselves the power of putting an end to the contract by notice, or otherwise, at any particular time, upon the happening of any particular event.

Addison on Contracts, vol. 1, sec. 361.

Chitty on Contracts, page 741.

Maloney vs. Malcolm, 31 Mo., 45.

And it has been held that where a power of revocaton or rescission is contained in the contract itself, the power and the right to rescind the same is indisputed.

Quinn vs. United States, 9th Otto, 31.

Tice vs. " " " " 286.

Slater vs. Emerson, 22 How., 224.

Under a stipulation that the parties have the right to declare the contract forfeited and void, it was held that upon the happening of the contingencies mentioned it was not even necessary to make an express declaration of forfeiture.

Malcolm vs. Maloney, 31 Mo., 45.

But where a declaration of forfeiture and rescisson is made, notice may be given to any agent or employe of the other party who is authorized to represent such other party in his business or that particular branch of it connected with the subject matter of the contract.

Dillon vs. Anderson, 43 N. Y. C. A. 231.

The twenty-two bonds claimed by the Respondent County here, are in controversy in a suit lately depending in the Supreme Court of Missouri, and still pending in the Circuit Court of Sullivan County, Missouri; and the Supreme Court of Missouri in passing upon the very contract in question, say,

"There can be no doubt of the power of the County Court under this contract to declare a forfeiture of it."

Hugh M. Cooper, Appellant, vs. Sullivan Co. et. als., 65 Mo. 542.

The contingencies provided for in the original contract of subscription happened. In accordance with the happening of such contingency, and as provided in the contract itself, such contract was rescinded and made null and void by the County, and she alone was and is entitled to the twenty-two bonds which are yet undisposed of in the hands of the Clerk of the U. S. C. C.

THE NEW CONTRACT—WAS THERE ANY?

There never was any new contract of subscription between the County and the Receiver.

It was contended by the Receiver on the trial of this cause, that he had made a new contract with the County, and to establish that fact he offered in evidence orders of the County Court dated June 24th, 1876, and October 13th, 1876, which are set out in full in the statement of this case, and that by virtue of such new contract, he claimed the bonds. Admitting for the sake of the argument that the Receiver did make a new contract, and that the orders before referred to constitute such new contract, (which, however, the Respondents deny,) does this place the Receiver in any better position? The Defendants contend that it does not, for the reason that by reference to the orders which the Receiver claims to constitute his new contract, it will be seen

in unmistakable english that the same condition precedent was required as in the original contract, *that the building and completion of the Railway must be paid for*, and all according to the terms of the original contract, before a single bond should be delivered to him.

The assertion of this pretended new contract by the Receiver is an admission, that the original contract, of date May 1st, 1871, between the County and the Railway Company, had been abrogated and rescinded, and no longer in force.

It is an admission that said bonds, in no manner or form are included in said mortgage.

It is an admission that if the Receiver has any legal or equitable right to said bonds, he obtains such rights, if any, by virtue of his pretended new contract.

To claim said bonds under the mortgage, and then to claim them by virtue of a new contract made subsequent to the foreclosure of the mortgage, seem to be, if not ridiculous, at least very inconsistent.

It being fully established by the evidence on file and admitted by the Receiver, that the original contract of subscription of date May 1st, 1871, was rescinded by the County and no longer in force, it then becomes important and material to inquire whether there was any new contract subscribing said bonds as a new subscription.

It is submitted as a general proposition that the Receiver is but an officer of the Court appointing him, and any contract of subscription made by him with the County Court of Sullivan County, would simply be, in legal contemplation a subscription to Court; or, in other phraseology, one Court contracting with another Court, for the sole purpose of increasing the assets of an insolvent corporation. A Court of equity will not permit itself to occupy any such equivocal position.

The Respondents further contend that there was a total want of power in the Receiver to make or to enter into any such contract, in this, that the charter of the Burlington and South-Western Railway Company authorized the making of no such contracts, the Railway Company itself, could not therefore have done so, and for an additional reason too, it would have been in

plain violation of the Statute Laws of Missouri and the Constitution of the same. In this regard, viewing it in the most favorable light for the Receiver, he occupies no better position and is possessed of no higher or other powers than that possessed by the Railway Company, and in fact not so good, for were it conceded, which the Respondents do not, that the charter of the Railway Company would authorize the making of such contracts and the general Statutory and Constitutional laws of the State would permit the making thereof, there would still exist another valid and fatal objection thereto, namely: The Court below never at any time conferred on the Receiver the power and authority to make or enter into any such a contract; the only authority the Receiver had in the matter, was derived from the order of the Court of date October 19th, 1875, and it made no reference, however remote, either to Sullivan County bonds, or the obtaining of a new contract of subscription thereof, it simply authorized the issue of $200,000 in Receiver's certificates of debentures, which were to be sold and the proceeds arising therefrom were to be used in completing the gap through Sullivan County, the Receiver's certificates or debentures were sold, the gap completed, and the value of the whole road increased to double its previous values, but no where appears any authority authorizing the Receiver to ask, receive or solicit Municipal aid, or to make any contracts in regard thereto. But on the contrary, the Court below in delivering its opinion said:

"The Receiver never obtained from this Court any authority to make the subsequent contract with the County."

In the absence of any such authority, there is a total want of power existing in him so to do.

Again it is submitted that judgment of foreclosure was entered at the April term, 1876, of the Court below. All the rights, privileges and franchises of the Burlington and South-Western Railway Company, were merged in that judgment. They were divested of all rights, chartered or otherwise, in the property. Yet in June and October following this judgment, we find the Receiver, without authority of law, without authority even from the Court appointing him, soliciting municipal aid, endeavoring to make a contract of subscription with Sullivan County, and now asserting that he did make such a contract, and asking this Court on this appeal to enforce the same.

It is not claimed that Sullivan County has the right to give away its bonds; consequently her bonds must be given in payment of a subscription to the capital stock of some Railway Company, authorized by its Charter to receive the same, and issue certificates of such stock to the County.

To what Railroad Company was this new contract of subscription, claimed by the Receiver, given? Was it to the Burlington and South-Western Railway Company? No! Because all its rights, privileges and franchises which might otherwise have authorized it to receive the same, were divested out of such Company and merged in the judgment of foreclosure.

Was it to the mortgagees? No! They have no power to receive such subscriptions or to make such contracts.

Was it to a Company, yet unformed, who is to become the purchaser under the mortgage foreclosure sale? No! Such a thing cannot be.

Was it to the Receiver? No! Because the Court never authorized him to make the same. Under these circumstances in what corporation is Sullivan County a stockholder. Who issues her certificates of stock? With what Railway Corporation was her contract of subscription made?

But upon an examination of the orders of the date June 24th, 1876, and October 13th, 1876, it will be seen that the Receiver's claim of a new contract is puerile, that it is founded on the veriest nonsense, that the order of date June 24th, 1876, was simply an order stating that at a subsequent time, upon subsequent conditions to be performed by the Receiver, said Court would make an order dismissing the mandamus suit pending in the Supreme Court of Missouri. The order dated October 13th, 1876, simply ordered the mandamus suit to be dismissed. It did nothing more; nothing more was intended to be done.

Had the County Court intended or attempted to make any new contract, as contended by the Receiver, there was an absolute want of power and authority of law so to do, for that because the Burlington and South-Western Railway Company, it will be recollected, is possessed only of charter powers, such as are derived under the general laws of the State of Missouri, and is without special privileges granted prior to the Constitution of 1865, and

that it only obtained the subscription in the first instance by having the County make such subscription to the capital stock of the Saint Joseph and Iowa Railroad Company, and providing for the delivery of the bonds to said Burlington and South-Western Railway Company. By an act of the General Assembly of the State of Missouri, approved January 30th, 1872, the section (section 6) of the charter of the Saint Joseph and Iowa Railroad Company was repealed; this was the section under which the original subscription was obtained. Section two of said act of January 30th, 1872, provided that, "The County Court of any County in this State shall not alter, change or modify the conditions of any order of such Court authorizing a subscription to the stock of any Railroad Company, without first having obtained a two-thirds votes of the County interested, at a special election held for that purpose authorizing such alteration, change or modification."

In addition to this special prohibition, there was a general prohibition in the General Laws of the State without the assent of two-thirds of the qualified voters of the County, lawfully expressed at an election held for that purpose.

If anything more were needed to fully show the utter fallacy of this claim by the Receiver, it is submitted that the Constitution of 1875, in full force at the time the Receiver asserts this new contract to have been made, contains absolute inhibition prohibiting County Courts from making any such contracts. Any such new contract, had any been made, would therefore have been ULTRA VIRES.

It would seem then, that neither the Receiver nor the County had the legal capacity to make such a contract; and if they did make such a contract, it is in violation of law; if it is in violation of law it is void, and equity will not enforce it.

Nor could the Receiver obtain either an equitable or a legal right to said bonds thereunder.

There would exist the same want of power to renew the original contract which exists in opposition to the making of the new contract.

It must be therefore conceded that if there is any contract in force between the Railway Company, or the Receiver and

County, it is the original contract of May 1st, 1871, and it, as shown by the evidence and admitted by the Receiver, was abrogated and rescinded in accordance with a power contained in such original contract, and since such rescission has been recognized as no longer in force.

See Addison on Contracts, vol. 1, Sec. 361.

Chitty on Contracts, page 741.

Maloney vs. Malcolm, 31 Mo., 45.

Quinn vs. United States, 9th Otto., 31.

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Slater vs. Emerson, 22 How., 224.

Cooper, appellant, vs. Sullivan County et als, 65 Mo., 542.

But these Respondents insist that they are not, and were not debarred by reason of which rescission for the reason that as we have already seen, their equities arose while there was yet a valid and binding contract in force, on which they had a right to, and did rely for the satisfaction of their claims, and before any attempted rescission thereof, nor are these Respondents estopped from denying the Receiver's title or right of possession to said bonds, or showing a state of facts to exist which would preclude him from any legal or equitable right to said bonds, for the reason that he is attempting to assert his rights in equity, and if he has no rights, he has no remedy, in other words if he has neither right nor remedy, this Court will not permit him to contest the validity of the judgments and proceeding of the Sullivan Circuit Court, in which these Respondents finally determined and enforced their rights, nor will this Court permit him to recover the bonds or the proceeds thereof from these Respondents.

The Receiver must maintain this action, if at all, upon the strength of his own right and title.

And in conclusion it may be added that the Receiver's petition does not state a cause of action against Respondents either at law or in equity.

Wherefore Respondents, Ash, Boner and Stanley, say that the Circuit Court of Sullivan County obtained first and prior jurisdiction, and rightfully retained such jurisdiction to the end of the

controversy, and until the rights of the parties were finally enforced.

That the Railway Company being regularly a party to those proceedings is thereby estopped, and that the estoppel of the corporation is the estoppel of its Receiver.

That they have pre-existing equities which Courts of Equity will recognize and protect.

That the Sullivan County bonds were not, are not, and could not be included in the mortgage.

That there was no new contract of subscription between the County and the Receiver, and if there was any attempted such action was *ultra vires* and the contract void.

That the bonds subjected to the payment of Respondents debts were sold in those proceedings for largely more than their actual value in open market.

That the Railway Company received the benefit of those bonds in the reduction of a portion of their just and honest debts created in the building of the road.

And Sullivan County, Respondent, insists that the contract of May 1, 1871, has been duly rescinded and is no longer in force.

That there was a total want of power both in the County and the Receiver, to make the new contract claimed by him.

In view of all which Respondents submit that the Receiver has no standing in law or equity to maintain his action, and ask for an affirmance of the judgment as to Ash, Boner and Stanley, and for the entry of a decree in this Court awarding the twenty-two bonds in controversy, now in the custody of the Court below to the Respondent, Sullivan County.

JNO. P. BUTLER, *Solicitor*

for Ash, Boner and Stanley and Sullivan Co.

F. M. COCKRELL, *of Counsel.*

OFFICE SUPREME COURT U. S.
FILED
OCT 11 1881
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

No. 10.

ELIJAH SMITH, RECEIVER OF THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY, *Appellant*,

vs.

WARREN McCULLOUGH ET AL., *Appellees*.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

STATEMENT AND BRIEF FOR APPELLEES,

McCULLOUGH, BONER, COMBS AND OTHERS,

—BY—

A. W. MULLINS, of Counsel.

Burch & Ferguson, Printers, Jefferson City, Mo.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

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ELIJAH SMITH, Receiver of the Burlington and Southwestern Railway Company, Appellant,
vs.
WARREN McCULLOUGH, et al., Appellees.

STATEMENT OF THE CASE FOR APPELLEES.

In behalf of the Appellees, Warren McCullough, trustee, and John Q. Boner, Edmund Ash, J. H. B. Smith, administrator of the estate Joseph M. Stanley, deceased, Prewitt & Cave, Joseph Combs, B. F. Northcott, G. D. Burgess and Marion Cave, judgment creditors, and said Combs, Northcott and Cave, interpleaders, I submit the following brief statement:

On the first day of May, 1871, the county court of Sullivan county, Missouri, for and in behalf of said county, subscribed $200,000 to the capital stock of the St. Joseph and Iowa Railroad Company to aid in the building of a branch of said rialroad through said county. At that time the Burlington and Southwestern Railway Company was building a railway from the city of Burlington, Iowa, in a southwesternly direction, with the intention of extending said road through a

portion of the State of Missouri; and, with this in view, said company was then negotiating for the purchase of the *franchises* &c., of the said St. Joseph and Iowa Railroad Company. This contemplated purchase was subsequently, (on June 23, 1871,) consummated, and the Burlington and Southwestern Railway Company succeeded to the corporate rights of the said St. Joseph and Iowa Railway Company, subject however, to certain conditions and liabilities imposed by an act of the Legislature of Missouri, approved March 24, 1870.

The said order of subscription of Sullivan county provided that the payment thereof should be made by *said county issuing and delivering*, upon the terms and condition specified in the order, *the bonds of said county made by its county court to be of the denomination of* $1,000, *and payable twenty years after date.* The bonds were made payable to the *St. Joseph und Iowa Railroad Company*, but when issued said bonds were to be placed in the hands of Warren McCullough as trustee for said county and the *Burlington and Southwestern Railway Company*, for the reasons above indicated. By the terms of said order of subscription the last named company was to commence the construction of the road in said Sullivan county within six months of the first day of May, 1871, and complete the same through the county and have the rolling stock thereon within twenty-one months thereafter. And said order further provides that "*as soon as one-fourth the cost of said work in said county is completed, as shown by the report and certificate of the engineer in charge of the work, and said work paid for by said company, then the said county, through said trustee*, shall deliver to said Burlington and Southwestern Railway Company forty thousand dollars of said bonds; and when one half of said work is completed *and paid for* by said Burlington and Southwestern Railway Company, then the county is in like manner to deliver forty thousand dollars more of said bonds, and so on until the road is completed through the county, *and paid for by said company*, with the iron and rolling stock thereon, when the last installment of said two hundred thousand dollars in bonds is to be delivered to said company." (See printed record, p. 41.)

The subscription was accepted by the St. Joseph and

Iowa Railroad Company, through B. F. Northcott, Joseph Combs and Marion Cave, (appellees herein,) as agents of said company on the same day said order of subscription was made. Prior to the making of this subscription, said Northcott, Combs and Cave had been appointed by said St. Joseph and Iowa Railroad Company its agents to obtain and receive donations and subscriptions to aid in the construction of said branch road, and they, as such agents, procured said subscription from Sullivan county, and they had also, on the — day of April, 1871, entered into a contract with the said Burlington and Southwestern Railway Company in substance and to the effect that if said company should "consolidate its railway with said branch line, or in some legal way obtain the control thereof," then it was "understood and agreed by the parties" to said agreement "that if said B. F. Northcott, Joseph Combs and Marion Cave shall procure collectable and responsible subscriptions, by private individuals and corporations, either in the form of individual subscriptions to stock, individual donations, *county* or township *subscriptions*, or in any other proper and legitimate way, to the amount of $500,000, or a sum sufficient to grade, tie and bridge the said branch line from Unionville to Linneus, in Linn county, or if they shall procure such aid as will, in the estimation of the Board of Directors, render it advisable for the Burlington and Southwestern Railway Company to consolidate with said branch line, or to accept the benefits of said subscriptions, and to proceed and undertake to finish this road, and shall thereupon conclude to do so, and receive aid, and take said road, either by consolidation, purchase or other legitimate transfer, then said parties representing said branch line agree to make such transfer, or such other arrangement to procure the same to be done, by said company building such branch line, as will cause the said aid to accrue to the benefit of said Burlington and Southwestern Railway Company, to be expended on said line in constructing the same, and said Burlington and Southwestern Railway Company will take said subscriptions, less ten per cent. in kind, of all amounts subscribed by corporations, to be paid in bonds or money. * * * * * Such deductions to be the compensation for services rendered and money expended in procuring said subscriptions." (See printed record, pp. 104–106.)

The Burlington and Southwestern Railway Company acquired said branch road by purchase, accepted the aid procured by said Northcott, Combs and Cave from said Sullivan county, (with certain other aid,) and undertook the construction of the road.

That on the first day of April, 1872, the said Burlington and Southwestern Railway Company executed to the Farmers' Loan and Trust Company, of New York, a deed of trust, or mortgage, to secure the payment of bonds to be issued by said Railway Company and to be known as first mortgage bonds, "*to an amount not exceeding $20,000 per mile of the whole line of said branch*" *railroad*, to aid in the construction thereof; which said deed of trust granted, bargained, sold, transferred and conveyed unto the said Farmers' Loan and Trust Company "all the following and all the above described property, to-wit: All the present and in future to be acquired property of or in any manner pertaining to the said Linneus branch of the Burlington and Southwestern Railway Company, and all the right, title and interest and equity of redemption therein, whether of said company or the stockholders in said branch or leased premises, that is to say, all the branch railroad including the premises leased as aforesaid of the Lexington, Lake and Gulf Railroad Company now made and to be constructed, extending from the main line of said Burlington and Southwestern Railway at or near Unionville, in the county of Putnam in the State of Missouri, by the way of Linneus and Lexington to Kansas City, and by the line of said leased premises from Lexington to Butler, in Bates county, Missouri, and to such other points in southwestern Missouri as may be determined upon by the board of directors, or however said branch line of road including said leased premises may be described or built, including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes and all the lands and depot grounds, station-houses, depots, viaducts, bridges, timber and materials and property purchased and to be purchased or otherwise acquired for the construction and maintenance of said branch railroad, and all the engines, tenders, cars and machinery, and all kinds of rolling stock now owned or hereafter purchased by said party of the first part for and on ac-

count of said branch railroad, all the revenue and income of said Linneus branch, and all the rights, privileges and franchises relating thereto, and property acquired by virtue thereof, now in possession or hereafter to be acquired, including machine shops, tools, implements and personal property used therein or along the line of said branch railroad, together with all the property of every kind acquired by said first party by virtue of said lease of said Lexington, Lake and Gulf Railroad, and which branch line of road and leased premises extending from said town of Unionville by the way of Linneus and Lexington to Kansas City and southwestern Missouri, as hereinbefore set forth, is known and designated as the Linneus Branch of the Burlington and Southwestern Railway."

Suit was commenced in the court below by the Farmers' Loan and Trust Company, on the 8th day of August, 1874, to foreclose said deed of trust, or mortgage, and on the 17th day of November, 1874, N. B. Baker was appointed receiver of said Branch Railway and the property included in said deed of trust, but said receiver did not quality as such until the 6th day of May, 1875. (See printed record p. 14.) On the 19th day of October, 1875, said Baker resigned as such receiver, and thereupon on the same day, Elijah Smith was appointed receiver to succeed said Baker. The order appointing said Smith receiver, authorized him to borrow any sum of money not exceeding $200,000 and issue receiver's certificates, or bonds therefor, and giving a preferred lien on the railway property in Missouri for the payment thereof. And said receiver was also authorized "*to prosecute and defend all suits in law or in equity, in which the interests of the property or parties are involved.* (See printed record pp. 25–26.)

The final decree foreclosing the deed of trust, or mortgage, was rendered at the April term, 1876, and entered of record May 19, 1876. (Printed rec. pp. 32–35.)

The said branch railroad was partly built in said Sullivan county, and 160 of the said bonds had been delivered when the railway and property were put in charge of the receiver.

On the 24th day of June, 1874, *prior to the commencement of the suit to foreclose said deed of trust*, the appellees, Ash, Stanley and Boner instituted actions by *attachment* in the

circuit court of said Sullivan county against said Burlington and Southwestern Railway Company, on indebtedness of said company, *which accrued solely on account of the construction of the said branch railroad in said Sullivan county*, and the said McCullough was thereupon, *June 22, 1874*, duly summoned as garnishee, and the remaining 40 bonds of said county—the bonds in question—attached in his hands. Judgments were duly rendered by said Sullivan county circuit court in said actions, and also against said McCullough as garnishee, for amounts aggregating $13,059.93 and costs, and 18 of the bonds, by order of said court, were sold to pay said judgments, interest thereon and costs, and said sale duly approved by the judge of said court. (See printed record, pp. 60–71.)

Like actions by *attachment* were commenced in the Linn county court of common pleas—a court of general jurisdiction in civil cases—by the appellees Northcott, Combs, Cave Burgess and Cave and Prewitt, (and other creditors,) against said railway company, *on the 16th of June, 1874*, on a large amount of indebtedness, which, with the amounts sued on in the Sullivan county circuit court above mentioned, exceeded the par value of said 40 bonds. And that at the time said last mentioned actions were commenced said McCullough was duly summoned as garnishee in said several causes, and said bonds attached in his hands, and thereafter judgments were duly rendered by saidcourt in favor of said parties against said railway company, and, also, against said McCullough as such garnishee, and ordering a disposal of the bonds. (See printed record, pp. 100–111.)

At the November term, *November 10th, 1876*, of said common pleas court, the appellees Northcott, Combs and Cave filed their interplea in the cases then pending in said court, wherein said judgment creditors were plaintiffs and said Warren McCullough, (garnishee) defendant, alleging that 12 of said bonds—under their contract with said Burlington and Southwestern railway company, herein, in substance, set out—were the property of and belonged to said interpleaders. The matters set out in said interplea were put in issue by said judgment creditors, who filed answer thereto, and a trial was had in said court upon the issues so joined, and the court found

for said interpleaders, as to the said 12 bonds, and rendered judgment accordingly.

On the 11th day of October, 1876, the receiver, (appellant herein,) presented his petition to the Honorable Arnold Krekel, one of the judges of said circuit court of the United States for the western district of Missouri, praying for a restraining order as against said McCullough and said Ash, Stanley and Boner to prevent the disposal of said bonds under the judgments which had been rendered in the Sullivan county circuit court, and for an order for the delivery of the bonds to said receiver, for the reasons and upon the grounds set out in said petition. (Printed rec., pp. 36–37.)

And afterwards, *on the 10th day of November, 1876*, said receiver presented a like petition to that last aforesaid to the Honorable Arnold Krekel, as such judge, and praying for like orders as against said McCullough and the said Combs, Cave, Prewit, Burgess, Northcott and others to prevent the disposal of said bonds under and in accordance with the judgments which had been rendered in the circuit court of Sullivan county, and in the Linn county court of common pleas. (See printed rec., pp. 48–50.)

The defendants—appellees herein—appeared and filed their answers to the receiver's said petitions and a trial was had at the November term, 1876, of said United States circuit court, and the matters in issue taken under advisement by the court; and afterwards at the April term, 1877, of said court, a decree was rendered dismissing said petitions of the receiver and dissolving the injunction that had been granted, and from which the receiver appealed.

BRIEF.

I.

The circuit courts of the State of Missouri are courts of general jurisdiction. (Constitution of Missouri, 1865, Art. VI., §§ 1—13; Con. of Mo., 1875, Art. VI., §§ 1—22.) And the Linn county court of common pleas is a court of general jurisdiction in all civil cases. (Session Acts of Mo., of 1867, pp. 92—93.) The circuit court of Sullivan county and the Linn county court of common pleas had jurisdiction of the parties and the subject matter of the actions with respect to the bonds in question, and the judgments therein rendered were and are regular and valid. These actions were pending in said State courts and McCullough, the trustee, had been duly garnisheed, when the suit to foreclose the deed of trust, or mortgage, was commenced in the United States circuit court, and were so pending when the receiver was appointed. The receiver knew of the pendency of those actions in the State courts and of the garnishment of the trustee, McCullough. The evidence of McCullough in this regard is: "On or about the 26th day of September, 1876, prior to the completion of the gap in Sullivan county, he, affiant, was asked in said Sullivan county by Elijah Smith, receiver in the above entitled cause, if he, affiant, would deliver the 40 one thousand dollar bonds of Sullivan county then in his hands as trustee to him, said Smith, upon the completion of said railway through said Sullivan county as required by the orders of the Sullivan county court; that affiant then and there replied to said Smith that he, affiant, could not then tell; that the said bonds were attached in his hands by creditors in the circuit court of Sullivan county, and in the common pleas court of Linn county, Missouri, and that affiant would have to advise with his counsel and would be governed by his directions in regard thereto. The affiant afterwards and within a few days did advise with

his counsel, A. C. Eubanks, Esq., of Sullivan county aforesaid, and said counsel advised affiant not to deliver said bonds to any one until said attachment cases in Linn and Sullivan counties were disposed of; that affiant then notified said Smith of the advice he had received and declined to deliver said bonds to said Smith prior to the filing of his answer in any of said suits in either Linn or Sullivan counties." The evidence of said McCullough further shows that the answers he had prepared to file in all the several cases wherein he was required to answer as garnishee, were submitted by him to L. T. Hatfield, Esq., the attorney and counsel for the receiver, Elijah Smith, and that at the suggestion and instance of said Hatfield, certain alterations and amendments were made in and to said answers, and after being thus amended they were filed; and further, that at the instance of said Hatfield as such attorney a continuance of some of said causes was obtained. (See printed record, pp. 111–112, 113–114.) And at the October term, 1876, of the Sullivan county circuit court the said Hatfield in the name of and as attorney for the Burlington and Southwestern railway company filed a motion in the case of Edmund Ash against Warren McCullough as garnishee of said railway company, to strike from the files the interrogatories of said Ash exhibited to said McCullough in that case. (Record, pp. 64–65.) The circumstances plainly show that this motion was really filed on behalf of the receiver. And the order appointing Elijah Smith receiver authorized him to defend for the company. Said order in this regard reads: "And the said receiver is hereby authorized ty pay all due and unpaid taxes now existing against said railway company, *and to prosecute and defend oll suits in law or in equity, in which the interests of the property or parties are involved.*" (Record, p. 26.)

Where there is a conflict as to the authority or right of two co-ordinate courts to the jurisdiction over or custody of property, under process issued by the respective courts, it is, I think, a universal rule that the court in which jurisdiction first attached by the seizure and custody of the property under its process, must prevail. (Freeman vs. Howe, 24 How. U. S., 450; Metzner vs. Graham, 57 Mo., 404, 410.) And when the property is actually seized under the process of one of such

courts, it is in the custody of the law, and cannot be lawfully levied on or seized in anywise, and thereby taken out of such custody by any process issued from another court. (Taylor vs. Carryl, 20 How. U. S., 583; Hagan vs. Lucas, 10 Pet., 400; Buck vs. Colbrath, 3 Wall., 334; Mollison vs. Eaton, 16 Minn., 426.) In such cases if a paramount right is claimed to the property attached, the controversy must be adjudicated in the court first acquiring jurisdiction over the property, or, at least, the party claiming the adverse or paramount right, will be postponed until the property is released from the custody of the law. (Metzner vs. Graham, 57 Mo., p. 410, and authorities, *supra.*)

The judgments of the State courts were and are binding and valid against the railway company, and the trustee, McCullough, and as the receiver knew of the suits in those courts while therein pending and of the garnishment of the trustee, and being authorized to go into those courts and defend or take such steps as he deemed proper to have his claim to the bonds adjudicated, and as the receiver must claim under the railway company, the judgments against the company are, under the circumstances, conclusive against the receiver.

Eyster vs. Gaff, et al., 91 U. S., (1 Otto) 521.

Stourt vs. Walsh, U. S. Supreme Court, October term, 1880; s. c. 12 Central Law Journal, p. 586.

State ex rel. vs. Rainey, Supreme Court of Mo., April term, 1881; s. c. 12 Central Law Journal, p. 587.

II.

The bonds in question were not embraced in nor conveyed by the deed of trust, or mortgage, to the Farmers' Loan and Trust company. The mortgage conveys "all the following and all the above described property, to-wit: All the present and in future to be acquired property of or in any manner pertaining to the Linneus branch of the Burlington and Southwestern Railway Company, and all the right, title and interest and equity of redemption therein, whether of said company or the stockholders in said branch or leased premises, that is to say, all the branch railroad including the premises leased as aforesaid of the Lexington, Lake and Gulf Railroad Company, now made and to be constructed, extending from the main line of said Burlington and Southwestern Railway at or near Unionville, in the county of Putnam, in the State of Missouri, by way of, etc., including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes and all the lands and depot grounds, station houses, depots, viaducts, bridges, timber and materials and property purchased and to be purchased, or otherwise acquired for the construction and maintenance of said branch railroad, and all the engines, tenders, cars and machinery, and all kinds of rolling stock now owned or hereafter purchased by said party of the first part for and on account of said branch railroad, all the revenue and income of said Linneus branch, and all the rights, privileges and franchises relating thereto, and property acquired by virtue thereof, now in possession or hereafter to be acquired, including machine shops, tools, implements and personal property used therein or along the line of said branch railroad, together with all the property of every kind acquired by said first party by virtue of said lease of said Lexington, Lake and Gulf Railroad," etc. (Printed record, pp. 4 and following)

Thus all the "property" conveyed, or intended to be conveyed thereby, is particularly mentioned, designated and described by apt and *specific terms of description*, and there is no term used or language employed that is broad enough to include the Sullivan county bonds, or any county securities

whatever. Even if it were proper to separate and disconnect the first part of the granting clause in the mortgage: "All the present and in future to be acquired property of, or in any manner pertaining to the said Linneus branch of the Burlington and Southwestern Railway Company," from the language that immediately follows, and consider that alone, it would require a srtained, and, indeed, unwarranted construction to include the bonds in question. But the entire granting clause or clauses must be read and construed together. And "general words of description may be modified and restricted by particular words following them." (Jones on Chattel Mortgages, § 77.) The general words of description here are defined, limited and restricted by the particular words following them: "That is to say, all the branch railroad * * * including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes," etc.

Farmers' Loan and Trust Co. vs. Commercial Bank, 15 Wis., 424.

Farmers' Loan and Trust Co. vs. Commercial Bank, 17 Wis., 207.

Farmers' Loan and Trust Co. vs. Carey, 13 Wis., 110, 119.

Parish vs. Wheeler, 22 N. Y., 494.

Seymour vs. R. R. Company, 25 Barb., 284.

Mississippi Valley Co. vs. Chicago, etc., R. Co., Supreme Court of Miss., April term, 1881; s. c. 13 Central Law Journal, p. 66.

Calhoun vs. Paducah and Memphis R. Co., 9 Central Law Journal, p. 66.

2 Story on Contracts, §§ 631-634.

2 Parsons on Contracts, p. 499.

The county bonds were issued for the express purpose of negotiation and sale. They were the bonds of a good, thrifty and prosperous county, and commanded a ready sale at a good price. The object of the railway company in making the mortgage was to raise money to construct the road, and not to convey away or pledge county securities—such as these in question—for the purpose of obtaining the *mortgage* bonds

which were far less valuable than the *county* bonds. The mortgage provides for issuing bonds to the amount of $20,000 to the mile, and bearing seven per cent. interest, payable annually, in gold coin. That *default* would be made in the payment of the interest on such mortgage bonds was apparent. It was a mere question of time when the mortgage was made, but it was inevitable. In fact only one year's interest was paid. (Record, pp. 1-3.)

In giving construction to the mortgage the intention of the parties to it should, if possible, be arrived at, and as an aid thereto the object in view, the situation of the parties and all the attending circumstances should be considered. (Farmers' Loan and Trust Co. vs. Commercial Bank, 15 Wis., 424, and authorities, *supra*; also, Jones on Chattel Mortgages, §§ 55, 62; Partridge vs. White, 59 Maine, 564; Curtis vs. Phillips, 5 Mich., 112.)

It is quite clear that it was not within the contemplation of the parties to the mortgage that the county securities should be embraced in it. The whole of the property that was conveyed, or intended to be conveyed, by the mortgage, is designated with great particularity and precision by specific terms of description, and no reference whatever is made to the county bonds. Had it been the intention of the parties to include the county securities—amounting to $200,000 in Sullivan county *alone*, besides large amounts in other counties—it seems quite evident that some direct mention or reference would have been made to them.

III.

The order of the county court of Sullivan county, of date June 24, 1876, (see printed record, p. 40,) and under which the receiver in his petition claims he is entitled to the bonds, (see printed record, pp. 48—49,) can have no controlling effect in this case.

The receiver never obtained any authority from the court appointing him such receiver to enter into such contract or arrangement with county court. (See opinion of the court below, printed record, p. 132; High on Receiver's, § 390.) Nor could the court have made any order that would have been availing to enable the receiver to make such contract with

the county court. The sixth section of the act to incorporate the St. Joseph and Iowa railroad company, under which the county court was authorized to and did make the subscription to the capital stock of said company, and in payment of which the bonds in question were issued, (see the State, *ex rel* &c., vs. The County Court of Sullivan County, 51 Mo., 522, 530,) was repealed by an act of the General Assemby of the State of Missouri, entitled "An act to repeal certain sections of law granting to county courts and other corporate bodies the power to subscribe stock to railroad companies," approved January 30, 1872. The first section of said act, so far as the same relates to the charter of said St. Joseph and Iowa railroad company is as follows: "Section 1. The following numbered and designated sections of the following specified acts, approved as herein set forth, granting to county courts and other corporate bodies the power to subscribe stock to railroad companies, be and the same are hereby repealed, to-wit: * * * * section six (6) of an act to incorporate the St. Joseph and Iowa railroad company, approved January 22, 1857." * * * *.

And the third section of said act approved January 30th, 1872, is as follows: Sec. 3. All sections, parts of sections, acts and parts of acts, that may have been heretofore passed, and not above enumerated, granting power to county courts to take stock in railroad corporations without a vote of the qualified voters of such county, are hereby repealed."

And by the second section of said act it is provided: "The county court of any county in this State shall not alter, change or modify the conditions of any order of such court, authorizing a subscription to the stock of any railroad company, without first having obtained a two-thirds vote of the county interested, at a special election held for that purpose, authorizing such alteration, change or modification." Session acts of Mo., 1872, pp. 76—78.) And by an act of the Legislature of Missouri, approved March 27, 1874, (session acts of Mo., 1874, p. 45,) a violation of the provision of the act, last above referred to, by the county court is made a felony.

The county court could not, therefore, make a *new* subscription, nor *alter, change or modify* the order made May 1, 1871, after the 30th of January, 1872.

Notwithstanding the rescission orders that appear to have been made by the county court, as shown by the record, under the circumstances, the bonds could not have been withheld after the completion of the road, although it was not finished until after the time specified in the order of subscription had expired. (Kansas City, St. Joseph and Council Bluffs R. R. Co. vs. Alderman, et al., 47 Mo., 349.) But the bonds could be delivered only under the original order made by the county court, May 1, 1871.

An examination of the order made by the county court, June 24, 1876, on the proposition submitted by Elijah Smith, receiver, will disclose that the court did not by its order undertake to have the bonds delivered to said receiver. That part of the order relating to the final disposition of the bonds is: "The forty bonds of one thousand dollars each, * * * * shall be left in the hands of said Warren McCullough, trustee as aforesaid, *to be disposed of upon the terms and conditions and as stated in the original order of subscription of date May 1st, 1871.*" (Printed record, p. 40.) And the order of said county court made October 13, 1876, sets out the fact that the road had been finished through said Sullivan county by Elijah Smith, receiver, with rolling stock thereon, etc. "All according to the original order of May 1, 1871." And with reference to the delivery of the bonds the court "ordered * * that the said forty bonds of one thousand dollars each of said county, yet remaining in the hands of said Warren McCullough, trustee as aforesaid, be left to be disposed of according to law. * * (Record, pp. 46-47.)

IV.

The actions in the State courts by the judgment creditors, appellees herein, were commenced by *attachment* and McCullough, the holder of the bonds in question, was summoned as garnishee upon the institution of those actions under the *writs of attachment* therein issued. (Printed record, pp. 60-62, 100–102.)

These bonds having been attached in the hands of McCullough *before* the commencement of the suit of the Farmers' Loan and Trust Company against the Burlington and South-

western railway company and others, in the court below, to foreclose the deed of trust, or mortgage, *and prior to the appointment* of the receiver, such appointment did not affect or impair the lien already acquired by the creditors under their attachment.

High on Receivers, §§ 348, 440.
Jones on Railroad Securities, § 494.
Hubbard vs. Hamilton Bank, 7 Met. (Mass.) 340.
Davenport vs. Kelly, 42 N. Y., 193.
Van Alstyne vs. Cook, 25 N. Y., 489.
Becker vs. Torrance, 31, N. Y., 631, 641.

V.

The final decree in the case of the Farmer's Loan and Trust Company against the Burlington and Southwestern railway company and others, foreclosing the deed of trust, or mortgage, was rendered at the April term, 1876, of the Circuit Court of the United States for the Western District of Missouri, and said decree was entered of record on May 19, 1876. The receiver claims through the railway company, by virtue of the mortgage. But even if the mortgage had been sufficiently broad in its terms to have embraced the bonds in question, it is not claimed by the receiver that he was entitled to them at time when the said foreclosure decree was rendered. He insists that *thereafter* on the 30th day of September 1876, under and in pursuance of a contract or arrangement with the county court of Sullivan county, *made on the 24th of June, 1876*, also, *after* said final decree was made, he became entitled to the bonds by virtue of the mortgage.

I insist that the judgment and decree of the court foreclosing the deed of trust, or mortgage, operated as a merger of the mortgage lien—the mortgage being thereby merged in the decree entered upon it. The lien of the *mortgage* is thus extinguished and gone. (Ayres vs. Cayce, 10 Texas, 99,105; The People vs. Beebe, 1 Barb. N. Y., 379, 388; Gage vs. Brewster, 31 N. Y., p. 225; Freeman on Judgments, § 398.)

In the case of The People vs. Beebe, *supra*, the Supreme Court of New York held *that a decree of foreclosure extin-*

guishes a mortgage. And in the case of Gage vs. Brewster, *supra*, Mullin, Judge, held that after the decree foreclosing the mortgage was rendered "the mortgage is gone."

It cannot be pretended that the bonds in question are included in the said decree, or that the plaintiff's bill, in the suit to foreclose, sought to include them, or that said bonds have been in anywise mentioned or referred to in any of the proceedings of the court below, in regard to the foreclosure of said mortgage.

The receiver's right of custody extends only to the property which is the subject matter of litigation.

Noyes vs. Rich, 52 Maine, p. 116.
High on Receivers, sec. 394.
Jones on Railroad Securities, sec. 493.

It therefore follows that as these bonds were not in anywise the subject matter of litigation, or embraced in the foreclosure proceedings, that the right of custody of the receiver, as such, did not extend to them. The mortgagees have made no claim to them. And the receiver made no report of them to the court appointing him as property or effects covered by the mortgage. The arrangement that he sought to make with the county court, without authority of the court appointing him receiver, and subsequent to the foreclosure of the mortgage, was wholly unauthorized by law and void. It is manifest that it was a mere *private* enterprise on the part of the appellant aside from his office and duties as receiver. The receiver was, by the court, authorized to and did issue debentures or receiver's certificates to the amount of $200,000 to finish the railway so as to connect the two ends thereof, and by means so obtained paid for that work.

When the bonds in question were about to be disposed of under the judgments of the State courts the appellant sought to obtain possession of them by applying to the court below, in the name of his office as receiver, to procure an order for their delivery to him. And thus it was, and for the first time, that the attention of the court appointing the receiver was called to these bonds and why that court happened to be advised that there were such bonds.

VI.

McCullough, as the holder and custodian of the bonds, was subject to the garnishee process of the circuit court of Sullivan county, and, also, that of the Linn county court of common pleas, and the service of the garnishments upon him attached in his hands the said 40 bonds. (1 Wagner's Mo. Stat., 1872, § § 18 and 19, and paragraph 11, § 23, pp. 184, 185; id. §§ 1 and 4, pp. 664, 665.) And the judgments of said courts in favor of the judgment creditors, appellees herein, as well, also, the appointment of the receiver and the sale of the 18 bonds to pay the judgments in favor of Ash, Boner and Stanley, were authorized law, regular and valid. (See also, 1 Wag. Mo. Stat., 1872, §§ 7 and 8 p. 665; id. §§ 30-35 inclusive, pp. 187-188.)

Section 17 on page 184 of 1 Wagner's Mo. Stat., cited above, provides that "the original writ of attachment shall be directed and delivered to the sheriff, * * * * and shall command him to attach the lands, tenements, goods, chattels, rights, moneys, credits, evidences of debt and effects of the defendants, * * * * *and to summon as garnishees atl persons in whose hands or posiession any personal property, rights, credits, evidences of debt, effects or money of the defendat may be*, or who may be named by the plaintiff or his attorney as garnishee."

And section 19 of said statute, cited *supra*, is as follows: "Under an attachment, the officer shall be authorized to seize as attachable property, the defendant's account books, accounts, notes, bills of exchange. *bonds*, certificates of deposit, and other evidences of debt, as well as his other property, real, personal and mixed, and any and all judgment debts of the defendant, as well where the judgment or judgments may exist in the court out of which such writ may issue as where the same may exist in any other court within the jurisdiction of the court out of which such writ may issue; but no property or wages, declared by statute to be exempt from execution, shall be attached, except in the case of a non-resident defendant, or of a defendant who is about to move out of the State, with intent to change his domicil."

Paragraph 11, § 23, 1 Wagner's Statute, p. 185, cited *supra*, provides that: "Garnishees shall be summoned by the sheriff or other proper officer, declaring to them that he does summon them to appear at the return term of the writ, to answer the interrogations which may be exhibited by the plaintiff, and by reading the writ to them, if required."

And the 4th section of the Missouri Statute in regard to garnishments, (1 Wag. Stat., pp. 664-5, cited *supra*,) provides that "notice of garnishment, served as provided by this chapter, shall have the effect of attaching all personal property, money, rights, credits, *bonds*, bills, notes, drafts, checks or other choses in action of the defendant, in the garnishee's *possession or charge, or under his control* at the time of the service of the garnishment, or which may come into his possession or charge, or under his control, or be owing by him, *between that time and the time of filing his answer*; but he shall not be liable to a judgment in money on account of such *bonds*, bills, notes, drafts, checks or other choses in action, unless the same shall have been converted into money since the garnishment, or he fail, in such time as the court may prescribe, to deliver them into court, or to the sheriff, or other person designated by the court."

The position taken by the receiver that the bonds held by McCullough the trustee, were not the subject of garnishment, is not well founded. In some instances under the Missouri Statute a trustee holding a *purely equitable interest or estate* may not be garnished. But this is not that kind of a case. McCullough was the mere holder or custodian of the bonds.

Prior to the revision of the Statutes of Missouri in 1865, the Supreme Court of that State in a number of cases held that a garnishee *summoned under an execution* could not be charged unless he was a *debtor* of the defendant in the execution. But in actions brought by *attachment* that has never been the law in Missouri.

In the case of Pratt vs. Scott, 19 Mo., p. 626, the court say: "The Statute permitting *debtors* of the defendant in an execution to be summoned as garnishees, has been more than once before this court for construction and interpretation. In the cases of *Van Winkle and Rundall vs. McKee* defendant,

and *Baum*, garnishee, 7 Mo. Rep., 435; *Lee et al. vs. Faber* and *Watson*, 8 Mo. Rep., 322, and *Wood vs. Edgar*, 13 Mo. Rep., 451, it can be seen that this court regards the statute permitting the garnishing on *execution* as much more limited and restricted than the garnishing in original suits by *attachment.*" And again, in the same case at page 627, the court say: "In *attachment* suits garnishees may not be debtors; they may be garnished if they have property of the defendant in their possession. *The relation of creditor and debtor need not necessarily exist between them.* Not so, when garnished on execution." But under the Statute of Missouri in force since the year 1865, persons other than *debtors* of the defendant may be subject to the garnishee process under execution.

The judgment creditors, appellees herein, all commenced their actions by *attachment*, and therefore, the Missouri cases deciding as to the liability of persons to garnishment under and by virtue of executions, are wholly inapplicable here.

In the case of Lackland vs. Garesche, 56 Mo., p. 271—one of the cases relied on by the receiver—Judge Adams in delivering the opinion of the court says: "It must be borne in mind that this was a *continuing* express trust, to last at least for the life time of the beneficiary, which has been drawn into a court of law, by way of garnishment, to compel the trustee to execute the trust in favor of a creditor of the beneficiary. In my judgment, it was not contemplated by the Legislature to authorize a court of law, in a mere side issue growing out of an attachment suit, to exercise the intricate and complicated duties of a chancellor in the enforcement of *purely equitable trusts.* It is competent, under our statute, to summon a fraudulent assignee of property and effects, and compel him to disgorge in favor of a creditor. For when such issue is found in favor of the creditor, no trust exists, and the property or effects can be delivered over without any trouble, to satisfy the debt."

In this case there were no equitable trusts to enforce. The bonds when delivered by McCullough under order of the court would be wholly unincumbered and free from the embarrassment of any trust whatever.

In the case of Robert Armstrong vs. Elijah G. Tuttle and

Harvey W. Smith, garnishees of William Reuth, 34 Mo., 432, the court decided that a deed of trust executed by Reuth and wife to said Smith as trustee to secure a debt owing by said Reuth to said Tuttle, was fraudulent as to other creditors of Reuth. The trustee, Smith, took possession of the stock of goods conveyed by the deed of trust, and while so in possession Armstrong obtained judgment against Reuth and summoned Smith, the trustee, and Tuttle, as garnishees, and judgment was rendered against them as such garnishees by the circuit court, and this judgment was affirmed by the Supreme Court.

In the case of Hockaday vs. Sallee, garnishee, 26 Mo., 219, the court held that a promissory note assigned to a wife is subject to attachment for the debt of her husband, and that this was so, "independent of any question of fraud or resulting trust." And see also

Briggs vs. Block, garnishee, 18 Mo., 281;
Bank of State of Mo. vs. Bredow, 31 Mo., 523;
McGuire vs. Wilkinson, 72 Mo., 199.

When McCullough filed his answers as garnishee the bonds rightfully belonged either to the receiver or were subject to be disposed of for the use and benefit of the judgment creditors by the judgments and orders of the State courts. They were then ready for delivery. Had all of them been sold, as 18 of them were sold, by order of the State court, no lien, incumbrance, equity or trust would have followed them.

VII.

The amended petition, filed by the receiver on the 22d of November, 1876, alleges that the 18 bonds sold by order of the circuit court of Sullivan county to satisfy the judgments in favor of Ash, Boner and Stanley, Boner being the owner of all said judgments, were wrongly sold, and seeks to recover from McCullough and Boner the proceeds of the sale of said bonds, or that the bonds be obtained by them and delivered to the receiver, the appellant herein. (Printed record, p. 98.)

This amended petition tenders issues which should be determined by an action at law. The bonds were *sold*, *paid for* and *delivered* before this proceeding by the receiver, in the

court below, was commenced; and even if he could properly sue for and recover the value of said bonds, his remedy would be by an action at law, and not by a summary proceeding in a court of equity.

High on Receivers, sec. 145, 149.

Gelpeke et al., vs. Millwaukee and Horicon R. R. Co., 11 Wis,. 454.

Levi vs. Karrick, 13 Iowa, 344.

VIII.

The statute of Missouri in regard to interpleading in attachment cases, is as follows: "Any person claiming property, money, effects or credits attached, may interplead in the cause, verifying the same by affidavit, and issues may be made upon such interpleader, and shall be tried as like issues between plaintiff and defendant, and without unnecessary delay." (1 Wag. Mo. Stat., p. 192, sec. 52.)

While the actions were pending in the Linn county court of common pleas between the various jundgment creditors and Warren McCullough, the garnishee, the appellees, Northcott, Combs and Cave, filed their interplea in said causes, claiming 12 of said bonds in the hands of said McCullough, and the judgment creditors appeared and filed answers to said interplea, denying the interpleaders' right to said bonds. A trial was had upon the issues so joined, which result in a judgment in favor of the interpleaders for said 12 bonds.

This proceeding was regular and as authorized by law.

Ladd vs. Couzins, 35 Mo., 513.

Richardson vs. Watson, 24 Mo., 34.

Richerdson vs. Jones, 16 Mo., 177.

Sanders et al., vs. Ohlhausen, 51 Mo., 163.

State to use &c., vs. Langdon et. al., 57 Mo., 353.

As to these 12 bonds the railway company never had any right to or interest in them whatever, and neither said company nor the receiver has ever been entitled to the possession of them.

IX.

If the equities of the parties above should be looked to, they

are with the judgment creditors appellees herein, not with the receiver. The original subscription, to pay which the bonds were issued, contains a condition that the work in the construction of the railway should be paid for by the company before it was to be entitled to the bonds. (Printed record, p. 41.) The indebtedness upon which the judgement creditors, Ash, Bonner, Stanley and others obtained their jungments was incurred *exclusively*, by the railway company in the construction of the road in Sullivan county. The provission in the original subscription, above referred to, was intended to give security to those to whom the railway company might become indebted, on account of building the road in that county. It is good equity to construe that provision in the order of subscription as a contract existing betwen the county and railway company in behalf of such creditors, and giving to them primary security on said bonds. Such is its obvious spirit and intent.

"It the bondholders' money went to complete the road under the order authorizing the receiver to build, they have the security provided by that order and they have the benefit of the materials supplied by the respondents which went into the construction of the road." (See the opinion of the court below.)

X.

There was no appeal taken from the decree of the court below dismissing the intervening petition filed on behalf of Sullivan county, and the questions sought to be raised by that petition are not here for consideration.

Upon the whole record it is submitted that the decree of the court below ought to be affirmed.

A. W. MULLINS,

Of counsel for McCullough, Boner, Combs and others, Appellees.

14-30

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 385. ~~433~~ 14

JOHN H. MARTIN, PLAINTIFF IN ERROR,

vs.

LUTHER A. COLE.

IN ERROR TO THE SUPREME COURT OF COLORADO TERRITORY.

FILED FEBRUARY 4, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 385.

JOHN H. MARTIN, PLAINTIFF IN ERROR,

vs.

LUTHER A. COLE.

IN ERROR TO THE SUPREME COURT OF COLORADO TERRITORY.

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1 In the supreme court of the Territory of Colorado.

Pleas in the supreme court of the Territory of Colorado, held at the city of Denver in said Territory, at the February term of said court, begun on the second Tuesday of February, in the year of our Lord one thousand eight hundred and seventy-six, according to law.

Present: Hon. Moses Hallett, chief justice; Hon. Andrew W. Brazee, associate justice; Hon. Amherst W. Stone, associate justice; C. C. Tompkins, esq., United States marshal, and Jno. W. Webster, clerk of said court.

2 Error to the supreme court of Colorado Territory.

JOHN H. MARTIN, PLAINTIFF IN ERROR,
vs.
LUTHER A. COLE, DEFENDANT IN ERROR.

3 TERRITORY OF COLORADO,
County of Arapahoe, ss:

Pleas in the district court of the first judicial district of Colorado Territory, sitting in and for the county of Arapahoe, before the honorable Christian S. Eyster, associate justice of the supreme court of said Territory assigned to said judicial district, at a term thereof begun and held at the court-house in Denver, in said county, on the first Tuesday, it being the third day of January, A. D. one thousand eight hundred and seventy-one.

Present: Honorable Christian S. Eyster, judge of said court; M. A. Rogers, esq., district attorney of said judicial district; D. J. Cook, esq., sheriff of said county, and Oliver A. Whittemore, clerk of said court.

4 LUTHER A. COLE
vs. 1874. Assumpsit.
JOHN H. MARTIN.

Be it remembered that on, to wit, the 19th day of October, A. D. 1870, came the said plaintiff by his attorney Alfred Sayre, esq., and filed in the office of the clerk of the district court, his præcipe for, and sued out of said court a summons which said præcipe and summons are in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of the Territory of Colorado within and for the county of Arapahoe, to the January term, A. D. 1871.

LUTHER A. COLE, PLAINTIFF,
vs. In assumpsit. Damages, $5,000.
JOHN H. MARTIN, DEFENDANT.

The clerk of said court will issue a summons returnable as above
5 to be directed to the sheriff of Arapahoe to execute.

ALFRED SAYER,
Att'y for Pl'ff.

(Endorsed:) 1874. District court. Luther A. Cole, pl'ff, vs. John H. Martin, def't. Præcipe. Filed Oct. 19th, 1870. Alfred Sayre, att'y for plaintiff.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

The people of the Territory of Colorado to the sheriff of Arapahoe County, greeting:

We command you that you summon John H. Martin, if he shall be found in your county, personally to be and appear before the district court of said Arapahoe County on the first day of the next term thereof, to be holden at the court-house in Denver, in said Arapahoe County, on the first Tuesday of January, 1871, to answer unto Luther A. Cole, in a plea of assumpsit, to the damage of said plaintiff, as he says, in the sum of five thousand ($5,000) dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Oliver A. Whittemore, clerk of our said court, and the seal thereof, at Denver aforesaid, this 19th day of October, A. D. 1870.

[SEAL DISTRICT COURT, ARAPAHOE CO., COL.] OLIVER A. WHITTEMORE, *Clerk.*

(Indorsed:) 1874. District court summons. Docket No. 1874, page 505, district court. Luther A. Cole versus John H. Martin.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

OCTOBER 19TH, 1870.

I have duly executed the within, by reading the same to the within named J. H. Martin, and his acknowledging service on this writ, Oct. 19, '70, as I am therein commanded.

D. J. COOK, *Skeriff,*
By R. SOPRIS, *Deputy.*

Fees: Service, $1.50; mileage, 40; return, 75—$2.65.

Filed in the district court this 19th day of October, A. D. 1870.
OLIVER A. WHITTEMORE, *Clerk.*

And afterwards, and on, to wit, the 2nd day of June, A. D. 1871, came again the said plaintiff, by his attorney, Alfred Sayre, esq., and filed herein his declaration, which said declaration is in words and figures following, to wit:

6 TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of the Territory of Colorado, within and for the county of Arapahoe. To the January term, A. D. 1871.

Luther A. Cole, the plaintiff in this cause, by Alfred Sayre, his attorney, complains of John H. Martin, the defendant, who was summoned to answer unto the said plaintiff in a plea of trespass on the case on promises, for that whereas one John Webb heretofore, to wit, on the seventeenth day of July, A. D. one thousand eight hundred and sixty-eight, at Georgetown, C. T., at, to wit, the county of Arapahoe aforesaid, made his certain promissory note in writing, and thereby promised on or before eighteen months after the date thereof to pay to the defendant or order the sum of fourteen hundred and fourteen dollars and

fifteen [50]* one-hundredths of a dollar, for value received, at George T. Clark's & Co. Bank at Georgetown, with interest at the rate
7 of three per cent. per month from date until paid, and the defendant then and there endorsed, and under his hand assigned and delivered the same to the said plaintiff for value received.

And the said plaintiff further avers that afterwards, to wit, on the fifth day of February, A. D. one thousand eight hundred and seventy, the said promissory note being then due and wholly unpaid, he instituted a suit in assumpsit by summons against the said John Webb to the April term of the district court of the second judicial district of the Territory of Colorado, sitting within and for the county of Clear Creek, the said county being the county where the said John Webb then resided, and the said April term of said court being the first of any court held in said county after the maturity of said note having jurisdiction of the amount in controversy in said suit; and that afterwards, on the seventh day of April, A. D. one thousand eight hundred and seventy, the same being one of the days of the said term of said court, the said plaintiff, by the judgment and consideration of said court, recovered
8 a judgment in said suit against the said John Webb for the sum of two thousand two hundred and eighty-four dollars as his damages assessed in said action, together with his costs of suit by him expended, taxed at sixteen dollars and twenty cents.

And the plaintiff further avers that upon the said judgment he afterwards, to wit, on the ninth day of May, A. D. one thousand eight hundred and seventy, caused to be issued from the office of the clerk of said court a writ of fieri facias or execution, directed to the sheriff of the said county of Clear Creek, commanding him that of the goods and chattels, lands and tenements, real estate, and chattels real of the said John Webb, he cause to be made the damages and costs aforementioned, amounting in the aggregate to the sum of two thousand three hundred dollars and twenty cents, with interest thereon from the said seventh day of April, A. D. one thousand eight hundred and seventy, and the fees of the sheriff for the execution of the said writ of execution
9 and the collection of said judgment, and that he have these moneys ready to render to the said plaintiff for his damages and costs in ninety days from the date of said writ of fieri facias or execution, and make return of said writ.

And the plaintiff further avers that the said execution so issued and directed as aforesaid was afterwards and before the return day thereof, and while the said execution was in full life and force, to wit, on the said ninth day of May, in the year last aforesaid mentioned, to wit, at the county and within the jurisdiction aforesaid, placed in the hands of William L. Campbell, the sheriff of said county of Clear Creek, then and from that time up to the return of the said execution and for a long time thereafter sheriff of the said county of Clear Creek aforesaid, to be duly executed in due form of law, according to the command thereof.

And the said plaintiff further avers that the said sheriff of the said county of Clear Creek aforesaid afterwards, and before the institution of this suit, to wit, on the sixth day of June, A. D. one thousand
10 eight hundred and seventy, to wit, at the county and within the jurisdiction aforesaid, made return of the said writ of execution into the office of the clerk of the said district court with his return duly indorsed thereon to the effect following, that is to say, that he, the said

* AMENDMENT.—The word "fifty" effaced, and the word "fifteen" interlined, by leave of the court, given May 11th, 1872.

sheriff, did on the ninth day of May, A. D. one thousand eight hundred and seventy, levy on the undivided one-half of the discovery of fourteen hundred feet on the Big Gun and Star Spangle Banner lodes, all located in Griffith Mining District, also on an undivided one-twelfth of three thousand feet on the Live Yankee lode, in Montana Mining District; also number seven (7) northeast on the Frye and La Plata lodes in Upper Union Mining District, all located in said county of Clear Creek and Territory of Colorado aforesaid, and taken as belonging to the said John Webb, and that after said levy, to wit, on the first day of June, A. D. one thousand eight hundred and seventy, he, the said sheriff, proceeded to sell the aforesaid property so levied upon as aforesaid accord-
11 ing to law, in front of the office of the said sheriff at Georgetown, in said county of Clear Creek, at which said sale the whole of said property was sold for certain sums of money, amounting in the aggregate to the sum of five dollars, besides the costs of said suit amounting to the sum of forty-five dollars and seventy-five cents. And of this the said sheriff makes due return, as will appear by the said execution and the return thereon indorsed, now on file in the office of the clerk of the said district court aforesaid, to wit, at the county and within the jurisdiction aforesaid, of all which said several premises the said defendant afterwards, to wit, on the same day and year last aforesaid at the county aforesaid had notice.

And the said plaintiff further avers that from the time of the rendition of the said judgment against the said John Webb until the commencement of this suit, he, the said Webb, had no other property either real or personal in said county of Clear Creek subject to execution
12 out of which the balance of said judgment or any part thereof could have been made, and the keeping of the said execution in the hands of the sheriff of the said county of Clear Creek for the period of ninety days from its date or the issuing of a pluries or other execution to collect the balance of said judgment would have been wholly unavailing.

And the said plaintiff further avers that he, the said plaintiff, used all due diligence to collect said note from the maker thereof, of all which the said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Arapahoe aforesaid, had notice. By means whereof the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, and interest thereon according to the tenor and effect of the said promissory note, and the said costs aforesaid adjudged to the said plaintiff, when he, the said defendant, should be thereunto afterwards requested, and being so liable, he, the said defendant, in consideration thereof
13 afterwards, to wit, on the same day and year last aforseaid, at the county aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said promissory note specified, and the interest thereon, according to the tenor and effect of the said promissory note, and the said costs so adjudged to the plaintiff as aforesaid, when he, the said defendant, should be thereunto afterwards requested.

SECOND COUNT.—And whereas also one John Webb, on, to wit, the seventeenth day of July, one thousand eight hundred and sixty-eight, at Georgetown, C. T., at, to wit, the county of Arapahoe aforesaid, made his certain other promissory note in writing, and then and there delivered the same to the said defendant, and thereby promised on or before eighteen months after the date thereof to pay to the defendant or

order the sum of fourteen hundred and fourteen dollars and [50]* fifteen one hundredths of a dollar, for value received, at George T. Clark's
14 & Co. Bank, Georgetown, with interest at the rate of three per cent. per month from date until paid, and the defendant then and there indorsed and under his hand assigned and delivered the same to the plaintiff for value received. And the plaintiff avers that at the time the said note became due and payable and from that time up to the time of the commencement of this suit and up to the present time, the said John Webb ever has been and still is insolvent and unable to pay said note, and that the institution of a suit against the said John Webb at the time the said note became due, or at any time from the maturity of the said note until the present time, would have been and was and would be entirely unavailing; of all which the said defendant had notice, to wit, at the county of Arapahoe aforesaid. By reason whereof the said defendant then and there became liable to pay to the said plaintiff the said sum in the said promissory note specified, and interest thereon
15 according to the tenor and effect of the said promissory note, when he, the said defendant, should be thereunto afterwards requested. And being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said promissory note specified, and interest thereon according to the tenor and effect of the said promissory note, whenever he, the said defendant, should be thereunto afterwards requested.

THIRD COUNT.—And whereas also one John Webb, on the seventeenth day of July, A. D. one thousand eight hundred and sixty-eight, at Georgetown, C. T., at, to wit, the county of Arapahoe aforesaid, made his certain other promissory note in writing, bearing date the day and year aforesaid, and then and there delivered the same to the said defendant, and thereby promised, on or before eighteen months after date there-
16 of, to pay to the defendant or order the sum of fourteen hundred and fourteen dollars and [50]* fifteen one-hundredths of a dollar, for value received, at George T. Clark's & Co. Bank, at Georgetown, with interest at the rate of three per cent. per month from date until paid.

And the said defendant afterwards, to wit, on the day and year last aforesaid, at, to wit, the county aforesaid, in consideration that the plaintiff would receive the promissory note aforesaid in payment for certain ditch stock then by the said plaintiff sold and delivered to the said defendant, the said defendant by his endorsement in writing on the back of said promissory note, signed with his hand by the name of John H. Martin, guaranteed the payment of the said sum of money and interest in the said promissory note specified, and agreed to pay the same according to the tenor and effect of the said promissory note if the same was not paid by the said John Webb at the maturity thereof. And the said promissory note so endorsed and guarantied by the said defendant
17 was then and there delivered by the said defendant to the said plaintiff; and the said plaintiff thereupon, confiding in the said guaranty and agreement of the said defendant, accepted and received the said promissory note, together with the said guaranty thereupon written, in payment for the said ditch stock so as aforesaid sold and delivered by the said plaintiff to the said defendant. And the said

*AMENDMENT.—The word "fifty" effaced and the word "fifteen" interlined by leave of the court, given May 11th, 1872.

plaintiff avers that the said John Webb did not pay the said sum of money in said promissory note specified according to the tenor and effect of the said promissory note at the maturity thereof, nor at any other time from thence hitherto, and of all which the said defendant then and there, to wit, on the day of the maturity of said note at the county of Arapahoe, aforesaid, had due notice: By means whereof the said defendant became liable to pay to the plaintiff the said sum of money in the said promissory note specified, with interest as therein specified, and being so liable, in consideration thereof, he, the said
18 defendant, then and there undertook and faithfully promised to pay him, the said plaintiff, the said sum of money and interest in the said promissory note specified, according to the tenor and effect of the said promissory note, when he, the said defendant, should be thereunto afterwards requested.

FOURTH COUNT.—And whereas also afterwards, to wit, one John Webb, on the seventeenth day of July, A. D. one thousand eight hundred and sixty-eight, at Georgetown, C. T., to wit, at the county of Arapahoe aforesaid, made his certain other promissory note in writing, and therein and thereby promised, on or before eighteen months after the date thereof, to pay to the defendant or order the sum of fourteen hundred and fourteen dollars and [50]* fifteen one-hundredths of a dollar, for value received, at George T. Clark's & Co. Bank, Georgetown, with interest at the rate of three per cent. per month from date until paid. And whereas afterwards, to wit, on the same day and year last aforesaid, at the county aforesaid, in consideration that the plaintiff
19 would accept and receive said last-mentioned promissory note in exchange for certain shares of stock in the Platte Water Company, then owned by the said plaintiff, he, the said defendant, by his indorsement in writing on the back of the said last-mentioned promissory note, guaranteed the payment of the said sum of money and interest in said promissory note specified by the said John Webb, according to the tenor and effect of the said promissory note and at the maturity thereof; and the said promissory note so indorsed and guarantied by the said defendant was then and there delivered by the said defendant to the said plaintiff, and the said plaintiff thereupon, confiding in the said guaranty and agreement of the said defendant, accepted and received the said promissory note in exchange for said shares of stock of said company. And the said plaintiff avers that the said John Webb did not pay the said sum of money in said promissory note specified
20 according to the tenor and effect of the said promissory note at the maturity thereof, nor at any other time from thence hitherto, and of all which the said defendant then and there had due notice, at the county of Arapahoe aforesaid: By means whereof the said defendant became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, with interest as therein specified, and being so liable, in consideration thereof, he, the said defendant, then and there promised to pay him, the said plaintiff, the said sum of money and interest in the said promissory note specified, according to the tenor and effect of the said promissory note, when he, the said defendant, should be thereunto afterwards requested.

FIFTH COUNT.—For that whereas also heretofore, to wit, on the seventeenth day of July, A. D. one thousand eight hundred and sixty-eight, at

* AMENDMENT.—The word "fifty" effaced and the word "fifteen" interlined by leave of court, given May 11th, 1872.

Georgetown, C. T., to wit, at the county of Arapahoe aforesaid, one John Webb made his certain promissory note in writing and delivered the
21 same to the said defendant, in and by which said promissory note the said John Webb promised, on or before eighteen months after date thereof, to pay the said defendant order the sum of fourteen hundred and fourteen dollars and [50]* fifteen one hundredths of a dollar, for value received, at Georgetown, with interest at the rate of three per cent. per month from the date of said note until the payment thereof; and afterwards, to wit, on the day and year aforesaid, at, to wit, the county aforesaid, the said defendant, for valuable consideration to him moving from the said plaintiff by his endorsement in writing on the back of said promissory note, guaranteed the payment of the said sum of money in the said promissory note specified, and promised to pay the same according to the tenor and effect thereof, if the same was not at the maturity thereof paid by the said John Webb; and thereupon the said defendant delivered the said promissory note to the said plain
22 tiff, and the said plaintiff accepted and received the same. And the said plaintiff avers that the said John Webb did not pay the said plaintiff the sum of money in the said promissory note mentioned at the maturity of the same, nor at any other time, of all which the said defendant had notice, to wit, at the county aforesaid; by means whereof the said defendant became liable to pay to the plaintiff the said sum of money in the said promissory note specified, with interest as therein specified; and being so liable, in consideration thereof he, the said defendant, then and there undertook and faithfully promised to pay him, the said plaintiff, the said sum of money and interest in the said promissory note specified, according to the tenor and effect of the said promissory note, when he, the said defendant, should be thereunto afterwards requested.

COUNT.—For that whereas also the said defendant heretofore,
23 to wit, on the first day of October, in the year of our Lord one thousand eight hundred and seventy, at Denver, C. T., to wit, at the county aforesaid, was indebted to the said plaintiff in the sum of five thousand dollars, lawful money of the United States, for money by said plaintiff before that time lent and advanced to and paid, laid out, and expended for the said defendant, and at his special instance and request; and also in the further sum of five thousand dollars, of like lawful money, for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and also in the further sum of five thousand dollars, of like lawful money, for so much money before that time and then due and payable from the said defendant to the said plaintiff for interest upon and for the forbearance and use of divers large sums of money before that time due and owing from said defendant to the said plaintiff, and by the said plaintiff forborne to the said defendant for divers long spaces of time before
24 then elapsed, and at the like special instance and request of the said defendant; and also that the said defendant accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff before that time due and owing and then in arrear and unpaid; and upon such accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiff in the further sum of five thousand dollars, of like lawful money; and being so indebted he, the said defendant, in consideration

*AMENDMENT.—The word "fifty" effaced and the word "fifteen" interlined by leave of the court, given May 11th, 1872.

thereof afterwards, to wit, on the day and year aforesaid, at, to wit, the county aforesaid, undertook and then faithfully promised the said plaintiff to pay him the said several sums of money in this count mentioned when he, the said defendant, should be thereunto afterwards requested.

Breach.

Nevertheless, the said defendant, not regarding his said several promises and undertakings, has not yet paid the said several sums of
25 money, or any or either of them, or any part thereof, to the said plaintiff (although often requested so to do), but the said defendant to pay him the same has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiff of five thousand dollars; and therefore he brings this suit, &c.

ALFRED SAYRE,
Attorney for Plaintiff.

Copy of instrument and account sued in said declaration.

$1,414.15. | GEORGETOWN, C. T., *July 17th*, 1868.

On or before eighteen months after date I promise to pay to John H. Martin or order the sum of fourteen hundred and fourteen $\frac{15}{100}$ dollars for value received, at George T. Clark & Co. Bank, at Georgetown, with interest at the rate of three per cent. per month from date until paid.

JOHN WEBB.

(Endorsed on the back:)
Pay to the order of Luther A. Cole. Value received.

JOHN H. MARTIN.

(Endorsed on face:) One dollar & half stamp, on deed of trust.

26 *John H. Martin to Luther A. Cole, Dr.*

Oct. 1, 1870.—For money lent, advanced to, paid, laid out, and expended July 17th, 1868		$5,000 00
" 1, 1870.—For money had and received July 17th, 1868		$5,000 00
" 1, 1870.—For interest upon and forbearance of divers and large sums of money due July 17th, 1868		$5,000 00
" 1, 1870.—For money due and owing, and in arrears and unpaid on an accounting July 17th, 1868		$5,000 00

(Endorsed:) 1874. In district court. Luther A. Cole vs. John H. Martin, dec. Filed June 2nd, A. D. 1871. George H. Mills, clerk. Alfred Sayer, pl'ff's att'y.

And afterwards and on, to wit, the 9th day of January, A. D. 1871 (the same being one of the regular days of the January term, A. D. 1871, of said court), the following proceedings "inter alia" were
27 had and entered of record in said court in said cause, to wit:

LUTHER A COLE
vs. } 1874. Assumpsit.
JOHN H. MARTIN

Now on this day this cause was continued.

And afterwards and on, to wit, the 13th day of June, A. D. 1871 (the same being one of the regular judicial days of the June term, A. D. 1871, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE
vs. } 1874. Assumpsit.
JOHN H. MARTIN.

Now on this day comes the said plaintiff by Alfred Sayre, esq., his attorney, and the said defendant by Messrs. Browne, Harrison, and Putnam, his attorneys, also comes, and thereupon, upon motion of the plaintiff's attorney, the said defendant was ruled to plead by or before the incoming of court on Monday morning next, June nineteenth instant.

28 And afterwards and on, to wit, the 17th day of June, A. D. 1871, came the said defendant, by his attorneys Messrs. Browne and Putnam, and filed herein his said plea, which said plea is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
Arapahoe County, ss:

In the district court of the first judicial district of Colorado Territory in and for Arapahoe County. To the June term, A. D. 1871.

JOHN H. MARTIN
ats. } In assumpsit.
LUTHER A. COLE.

And now comes the said defendant by Browne & Putnam, his attorneys, and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiff hath in his said declaration thereof complained against him, and of this he puts himself upon the country, etc.

By BROWNE & PUTNAM,
Att'ys for Def't.

29 And the plaintiff doth the like.

ALFRED SAYRE.

And for further plea in this behalf as to the first and second counts in said declaration, by leave of the court first had and obtained, the defendant says actio non, because, he says that the several causes of action in the said first and second counts in said declaration are for one and the same thing, to wit, the said supposed indorsement of said promissory note, and for no other cause whatever. And the said defendant avers that he made the said indorsement, when it was so made, in blank; that is to say, by writing his name across the back of said promissory note, and that he made said indorsement with the express agreement by and between him and the said plaintiff, the said Luther A. Cole, that the said indorsement should never be filled up so as to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name if
30 suit thereon should become necessary. And this defendant avers

that he, relying upon the assurance of the said plaintiff that his indorsement would not be filled up so as to render him liable as endorser thereon, *he* signed his name upon the back of said note, which, without said assurance, he would not have done. And this he is ready to verify.

Wherefore the defendant prays judgment, etc.

By BROWNE & PUTNAM,
His Att'ys.

(Endorsed:) 1874. John H. Martin ats. Luther A. Cole. Pleas. Filed June 17th, '71. G. H. Mills, clerk. B. & P.

And afterwards, and on, to wit, the 26th day of June, A. D. 1871, came again the said plaintiff, by his said attorney, Alfred Sayre, esq. and filed herein his replication, which said replication is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

31 In the district court of the first judicial district of Colorado Territory, within and for the county of Arapahoe.

LUTHER A. COLE
vs.
JOHN H. MARTIN. } Assumpsit.

And the plaintiff, by way of replication to the said plea of the defendant secondly above pleaded, says precludi non, because, he says that the said plaintiff did not agree to and with the said defendant in manner and form as the defendant in his said plea thereof hath alleged against him. And this he prays may be inquired of by the country.

By ALFRED SAYRE,
Att'y for Pla'tiff.

(Endorsed:) 1874. District court of Arapahoe County. Luther A. Cole vs. John H. Martin. Assumpsit. Replication. Filed June 26, 1871. G. H. Mills, clerk. Alfred Sayre, att'y for pl'ff.

And afterwards, and on, to wit, the 19th day of July, A. D. 1871
32 (the same being one of the regular judicial days of the June term, A. D. 1871, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE
vs.
JOHN H. MARTIN. } Assumpsit.

Now, on this day, upon motion of the said defendant, and by agreement of parties, it is ordered by the court that this cause be continued to the next term of this court, and that the said defendant pay all costs accrued at this present term of the court in this cause.

And afterwards, and on, to wit, the 18th day of October, A. D. 1871, (the same being one of the regular judicial days of the October term, A. D. 1871, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause to wit:

LUTHER A. COLE
vs. } Assumpsit.
JOHN H. MARTIN.

33 Now, on this day, by agreement of the said parties, through their attorneys, it is ordered by the court that this cause be continued to the next term of this court.

And afterwards, and on, to wit, the 6th day of November, A. D. 1871 (the same being one of the regular juridical days of the October term, A. D. 1871, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE
vs. } Assumpsit.
JOHN H. MARTIN.

Now on this day comes the said plaintiff by Messrs. Sayre and Wright, his attorneys, and the said defendant, by Messrs. Browne and Putnam, his attorneys, also comes. And the court having heretofore heard the arguments of counsel upon and taken under advisement the exceptions of the defendant to the depositions of W. L. Campbell, John T. Harris, and Levi H. Shepard, taken in this cause on behalf of the said plaintiff, and the court being fully advised in the premises,

34 it is considered by the court that so much of the said exceptions as refers to the sixth and eighth interrogatories propounded to the said witness Campbell, and the answer thereto, and the eighth, fifteenth, and sixteenth interrogatories propounded to the witness Shepard and the answer thereto, be sustained, and that the said interrogatories and the answers thereto be suppressed. It is further ordered that all other exceptions of the said defendant to the said depositions be overruled.

And afterwards, and on, to wit, the 12th day of January, A. D. 1872 (the same being one of the regular juridical days of the January term, A. D. 1872, of said court), the following proceedings (inter alia) were had and entered of record in said court, in said cause, to wit:

LUTHER A. COLE
vs. } 1874. Assumpsit.
JOHN H. MARTIN.

Now on this day, by agreement of the said parties through their attorneys, it is ordered by the court that this cause be continued

35 to the next term of this court.

And afterwards, and on, to wit, the 1st day of April, A. D. 1872 (the same being one of the regular juridical days of the April term, A. D. 1872, of said court), the following proceedings (inter alia) were had and entered of record in said court, in said cause, to wit:

LUTHER A. COLE
vs. } 1874. Assumpsit.
JOHN H. MARTIN.

Now on this day, by agreement of the said parties, through their attorneys, it is ordered by the court that the said plaintiff have leave

to withdraw his replication to the said defendant's second plea, and to demur thereto.

And afterwards, and on, to wit, the 24th day of April, A. D. 1872 (the same being one of the regular juridical days of the April term, A. D. 1872, of said court), the following proceedings (inter alia) were had and entered of record in said court, in said cause, to wit:

LUTHER A. COLE } 1874. Assumpsit.
vs.
JOHN H. MARTIN. }

36 Now on this day, comes the said plaintiff, by Messrs. Sayre and Wright, his attorneys, and the said defendant, by Messrs. Browne & Putnam, his attorneys, also comes. And the court having heretofore heard the arguments of counsel upon and taken under advisement the demurrer of the plaintiff to the defendant's second plea, and the court being fully advised in the premises, it is considered by the court the matters contained in the said second plea are not sufficient in law to bar or preclude the plaintiff from having and maintaining his said action against the defendant.

And afterwards, and on, to wit, the 7th day of May, A. D. 1872 (the same being one of the regular juridical days of the April term, A. D. 1872, of said court), the following proceedings (inter alia) were had and entered of record in said court, in said cause, to wit:

LUTHER A. COLE } 1874. Assumpsit.
vs.
JOHN H. MARTIN. }

37 Now, on this day, by agreement of the said parties through their attorneys, it is ordered by the court that this cause be set down for trial before the court upon Saturday next, May 11th instant, without the intervention of a jury.

And afterwards, and on, to wit, the 11th day of May, A. D. 1872 (the same being one of the regular juridical days of the April term, A. D. 1872, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE } 1874. Assumpsit.
vs.
JOHN H. MARTIN. }

Now on this day, by agreement of the said parties through their attorneys, it is ordered by the court that this cause be continued to the next term of this court, and the said plaintiff consenting thereto, it is further ordered that the plaintiff pay all costs accrued in this cause at this said term of the court; therefore it is considered by the court that the said defendant do have and recover of and from the said plaintiff his costs by him in and about his defence in this behalf at this said term
38 of the court expended, and have execution therefor; and by agreement of the said parties, it is further ordered by the court that the plaintiff and defendant respectively have leave to amend their pleadings herein, and to file additional pleadings.

And afterwards, and on, to wit, the 8th day of October, A. D. 1872 (the same being one of the regular juridical days of the October term, A. D. 1872, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE
vs. } 1874. Assumpsit.
JOHN H. MARTIN.

Now on this day come the said parties by their attorneys respectively, whereupon, on motion of the said defendant, it is ordered by the court that this cause be continued to the next term of this court.

And afterwards, and on, to wit, the 18th day of April, A. D. 1873 (the same being one of the regular juridical days of the April term,
39 A. D. 1873, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE
vs. } 1874. Assumpsit.
JOHN H. MARTIN.

Now on this day c me the said parties by their attorneys respectively, and thereupon by agreement of said parties through their said attorneys here in open court it is ordered by the court that this cause be set down for trial by the court without the intervention of a jury at the present term thereof, reserving to both parties the right to demand a jury upon the second or any subsequent trial of the said issues.

And afterwards, and on, to wit, the 28th day of May, A. D. 1873 (the same being one of the regular juridical days of the April term, A. D. 1873, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE
vs. } Assumpsit.
JOHN H. MARTIN.

40 Now on this day comes the said plaintiff, by Alfred Sayre, esq., and C. W. Wright, esq., his attorneys, and the said defendant, by S. E. Browne, esq., and T. G. Putnam, esq., his attorneys, also comes, and thereupon this cause came on for trial before the court, the said parties having here in open court expressly waived the intervention of a jury; and thereupon comes the evidence, after which, and the arguments of counsel thereupon, day until the first day of the October term next of this court is given to the said parties to hear the judgment of the court in the premises. And day until sixty days from this date is given the said defendant to tender his bill of exceptions reserved by him on the trial of the said issues. And it is ordered by the court that when the said bill of exceptions shall be allowed and signed by the judge of this court the same be filed herein as of this date.

And afterwards, and on, to wit, the 7th day of October, A. D. 1873 (the same being one of the regular juridical days of the October
41 term, A. D. 1873, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE } Assumpsit.
vs.
JOHN H. MARTIN. }

Now on this day comes the said plaintiff by Alfred Sayre, esq., and C. W. Wright, esq., his attorneys, and the said defendant by Samuel E. Browne, esq., and T. G. Putnam, esq., his attorneys, also comes, and this cause having heretofore by agreement of the said parties been set down for trial before the court without the intervention of a jury, and the court having heard the evidence produced as well on the part of the defendant as of the said plaintiff, and being now fully advised in the premises, doth find the issues herein joined between the said plaintiff and the said defendant for the defendant. And thereupon the said plaintiff prays leave of the court to submit to judgment of non-suit.

42 And afterwards, and on, to wit, the 9th day of October, A. D. 1873 (the same being one of the regular juridical days of the October term, A. D. 1873, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE } 1874. Assumpsit.
vs.
JOHN H. MARTIN. }

Now on this day comes the said parties by their attorneys respectively, and thereupon as well the said defendant as the said plaintiff consenting thereto, it is ordered by the court that the finding aforesaid of the court in this behalf be vacated and set aside, and that this cause stand continued to the next term of the court, with leave to the said defendant to have advantage of any and all defenses which he might or could have advantage of to any new action upon the same cause of action had the said plaintiff submitted to a non-suit herein and insti-
43 tuted such new action. Nevertheless it is ordered by the court that the plaintiff pay all costs heretofore accrued in this cause. Therefore it is considered by the court that the said defendant have and recover of and from the said plaintiff all costs by him in and about his defence in this behalf heretofore expended and have execution therefor.

And afterwards, and on, to wit, the 11th day of December, A. D. 1873 (the same being one of the regular juridical days of the October term, A. D. 1873, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE } 1874. Assumpsit.
vs.
JOHN H. MARTIN. }

Now on this day come the said parties by their attorneys respectively, and thereupon by agreement of the said parties through their said attorneys here in open court, it is ordered by the court that this cause be set down for trial before the court at the next regular term thereof without the intervention of a jury.

41 And afterwards, and on, to wit, the 19th day of December, A. D. 1873 (the same being one of the regular juridical days of the

October term, 1873, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

Now on this day it is ordered by the court that the following mentioned causes be set down for trial at the next regular term of this court upon the days hereinafter mentioned, that is to say:

* * * * * * *

Upon the thirty-second day of said term, G. D. No. 1874, Luther A. Cole vs. John H. Martin.

And afterwards, and on, to wit, the 13th day of May, A. D. 1874 (the same being one of the regular juridical days of the April term, A. D. 1874, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE
vs.
45 JOHN H. MARTIN. } 1874. Assumpsit.

At this day comes the said plaintiff by Alfred Sayre, esq., his attorney, and the said defendant by Samuel E. Browne, esq., and T. G. Putnam, esq., his attorneys, also comes. And it is ordered by the court, both parties consenting thereto, that the issues herein joined be set down for trial by the court without a jury.

And afterwards, and on, to wit, the 6th day of June, A. D. 1874 (the same being one of the regular juridical days of the April term, A. D. 1874, of said court), the following proceedings (inter alia) were had and entered of record in said court in said cause, to wit:

LUTHER A. COLE
vs.
JOHN H. MARTIN. } Assumpsit.

At this day comes the said plaintiff by Alfred Sayre, esq., his attorney, and the said defendant by Samuel E. Browne, esq., his attorney, also comes. Whereupon it is ordered by the court, both parties
46 consenting thereto, that the issues herein joined be set down for trial by the court without a jury, and the court having heard the evidence produced as well by the said plaintiff as by the said defendant to maintain the said issues, it is considered by the court that the said plaintiff have and recover of and from the said defendant two thousand four hundred and seventy-eight dollars and seventeen cents ($2,478\frac{17}{100}$), his damages by occasion of the premises in the declaration mentioned, together with his costs by him in this behalf laid out and expended, taxed at dollars, and have execution therefor.

Thereupon the said defendant prays an appeal from the judgment aforesaid of this court to the supreme court of this Territory, which is allowed to him on condition that within ten days from this date he file with the clerk of this court his bond in said appeal in the penalty of four thousand eight hundred dollars ($4,800.00) conditioned according
47 to law and with sureties to be approved by the clerk of this court.

And day until sixty days from this date is given to the said defendant in which to tender to the judge of this court his bill of exceptions reserved upon the trial of the said issues, which when allowed and sealed by the judge of this court shall be filed herein as of this date.

And afterwards, and on, to wit, the 27th day of February, A. D. 1875, came again the said defendant by his attorneys as aforesaid and filed herein (as of June 6th, A. D. 1874) his bill of exceptions, which said bill is in words and figures following, to wit:

TERRITORY OF COLORADO,
Arapahoe County, ss:

In the district court, April term, A. D. 1874.

LUTHER A. COLE
vs. } In assumpsit.
JOHN H. MARTIN.

Be it remembered, that on the trial of said cause at the April term, A. D. 1874, the said plaintiff in said district court, to maintain the
48 action on his part, gave in evidence a note of which the following is a copy, and the endorsement thereon, as follows, to wit:

$1,414 $\frac{50}{100}$. GEORGETOWN, C. T., *July 17th*, 1868.

On or before eighteen months after date I promise to pay to John H. Martin or order the sum of fourteen hundred & fourteen $\frac{15}{100}$ dollars for value received, at George T. Clark & Co.' bank, at Georgetown, with interest at the rate of three per cent. per month from date until paid.

JOHN WEBB.

And on which note was the following endorsement:

"Pay to the order of Luther A. Cole, value rec'd.

"JOHN H. MARTIN."

The plaintiff thereupon offered to read in evidence the depositions of William L. Campbell, Levi H. Shepherd, and John T. Harris, except interrogatories six & eight in the deposition of Campbell and the answers thereto, and interrogatories eight, fifteen, and sixteen to the deposition of Levi H. Shepherd and the answers thereto, which had been previously suppressed, to the reading whereof defendant objected because the evidence is not competent; there is better evidence. Interrogatory five
49 has no relation to the issue on trial and is incompetent, because the evidence shows that all witness knows of the matter is gained by him from the executions. Defendant also objected to the answer to the 5th interrogatory propounded to Shepherd because the witness testified to facts which came to his knowledge as the attorney *as the attorney* of said Webb, and as his confidential adviser; because the execution is shown to have been issued so as to expire August 8th, 1870, and was returned in twenty-one days after its date; because the answer to interrogatory No. six shows the recollection of witness about matters of record. The evidence is an effort to prove by parol what is matter of record, but the depositions were read subject to these objections, exceptions by defendent, and which depositions, after the formal part thereof, are as follows, to wit:

WILLIAM L. CAMPBELL.

Interrogatory 1st. What is your name, age, and place of residence?

Ans. My name is William L. Campbell. My age, forty-one. My residence is Georgetown, Clear Creek County, Colorado Territory.

50 Int'g'y 2nd. What was your business from the 2nd day of January, A. D. 1869, until 7th day of June, 1869?

Ans. I was acting as deputy sheriff, and from September, 1869. I was sheriff of Clear Creek County for the two years following Sept., 1869.

Int'g'y 3d. Do you know John Webb?

Ans. I do know him.

Int'g'y 4th. State how long you have known John Webb.

Ans. Four or five years.

Int'g'y 5th. State if you know what property, if any, John Webb was possessed of or owned from Jan'y 7th, 1869, to the present time.

Ans. All the property that I know he was possessed of was what I attached, and to that the title was doubtful.

(Here int'g'y 6th and the answer thereto was suppressed.)

Int'g'y 7th. What kind of property was it you attached?

Ans. Lode property and a house and lot.

(Here the 8th interrogatory and answer were suppressed.)

Int'g'y 9th. What was the character of the lode property? Had it been developed?

51 Ans. That I cannot tell.

Inter. 10. State if he had any real property that was not covered by that attachment.

Ans. Not that I am aware of. I think I looked up the property myself.

Int'g'y 11th. State if Mr. Webb was possessed of any personal property.

Ans. None that I am aware of. His personal property consisted of household goods that were exempt from execution.

Int'g'y 12th. State what search, if any, you made for his property at the time you levied this attachment.

Ans. I think I searched the county records for property.

Int'g'y 13th. State what property Mr. Webb has been possessed of or owned since the levy of that attachment.

Ans. None that I am aware of. There has been on execution in my hands since the sale under the attachment, and I have not been able to find any other property.

WM. L. CAMPBELL.

Subscribed and sworn to before me this 2nd day of October, 1871.

ED. C. PARMELEE,
Notary Public.

52 JOHN F. HARRIS, sworn, testified and deposed as follows:

Int'g'y 1st. What is your name, age, and place of residence?

Ans. My name is John F. Harris. My age is forty-six years. My residence is Georgetown, Clear Creek County, Colorado Territory.

Inter. 2. State if you are acquainted with John Webb.

Ans. I am.

Int'y 3. Where does he reside?

Ans. He resides in Georgetown, Clear Creek County, Colorado Territory.

Inter. 4. How long have you known him?

Ans. Since 1865, to present time.

Inter. 5. State what property, if any, John Webb was possessed of Jan'y 1st, 1869.

Ans. I don't think he had any.

Inter. 6th. State what property, if any kind, he has owned since that time.

Ans. He has not owned any that I am aware of.

Inter. 7th. What is his occupation?

Ans. He is a miner; works by day's work.

Inter. 8th. State how you know Mr. Webb was not possessed
53 of any property real or personal.

Ans. In 1865, I sold him a house and lot. He executed his notes for $400, payable $100 per month. I never collected but the first note. I hold his notes for $300 now; have not been able to collect them.

Inter. 9th. Is that property in your name now?

Ans. It is.

Inter. 10. If Mr. Webb had been possessed of any property since Jan'y 7th, 1869, that was not exempt from execution, would you have known it?

Ans. I think I should have, from the fact that I knew of executions against him that could not be collected, and if he had had any property they would have been collected.

Inter. 11th. How many executions do you know of against Mr. Webb?

Ans. I cannot state the number, but is more than one.

JOHN F. HARRIS.

Subscribed and sworn to before me this 2nd day of October, A. D. 1871.

ED. C. PARMELEE,
Notary Public.

LEVI H. SHEPHERD, being sworn, deposes and says:

54 The further examination of witnesses in this case was adjourned at the request of the plaintiff's counsel until to-morrow, Oct. 3d, A. D. 1871, at 10 o'clock a. m.

ED. C. PARMELEE,
Notary Public & Commissioner.

TUESDAY, *Oct. 3d*, 1871.

Examination of LEVI H. SHEPHERD, a witness in this cause, duly sworn, resumed.

Interrogatory 1st. What is your name, age, and place of residence?

Ans. My name is Levi H. Shepherd; my age is 49 years; my residence is Georgetown, Clear Creek County, Colorado Territory.

Inter. 2nd. Do you know John Webb?

Ans. I do.

Interr'g'y 3d. Where does he reside?

Ans. In Georgetown, Clear Creek County, Colorado Territory.

Int'g'y 4th. How long have you known Mr. Webb?

Ans. Since 1865.

Int'y 5th. State what business connection, if any, there was between you and Mr. Webb since Jan'y 1st, 1869, to the present time.

Ans. I have been his attorney & confidential adviser in nearly
55 all matters relating to his legal and financial business.

Int'g'y 6th. State if you know what property, if any kind, Mr. Webb has owned since Jan'y 1st, 1869, to the present time.

Ans. Mr. Webb was the nominal owner of certain mining property;

the names of the lodes I cannot now recollect; one of the lodes in which he was part owner was called the Congress Lode. Also he was nominal owner of a small house & lot in town of Georgetown; all of which mining property was undeveloped, excepting the Congress Lode; that had a reasonable amount of development; has a shaft about forty-five feet in depth therein. The other lodes only sufficient to record. His title to the Congress Lode was in dispute at that time, also the title to the house & lot, all of which property was mortgaged by said Webb to John Martin to secure an indebtedness of Webb to Martin.

Int'g'y 7th. At what time was it that he was owner or claimed to be owner of this property?

Ans. I cannot recollect the time, but it was prior to June 1st, 1870.

(Here int'g'y 8th and answer was suppressed.)

56 Int'g'y 9th. State what other property Mr. Webb has owned or claimed to own (besides the property you have described) since Jan'y 1st, 1869.

Ans. Not any that I know of.

Int'g'y 10th. If he had owned any other propreprty during said time, would you or would you not have known it?

Ans. If he had owned other property since that time I would know it, for the reason that he was indebted to me for legal services, & I was during that time looking for property out of which to make the amount he owed me, but could find none.

Int'g'y 11th. State if you know what became of Mr. Webb's interest in the property you have described as owned or claimed to be owned by Mr. Webb.

Ans. The whole of the property which I have mentioned, except the Congress Lode, was sold by the master in chancery of this county and the sheriff of this county on judgments obtained against him in the district court, by one Luther A. Cole.

57 Int'g'y 12th. When were these sales made?

Ans. They were made on or about the first of June, A. D. 1870.

Int'g'y 13th. State, if you know, the value of the property so sold.

Ans. The property I have mentioned was of little or no real value, for reason that the mining property is undeveloped, and the title to the house and lot in dispute, & would cost as much to perfect the title as the same would sell for in cash after the title was perfected.

Int'g'y 14th. State, if you know, whether Mr. Webb was or is the owner of any personal property and credits during said time, that is since Jan'y 1st, 1869, to present time; if so, state what said property and credits consisted of.

Ans. Mr. Webb was not the owner of any personal property, within my knowledge, during the time spoken of, subject to execution, nor was he the owner of any rights or credits, except a few small accounts against private individuals, and those uncollectable. Mr. Webb is a common day laborer, with a family to support from the proceeds of his daily labor.

58 (Here int'g'y 15 & 16 and answers thereto are stricken out.)

LEVI H. SHEPHERD.

Subscribed & sworn to before me this 3d day of October, A. D. 1871.

ED. C. PARMELEE,
Notary Public.

Then follows certificate of officer in due form.

And be it further remembered that on the 2nd of November, A. D. 1871, the defendant filed in said cause his motion to suppress certain

portions of said depositions, and which in the following words and figures:

TERRITORY OF COLORADO,
Arapahoe County, ss:

In the district court of the first judicial district of Colorado Territory in & for Arapahoe County, of the October term, A. D. 1871.

LUTHER A. COLE
vs. } In assumpsit.
JOHN H. MARTIN.

And now comes the said defendant, by Browne & Putnam, his
59 att'ys, and excepts to the deposition of John F. Harris, William L. Campbell, & Levi H. Shepherd, heretofore taken and filed in said cause. And first, as to the deposition of the said William L. Campbell, def't excepts to the 6th int'g'y & the answer thereto, because the question is leading & the answer is incompetent. To the answer to the 8th int'g'y-in-chief, because it is not responsive to the question & is incompetent. To the 9th int'g'y-in-chief, because it is leading. And to the testimony of the said witness Campbell, because the plaintiff attempts to prove the levy and sale on execution by parol.

And to the testimony of the said John F. Harris, def't excepts to the 5th and 6th int'g'y, because they assume to show facts without showing the knowledge of the witness or his means of knowledge. To the answer to the 9th int'g'y, is immaterial. To the 10th int'g'y & the answer thereto, because of incompetency. To the deposition of Levi H. Shepherd, because the evidence of said witness discloses facts which
60 came to his knowledge as the att'y & confidential adviser. To the 8th int'g'y and answer thereto, because the witness attempts to show matters of record by parol. To the 9th & 10th int'g'ys and the answers thereto, because the same are incompetent, irrelevant, and immaterial. To the 11th int'g'y, because the answer is not the best evidence of the facts. To the 15th int'g'y, because it attempts to show facts which cannot be shown by parol, or by the opinion of a witness, and because it shows a conclusion of law. And to the 16th int'g'y, because the witness is asked to state conclusions without showing his knowledge of facts or his means of knowledge.

Whereupon the defendant prays that the said several inter's and answers and depositions may be suppressed, etc.

By BROWNE & PUTNAM,
Def't's Att'ys.

And thereupon said court suppressed int'g'ys 6 & 8 and the an-
61 swers thereto in Campbell's deposition, and int'g'ys 8, 15, & 16 in deposition of Shepherd, and denied the balance of the motion, to which ruling defendant then excepted.

And thereupon plaintiff offered in evidence the following transcript of the record in case of Luther A. Cole vs. John Webb, from district court Clear Creek County, Colorado Territory, to wit:

Pleas had and entered of record in the district court of the second judicial district of Colorado Territory, and in and for Clear Creek County, before the honorable William R. Gorsline, associate justice of the su-

preme court of Colorado Territory, and judge presiding in the second judicial district thereof.

To the April term, A. D. 1870.

Present, Wm. R. Gorsline, judge, &c.; Horace H. Atkins, clerk, by Wm. M. Clark, deputy clerk; Wm. L. Campbell, sheriff.

IN THE MATTER OF LUTHER A. COLE
vs.
JOHN WEBB. } In assumpsit.

Be it remembered that heretofore, to wit, on the 5th day of
62 February, 1870, it being in vacation after the October term, 1869, of the Clear Creek County district court, came the said Luther A. Cole, by Browne & Mechling, his attorneys, and filed in our said court his præcipe for summons, in words and figures as follows, to wit:

TERRITORY OF COLORADO,
Clear Creek County, ss:

In the district court, second judicial district, Colorado Territory, in and for Clear Creek County. April term, A. D. 1870.

LUTHER A. COLE, PLAINTIFF,
vs.
JOHN WEBB, DEFENDANT. } In assumpsit. Damages, $3,000.00

The clerk of said court will issue summons in the above-entitled cause directed to the sheriff of Clear Creek County, in a plea of trespass on the case on promises, returnable at the April term of said court, A. D. 1870, to the damage of the plaintiff of three thousand dollars.

BROWNE & MECHLING,
Plaintiff's Attorneys.

To the clerk of said court.

Filed this 5th day of February, 1870.

HORACE H. ATKINS, *Clerk,*
By WM. M. CLARK,
Deputy Clerk.

63 And afterwards, to wit, on this same day, summons was issued out of and under the seal of said court, in words and figures as follows, to wit:

TERRITORY OF COLORADO,
Clear Creek County, ss:

The people of the Territory of Colorado to the sheriff of said county, greeting:

We command you that you summon John Webb, if he shall be found in your county, personally to be and appear before the district court of the second judicial district in and for Clear Creek County, on the first day of the next term thereof, to be holden at the court-house in Georgetown, in said county, on the third Tuesday of April, 1870, to answer to Luther A. Cole in a plea of trespass on the case on promises, to the damage of said plaintiff, as he says, in the sum of three thousand dollars.

And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness Horace H. Atkins, clerk of our said court and the seal
64 thereof, at Georgetown aforesaid, this 5th day of February, A. D. 1870.

[DIST. COURT SEAL.] HORACE H. ATKINS, *Clerk*,
By WM. M. CLARK,
Deputy Clerk.

Sheriff's endorsement on summons:

TERRITORY OF COLORADO,
Clear Creek County, ss:

I have duly served the within this 10th day of February, 1870, by reading the same to the within-named John Webb, as I am therein commanded.

WM. L. CAMPBELL,
Sheriff.

Filed in district court this 11th day of February, 1870.
HORACE H. ATKINS, *Clerk*,
By WM. M. CLARK,
Deputy Clerk.

And on this same day, being the 5th day of February, 1870, and before the issuing of the said summons, the said plaintiff filed a bond for security for costs, in words and figures, to wit:

TERRITORY OF COLORADO,
Clear Creek County, ss:

In the district court in the second judicial district, Colorado Territory, in and for Clear Creek County. April term, A. D. 1870.

LUTHER A. COLE
vs.
JOHN WEBB.

65 I hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance to the laws of this Territory.

Dated this 20th Jan'y, 1870.

SAM. E. BROWNE.

(Endorsement:)

Approved and filed this 5th day of February, 1870.
HORACE H. ATKINS, *Clerk*,
By WM. M. CLARK,
Deputy Clerk.

And afterwards, to wit, on this same 5th day of February, the said Luther A. Cole, by Browne & Mechling, his attorneys, filed his declaration in this cause, in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Clear Creek, ss:

In the district court of the second judicial district of Colorado
66 Territory, within and for the county of Clear Creek, of the April term, A. D. 1870.

Luther A. Cole, the plaintiff in this suit, by Browne & Mechling, his attorneys, complains of John Webb, the defendant, who was summoned, &c., in a plea of trespass on the case on promises; for that, whereas the said defendant heretofore, to wit, on the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, at Georgetown, C. T., to wit, at the county aforesaid, made his certain promissory note in writing, bearing date the day and year aforesaid, and then and there delivered the same to John H. Martin, in and by which said note, said defendant, by the name, style, and description of John Webb, promised to pay to the order of the said John H. Martin, on or before eighteen months after the date of said note, the sum of fourteen hundred and fourteen dollars and fifteen cents, at George T. Clark & Co.'s Bank, at Georgetown, with interest at the rate of three per cent. per month from date until paid, for value received; and the said John
67 H. Martin, to whom or to whose order said note was payable, then and there endorsed, and under his hand, assigned the said note to the said plaintiff, and then and there delivered the same so endorsed to the said plaintiff, by means whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay said plaintiff said sum of money consideration thereof, then and there undertook and promised to pay the same to the said plaintiff according to the tenor and effect, true intent and meaning of said note and of the indorsement aforesaid, to wit, at the place aforesaid.

Copy of the note sued on.

$1,414.15. GEORGETOWN, C. T., *July 17th*, 1860.

On or before eighteen months after date, I promise to pay to John H. Martin, or order, the sum of fourteen hundred and fourteen $\frac{15}{100}$ dollars, for value received, at George T. Clark & Co. Bank, at Georgetown, with interest at the rate of three per cent. per month from date until paid.

JOHN WEBB.

(On the margin:) One dollar & half stamp on deed of trust.

2ND COUNT.—And whereas also the said defendant heretofore, to wit, on the 25th day of January, in the year of our Lord one thou-
68 sand eight hundred and seventy, at Georgetown, to wit, at the county aforesaid, was indebted to the said plaintiff in the sum of three thousand dollars, lawful money, for money by said plaintiff before that time lent and advanced to and paid, laid out and expended for the said defendant, and at his special instance and request; and also in the further sum of three thousand dollars, of like lawful money, for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and also in the further sum of three thousand dollars, of like lawful money, for so much money before that time and then due and payable from the said defendant to the said plaintiff for interest upon and for the forbearance and use of divers

large sums of money before that time due and owing from said defendant to the said plaintiff, and by the said plaintiff forborne to said defendant for divers long spaces of time before then elapsed and at the like special instance and request of the said defendant; and
69 also that the said defendant accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff before that time due and owing, and then in arrears and unpaid, and upon such accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiff in the further sum of three thousand dollars, of like lawful money, and being so indebted, he, the said defendant, in consideration thereof afterwards, to wit, on the day and year aforesaid at, to wit, the county aforesaid, undertook and then faithfully promised the said plaintiff to pay him the said several sums of money in said several counts mentioned when he, the said defendant, should be thereunto afterwards requested.

Nevertheless the said defendant, not regarding his said several promises and undertakings, has not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said
70 plaintiff (although often requested so to), but the said defendant to pay him the same has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiff of three thousand dollars, and therefore he brings suit, &c.

BROWNE AND MECHLING,
Attorneys for Plaintiff.

Copy of account sued in said declaration, 1870, Jan'y 25th.

John Webb to Luther A. Cole, D'r.

To money lent and advanced you			$3,000 00
"	"	had & received by you for my use	3,000 00
"	"	due me for interest	3,000 00
"	"	found due me on stated a/c	3,000 00

(Endorsement:) Filed Feb. 5th, 1870. Horace H. Atkins, by Wm. M. Clark, deputy.

And afterwards, to wit, on the 26th day of February, it being in vacation after the October term, 1869, of our said district court, a second summons was issued out of and under the seal of our said court
71 in words and figures as follows, to wit:

TERRITORY OF COLORADO,
Clear Creek County, ss:

The people of the Territory of Colorado to the sheriff of said county, greeting:

We command you that you summon John Webb, if he shall be found in your county, personally to be and appear before the district court of the second judicial district in and for Clear Creek County, on the first day of the next term thereof, to be holden at the court-house in Georgetown, in said county, on the first Tuesday in April, 1870, to answer unto Luther A. Cole in a plea of trespass on case on promises, to the damage of said plaintiff, as he says, in the sum of three thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Horace H. Atkins, clerk of our said court, and the seal thereof, at Georgetown aforesaid, this 26th day of February, A. D. 1870.

[DIST. COURT SEAL.] HORACE H. ATKINS,
Clerk,
By WM. M. CLARK,
Deputy Clk.

72 (Endorsement:)

TERRITORY OF COLORADO,
Clear Creek County, ss:

I have duly served the within by reading the same to the within-named John Webb, on this 7th day of March, A. D. 1870, as I am therein commanded.

WM. L. CAMPBELL,
Sheriff.

Filed in the district court this 7th day of March, A. D. 1870.
HORACE H. ATKINS,
Clerk,
By WM. M. CLARK,
Deputy.

And afterwards, to wit, on the first day of April, A. D. 1870, it still being in vacation after the October term, 1869, of our said district court, came the said defendant, John Webb, by L. H. Shepherd, esq., his attorney, and filed his plea of general issue, in words and figures as follows, to wit:

TERRITORY OF COLORADO,
Clear Creek County, ss:

In the district court of second judicial district of Colorado, within and for Clear Creek County. Of the April term, A. D. 1870.

LUTHER A. COLE
vs.
JOHN WEBB. } In assumpsit.

73 And the defendant, by L. H. Shepherd, his attorney, comes and defends the wrong & injury, when, &c., and says that he did not undertake and promise in manner and form as the plaintiff has in his declaration thereof complained against him, and of this he puts himself upon the country, etc.

L. H. SHEPHERD,
Att'y for Defendant.

And the plaintiff the like.

S. E. BROWNE,
Att'y for Plaintiff.

Be it remembered that, heretofore, to wit, on the 7th day of April, A. D. 1870, it being one of the regular days of the April term, 1870, of the Clear Creek County district court, the following proceedings were had and entered of record in the cause there then depending between Luther A. Cole, plaintiff, and John Webb, defendant, to wit:

Now comes the said plaintiff, by Browne & Mechling, his attorneys, and the said defendant, by L. H. Shepherd, esq., his attorney, also

74 comes, and their cause comes on for trial, upon the issues joined between the said plaintiff and the said defendant. Whereupon comes a jury of good and lawful men, as follows, to wit: Mathew P. Parlser, Lewis Trapp, Walter Bates, Isaac H. Sharp, Park Disbrow, Henry S. Shelton, George A. Mills, John Haff, Barney Rounds, Ed. C. Guibor, Thomas Raymond and George W. Woods, who were duly chosen, empanelled, and sworn to well and truly try the issue joined between the said plaintiff and the said defendant, and a true verdict render according to the evidence. After hearing the evidence for the plaintiff as well as for the defendant, the argument of counsel and the instructions of the court, the jury aforesaid returned into court their verdict for the plaintiff, assessing his damages at two thousand two hundred and eighty-four dollars.

Whereupon it is considered by the court that the said plaintiff do have and recover of and from the said defendant the said sum of two thousand two hundred and eighty-four dollars, as his damages as
75 assessed by the jury aforesaid, and also his costs of suit by him in this behalf expended, and that execution issue therefor.

Afterwards, to wit, on the 9th day of May, 1870, it being in vacation after the April term, A. D. 1870, of our said Clear Creek County district court, a certain execution was issued out of and under the seal of said district court upon the aforesaid judg't in this cause. Which said execution was in words and figures as follows, to wit:

TERRITORY OF COLORADO,
Clear Creek County, ss:

The people of Colorado Territory to the sheriff of Clear Creek County, greeting:

We command you that of the lands and tenements, goods and chattels of John Webb, defendant, in your county, you cause to be made the sum of two thousand two hundred and eighty-four dollars, which Luther A. Cole, plaintiff, lately in the district court of the second judicial district, in and for said county, at a term thereof begun and held at
76 Georgetown, in said county, on the first Tuesday of April (1870), last past, recovered against the said defendant, and which by said court was adjudged to the said plaintiff for his damages by him in this behalf sustained, and also the further sum of twenty-one dollars and twenty cents, which were adjudged to the said plaintiff for his costs and charges in that behalf expended, whereof the said defendant stands convicted as appeared of record; and have you these monies ready to render to the said plaintiff for damages and costs aforesaid, and make return of this writ, with an endorsement thereon in what manner you shall have executed the same, in ninety days from date hereof.

Witness Horace H. Atkins, clerk of our said court, and the seal thereof at Georgetown, in said county of Clear Creek, this 9th day of May, A. D. 1870.

[DIST. COURT SEAL.] HORACE H. ATKINS, *Clerk*,
By WM. M. CLARK,
Deputy Clerk.

77 TERRITORY OF COLORADO,
Clear Creek County:

District court.

LUTHER A. COLE
vs.
JOHN WEBB.

Plaintiff's costs.

Doc. case, 25c; att'ys' appearance, 25c; filing declaration, 15c; filing præcipe, 15c; iss. & filing 2 summons, 2.80; app. & filing sec. for costs, 65c; ent. on term docket, 75c; filing pleas, 15c; swearing & empanelling jury, 50c; 2 oaths, 30c; ent. & filing verdict jury, 90c; entri'g judg't, 75c; iss. & filing execution, 1.65; copying sheriff's return, 1.25; ent. on judg't docket, 25c; taking costs of suit, $1.00; total clerk's fees..... $12 20
Jury fee..... 5 00

Sheriff's fees:

On summons..... $2 00
" " 2 00
4 00
Total..... $21 20

I hereby certify the foregoing to be a true copy from my fee book of plaintiff's costs.

HORACE H. ATKINS, *Clerk*,
By WM. M. CLARK,
Deputy Clerk.

And afterwards, to wit, on the 7th day of June, 1870, the said sheriff of Clear Clear County returned said execution into court with the
78 following endorsement thereon as follows, to wit:

Received this execution this 9th day of May, at 2 o'clock p. m., 1870.

WM. L. CAMPBELL,
Sheriff.

TERRITORY OF COLORADO,
Clear Creek County, ss:

By virtue of the within execution, I have levied on the undivided half of the Discovery of 1,400 feet on the Big Gun and Star Spangled Banner Lodes, all located in Griffith Mining District, also an undivided $\frac{1}{12}$ of 3,000 feet on the Live Yankee Lode in Montana Mining District, also No. 7, N. E. on the Frye and La Plata Lodes in Upper Union Mining District, all located in Clear Creek County, Colorado Territory, and taken as belonging to the said John Webb.

WM. L. CAMPBELL,
Sheriff.

Sheriff's fees on execution, $24.55.

TERRITORY OF COLORADO,
Clear Creek County, ss:

I do hereby certify that I did on the first day of June, A. D. 1870,
79 at 2 o'clock p. m. of said day, in front of the sheriff's office in Georgetown, expose the above described property for sale, as it had been legally advertised, and did then and there strike off and sell

it in lots as follows: Lot No. 1 (the undivided half of the Discovery claim of 1,400 feet on the Big Gun Lode in Griffith's Mining District). Lot No. 2 (the undivided half of the Star Spangled Banner Lode, 1,400 feet) in Griffith Mining District. Lot No. 3 ($\frac{1}{12}$th of 3,000 feet on the Live Yankee Lode in Montana Mining District). Lot No. 4 (No. 7 NE. on the Frye Lode in Upper Union Mining District), and lot No. 5 (No. 7 NE. on the La Plata Lode in Upper Union Mining District). Each of these lots being sold to Luther A. Cole, he being the highest and best bidder, for $45.75 in all, and of this I make due return.

WM. L. CAMPBELL,
Sheriff.

GEORGETOWN, *June 1st*, 1870.

TERRITORY OF COLORADO,
Clear Creek County, ss:

I, Curtis G. Hathaway, clerk of the district court of the second judicial district of Colorado Territory, in and for Clear Creek County,
80 do hereby certify that the foregoing is a true and correct copy of the records of the proceedings had and all of the papers on file in the cause lately depending in our said court between Luther A. Cole, plaintiff, and John Webb, defendant.

Witness Curtis G. Hathaway, clerk of our said district court, and the seal thereof, at Georgetown, this 29th day of May, A. D. 1873.

CURTIS G. HATHAWAY,
Clerk,
By WM. M. CLARK,
Deputy Clerk in and for Clear Creek County.

Fees, $10.00.

(Endorsed:) Complete record in case of Luther A. Cole vs. John Webb. Filed June 16th, 1874. Elward F. Bishop, clerk, by J. E. Shipton, deputy.

And thereupon plaintiff called JOHN WEBB, who was sworn and testified as follows:

Is shown note and says: That is my signature to that note. At the time of the maturity of the note I was insolvent. I had nothing at the maturity of the note, not at the date of the judgment. Well, I be-
81 lieve I did have a little. I had an interest in one or two mining lodes, lead property. At the time of the maturity of the note, I owned three hundred and fifty feet in a certain lode mining claim. I believe that was all I owned at that time. It was on the Star Spangled Banner Lode. Afterwards it was sold under execution to make the amount of that note, when they went to the deed from the trustee; it was sold on execution, all the property given in the trust deed was sold by the trustee, I presume. I was not present at the sale. I presume the trustee sold it—I know it was sold. I don't know that I can tell all of the property that was sold to satisfy that judgment.

Witness is shown the execution and the return thereon, and says: I know of some of that property. I had no property over and above this, not that I am aware of. Some of the property there I did not know of; I had no real interest in the Congress lode; I ought to have had; I engaged with parties owning the Congress lode to do a certain amount of work for a certain amount of interest in that property.

82 After agreeing to do certain work on that lead I engaged other parties to do the work on equal shares, they to do the work and I to furnish materials; and at the completion, when the deed was was to be made, it was to be equally divided between us; but at the time or after the work was completed, for reasons that the parties that done the work had against me, they wanted the deed to be made to them from the original parties. They were to deed to me. After that deed was made they went off and sold the property out of my hands for two hundred and fifty dollars, and I never got anything from it. I never had any other interest in it than what I have stated. They sold the property, and made a deed to it. It was gone three or four days before I knew it. From the time of the maturity of the note up to this time I have not been able to pay anything.

To the question which elicited the last answer defendant ob-
83 jected, which objection was denied & exception taken.

Since that time I have had nothing; have been unable to pay anything. Since the maturity of the note I have been unable to pay anything. I have never had any property except what has been in the trust-deed and that levied on since that time.

On cross-examination the witness said:

Question by def't's attorney: You say this property that was sold by the sheriff. Do you know anything about what was sold except by inspection of this paper?

Answer. Yes, sir.

Question. Were you present at the sale?

No, sir.

All your knowledge was either the inspection of the record or this paper?

Yes, sir.

Question. That is all you know about it, and you don't know outside of the records & of this paper that any of your property was sold on that day?

Ans. Not that either the Star Spangled Banner or the Big Gun lode; the other lodes named there I never knew anything about.

Question. I say outside of the records you didn't know that any of your property was sold on that day?

84 Ans. The records of Clear Creek County.

Q. That is all the knowledge you have. When was it that this property called the Congress lode was sold by these parties to whom you had the title conveyed?

Ans. I cannot tell you the date; it was not after the maturity of the note. I think it was quite a while before that. I am a married man; a householder, and own the house I live in; that is, it is not my own house; it ceased to be mine when it was sold on that trust-deed.

Q. You say it was sold by the sheriff?

That I believe. The execution is other property than that in the trust-deed. I say I pretend that a sale was made of property on the trust-deed. I can't tell you the date; I was not present at the sale. I think I know from the record that it was sold. I suppose I really have no knowledge of my own that there was any such sale; that is, if any personal presence on the day of sale was necessary. I was not there then; I think I have knowledge of the sale, nevertheless, but I only
85 gain that information from the records of Clear Creek County. I had some little conversation with Martin in regard to that property to-day. I told him it had been sold for a dollar. All the knowl-

edge I had of that fact was from an inspection of the record. I was not present at the time. I believe that property was levied on and sold about the time of the sale under the trust-deed, or immediately thereafter; somewhere near June 1st, 1870. I have been in continuous, undisturbed possession of that property from that date to the present. No one has ever called on me for rent.

Question. Or to give possession to anybody else?

Ans. I don't propose to do so or to pay either.

Question. At that time, then, this was all the property you had?

Ans. It has been sold a time or two since for taxes.

Quest. What property did you say was embraced in that deed of trust; any other except the house?

Ans. Yes, sir; there is. I don't know *or* I said anything about it. There is other property; some I can name if necessary. I don't know whether I can name the whole or not. I signed the trust deed I
86 refer to aside from the house; there was in it a lode known as the Congress lode on Griffith Mountain, in Griffith Mining District, a lode known as the Greenback lode on Democrat Mountain, same district, and a lode known as the Congress lode on Douglas Mountain, and I think there was one or two more, but can't now remember exactly as to them. I think there was a couple of other lodes, though; my recollection is there was five lodes included in the trust deed and this house.

Witness re-examined:

My recollection *was* that it was a trust deed. I don't think it was a simple mortgage. It was an incumbrance on this. I' was sold to satisfy a demand, I know, at any rate. The property mentioned in that incumbrance and the property mentioned in the judgment was all I had in the shape of realty, as far as I know. My personal property would simply be my household furniture, and of such have nothing that would exceed three hundred dollars, all told. From the time of the sale
87 this house has not been my property. I can do nothing with it. I am an underground miner. I am laboring for myself. I have no one employed.

Question by def't. What is the value of that house?

Ans. I am sure I can hardly tell what its value is. When I bought it I bought it at five hundred dollars. I suppose I paid a little more than it was worth. (To att'y for pl'ff.) I mean for the house and lot. I never got a deed for it. I have not paid all the money on it yet.

By att'y for def't:

How much is due on it?

Ans. Somewhere in the neighborhood of fifty dollars. (To att'y for the plaintiff.) I never had a deed for the property.

And thereupon plaintiff rested his case, and defendant moved for a nonsuit because the endorsement sued on had not been proved.

The motion was overruled, and defendant excepted.

Defendant JOHN H. MARTIN was sworn in his own behalf, and is shown the endorsement on said note, and says the signature is
88 mine, but says the words "Pay to the order of Luther A. Cole, value rec'd" were not on said note when I wrote my name. I don't know whose handwriting those words are in. To the best of my knowledge it was not there.

On cross-examination:

I think my name was put there at the date of the note. My own endorsement at Georgetown. I had a mortgage on property in Georgetown; same mortgage Congress lode.

Indorsement is pointed out to witness, and he says: John H. Martin is his handwriting, but not the balance, and says he does not know it.

SAMUEL E. BROWNE is sworn, & he says: I made this indorsement about the time I brought this suit, as this record shows. I made it myself after the note came into my possession from Cole, endorsed in blank "John H. Martin."

89 The witness MARTIN is here recalled and asked: State under what circumstances this note was transferred by you to Luther A. Cole, plaintiff in this suit. (Plaintiff objects.)

The defendant then stated to the court that he offered to prove in defense a prarol promise contemporaneous with the indorsement of the note; that he proposes to prove by this witness that the parol agreement set forth and stated in the defendant's second plea pleaded was made by the parties; and the court sustained the plaintiff's objection to said evidence, to which defendant then and there excepted.

And thereupon defendant offered to prove that at the time the note was transferred by Martin to Cole it was expressly agreed between Martin & Cole that Martin should endorse his name on the note in blank to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as endorser or guarantor of its payment in the event he failed to collect it from the maker of the note.

90 To which offer plaintiff then & there objected, which objection was sustained by the court, and defendant excepted.

And thereupon defendant rested, and this was all the evidence given and offered in said case; and forasmuch as these matters do not appear of record, defendant prays that this his bill of exceptions may be allowed & sealed and made a part of the record herein, which is done accordingly;

(Signed) E. T. WELLS. [SEAL.]
Judge, &c.

It is agreed that the foregoing bill of exceptions may be signed and sealed without any objection as to the time thereof, or as if the same had been tendered within the time allowed therefor by the order of the court in that behalf.

(Signed) SAYRE & WRIGHT,
Attorneys for Luther A. Cole.

91 (Endorsed:) 1874. Ret'd Jan. 8, '75. Luther A. Cole vs. John H. Martin. Bill of exceptions. Filed in district court Feb'y 27th, A. D. 1875, as of June 6th, A. D. 1874. (Signed) Edward F. Bishop, clerk.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, Edward F. Bishop, clerk of the district court of the 1st judicial district of the Territory of Colorado, within and for Arapahoe County, do hereby certify the above and foregoing to be a true, correct, and complete transcript and copy of the process, with the return thereto, the pleadings of the parties, the bill of exceptions, and all the proceedings

had and entered of record in said court in a certain cause lately therein depending, wherein Luther A. Cole was plaintiff and John H. Martin was defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, in Denver, in said county and Territory, this 3d day of March, A. D. 1875.

[DIST. COURT SEAL.] EDWARD F. BISHOP, *Clerk.*

92 *Costs in appeal.*

Ent'g 2 orders of court	1 00
Filing bill of exceptions	10
Transcript, 163 fols., and certif	44 95
Total	$46 05

Assignment of errors attached to transcript.

TERRITORY OF COLORADO, *ss:*

In supreme court, February term, 1875.

JOHN H. MARTIN, PL'FF IN ERROR,
vs.
LUTHER A. COLE, DEF'T IN ERROR.

And the said John H. Martin comes and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. The court erred in overruling the exceptions to the depositions of Campbell, Harris & Shepherd.

Second. The court erred in sustaining the demurrer of Cole to Martin's second plea.

93 Third. The finding of the court was contrary to law.

Fourth. The finding of the court was contrary to the evidence.

Fifth. The judgment of the court was for Cole, when it should have been in favor of Martin.

Sixth. The court received improper evidence offered by plaintiff below.

Seventh. The court erred in refusing to allow Martin to show under what circumstances the indorsement was made, folio 159, and his offer of proof made, folios 160 & 161 of the record.

Eighth. The court erred in finding for the plaintiff Cole when the evidence clearly proved that Webb was not insolvent, and had real estate liable to execution at and after maturity of the note and at the time the execution on the judgment against him was in the hands of the sheriff and which was not seized and sold.

Wherefore plaintiff prays that said judgment may be reversed.

THOMAS G. PUTNAM,
Att'y for Pl'ff in Error.

94 (Endorsed:) G. D. No. 228. Term No. 108. John H. Martin, pl'ff in error, vs. Luther A. Cole, def't in error. Transcript and assignment of error. Filed March 8th, 1875. Jno. W. Webster, clerk.

And afterwards, to wit, on the twentieth day of March, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado by the defendant in error his joinder in error, which is words and figures as follows, to wit:

TERRITORY OF COLORADO, *ss:*

In the supreme court, of the February term, A. D. 1875.

JOHN H. MARTIN, PL'FF IN ERROR,
vs.
LUTHER A. COLE, DEF'T IN ERROR.

95 And now comes the said defendant in error, by his attorney, and says that there is no error in the record and proceedings aforesaid in manner and form as above assigned; therefore he prays that the said judgment may be in all things affirmed, and that his costs may be adjudged to him.

ALFRED SAYRE,
CHARLES W. WRIGHT,
Att'ys for Def't in Error.

(Endorsed:) 238, 108. John H. Martin, pl'ff in error, vs. Luther A. Cole, def't in error. Joinder in error. Filed March 20th, 1875. Jno. W. Webster, clerk. Sayre & Wright, def't's att'ys.

And afterwards on, to wit, the same twentieth day of March, A. D. 1875, the same being one of the regular judicial days of the February term, A. D. 1875, of the supreme court of the Territory of Colorado the following among other things were had and entered of record in
96 said court in said cause as follows, to wit:

Error to district court Arapahoe County.

JOHN H. MARTIN, PLAINTIFF IN ERROR,
vs.
LUTHER A. COLE, DEFENDANT IN ERROR. } 238, 108.

Now on this day comes the said plaintiff in error, by T. G. Putnam, esq., his attorney, and the said defendant in error, by Alfred Sayre, esq., his attorney, also comes, and this cause coming on to be heard, by consent of parties was submitted to the consideration and judgment of the court. And it is ordered by the court that said defendant in error reply herein by Tuesday, the first day of June next, and that said plaintiff in error rejoin in ten days thereafter.

And afterwards and on, to wit, the twelfth day of July, A. D. 1875, there was filed in the office of the clerk of the supreme court of the
97 Territory of Colorado a stipulation in this cause which is in words and figures as follows, to wit:

In supreme court.

TERRITORY OF COLORADO,
From Arapahoe County, ss:

JOHN H. MARTIN, PLAINTIFF IN ERROR,
vs.
LUTHER A. COLE, DEFENDANT IN ERROR.

Error to district court.

It is hereby stipulated and agreed that the plaintiff in error, on the trial of said cause in the district court, and upon the announcement of

the judgment of said court, excepted to the finding and judgment of said district court. No advantage is to be taken in the said supreme court of the failure of said plaintiff in error to insert said exception in his bill of exceptions in said cause.

SAYRE & WRIGHT,
Att'ys for Def't in Error.

(Endorsed:) 238. John H. Martin, pl'ff in error, vs. Luther A.
98 Cole, def't in error. Stipulation. Filed July 12th, 1875. Jno. W. Webster, clerk.

And afterwards and on, to wit, the eighth day of February, A. D. 1876, the same being one of the regular judicial days of the February term, A. D. 1876, of the supreme court of the Territory of Colorado, the following, among other proceedings, were had and entered of record in said court in said cause, to wit:

Error to district court, Arapahoe County.

JOHN H. MARTIN, PLAINTIFF IN ERROR, }
vs. } 238.
LUTHER A. COLE, DEFENDANT IN ERROR. }

Now on this day comes the said plaintiff in error, by Messrs. Browne & Putnam, his attorneys, and the said defendant in error, by Alfred Sayre, esq., his attorney, also comes, and this cause coming on to be heard upon the motion of said plaintiff in error, it is ordered by the court that
99 the plaintiff in error reply to the arguments of defendant in error within ten days from this date.

And afterwards and on, to wit, the twenty-second day of February, A. D. 1876, the same being one of the regular judicial days of the February term, A. D. 1876, of the supreme court of the Territory of Colorado, the following, among other, proceedings were had and entered of record in said court in said cause, to wit:

Error to district court, Arapahoe County.

JOHN H. MARTIN, PLAINTIFF IN ERROR, }
vs. } 238.
LUTHER A. COLE, DEFENDANT IN ERROR, }

At this day comes the said plaintiff in error by T. G. Putnam, esq., his attorney, and the said defendant in error, by Alfred Sayre, esq., his attorney, also comes, and upon motion of said defendant in error for leave to file supplemental briefs herein, it is ordered by the court
100 that the said defendant in error file his supplemental briefs herein by Friday, the twenty-fifth instant.

And afterwards and on, to wit, the twenty-eighth day of March, A. D. 1876, the same being one of regular judicial days of the February term, A. D. 1876, of the supreme court of the Territory of Colorado, the following proceedings among others were had and entered of record in said court in said cause, to wit:

Error to district court, Arapahoe County.

JOHN H. MARTIN, PLAINTIFF IN ERROR,
vs.
LUTHER A. COLE, DEFENDANT IN ERROR. } 238.

Now on this day comes the said plaintiff in error by T. G. Putnam, esq., his attorney, and the said defendant in error, by Alfred Sayre, esq., his attorney, also comes, and this cause comes on to be heard as well upon the transcript of judgment and other proceedings had in the
101 said district court for the county of Arapahoe as also upon the matters herein assigned for error, and it appearing to the court that there is no error in the record and proceedings aforesaid nor in giving judgment aforesaid:

It is considered by the court that the judgment in form aforesaid given be in all things affirmed, and stand in full force and effect; that the opinion of the court filed herein be recorded, and that said defendant in error do have and recover of and from the said plaintiff in error his costs and charges in this behalf expended to be taxed, and that he have execution therefor.

And afterwards and on, to wit, the sixteenth day of October, A. D. 1876, there was filed in the office of the clerk of the supreme court of Colorado a writ of error, wherein John H. Martin is plaintiff in error and Luther A. Cole is defendant in error, the original of which,
102 with the endorsements thereon, is hereto attached, and is in words and figures as follows, to wit:

103 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between John H. Martin, plaintiff in error, and Luther A. Cole, defendant in error, a manifest error hath happened, to the great damage of the said John H. Martin, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 11th day of October, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] JNO. W. WEBSTER,
Clerk of the Supreme Court of Colorado.

Allowed by—

MOSES HALLETT,
C. J. Sup. Court Col. Ter.

(Indorsed:) John H. Martin, plaintiff in error, vs. Luther A. Cole, defendant in error. Original. Writs of error. Filed Oct. 16th, 1876. Jno. W. Webster, clerk.

104 And heretofore, to wit, on the twenty-eight day of March, A. D. 1876, the same being one of the regular judicial days of the February term, A. D. 1876, of the supreme court of the Territory of Colorado, there was filed in the office of the clerk of the supreme court aforesaid the opinion of the court in this cause, a copy of which is hereto annexed to be transmitted herewith under the amendment to rule 8th of the Supreme Court of the United States, and which is in words and figures as follows, to wit:

In the supreme court.—Feb. term, 1876.

JOHN H. MARTIN, PLAINTIFF IN ERROR,
vs.
LUTHER A. COLE, DEFENDANT IN ERROR.

STONE, *J.*:

This is an action by an indorsee against the indorser of a promissory note. The defendant filed a special plea, setting up a
105 parol contemporaneous agreement between himself and the plaintiff that the endorsement was made in blank, to enable the holder to collect it in his own name, and that it should never be filled up so as to make the defendant liable in any manner upon the same. To this plea the plaintiff demurred, and the demurrer was sustained. The defendant sought to prove the facts set up in the plea under the general issue. The judgment on the demurrer, and the refusal of the court to admit the proof under the general issue, is assigned as error. The extent and character of the undertaking by general endorsement is fixed by law. It is that the note is due and payable according to its tenor; that the maker is of the ability to pay it when due, and that by the use of due diligence it is collectable; this legal import cannot be raised by parol. (Mason vs. Burton, 54 Ill., 349; Beattie vs. Browne, 64 Ill.,
106 360; Campbell vs. Robins, 29 Ind., 271.)

The plea and offer of proof is an attempt to make a general endorsement a restrictive endorsement; that the contract made was different from that expressed. This cannot be done without a violation of established principles. In the case Dale vs. Gear, 38 Conn., 18, the plea was substantially like the plea in this case, and a demurrer to it was sustained. The chief justice says: "It presents a naked case of an attempt to prove by parol that a clear and unambiguous contract of warranty is not such, and to contradict it in terms, to turn an indorsement without restriction before maturity into a restricted endorsement. Such a plea cannot be sustained without a violation of essential principles." He goes on to say, "It may be shown that there was an equity arising from an antecedent transaction, including an agreement that the note should be taken on the sole reliance and responsibility
107 of the maker, and that it was endorsed in order to transfer the title in pursuance of such agreement, and that the attempt to enforce it is a fraud." This case was again brought before the court on different pleadings, when this antecedent equity and a fraud in procuring the endorsement was plead, and the plea was sustained (39 Conn., 89); such cases are exceptions to the general rule. The plea contains no averment of fact which constitutes an exception to the gene-

ral rule, and the offer of proof is but a repetition of the facts stated in the plea.

The authorities cited, when applied to the facts of the case, do not sustain the position of the learned counsel for the plaintiff in error. The motion to suppress certain interrogatories and depositions was properly overruled.

Whether the evidence showed that the property of Webb, the maker of note, was exhausted or not, it is not necessary to consider, as no exception was taken to the finding and judgment of the court.

108 (Phelps vs. Sprnance, 1 Colo., 414.)

The judgment of the court is affirmed.

(Endorsed:) 238. John H. Martin vs. Luther A. Cole. Opinion. Recorded. Filed March 28, 1876. Jno. W. Webster, clerk.

STATE OF COLORADO, *ss:*

I, Jno. W. Webster, clerk of the supreme court of Colorado, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinion filed in the above entitled cause, wherein John N. Martin is plaintiff in error and Luther A. Cole is defendant in error, as the same now appears remaining in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of Colorado, at Denver, this 28 day of October, A. D. 1876.

[SEAL.]

JNO. W. WEBSTER,
Clerk Supreme Court of Colorado.

109 Clerk's fees for making transcript of record, 188 fo's, @ 20 ..... $37 60
Certificate and seal 1 00

Total due clerk $38 60

Received payment of John H. Martin, pl'ff in error.

JNO. W. WEBSTER,
Clerk Supreme Court Colorado.

(Indorsed:) John H. Martin, plaintiff in error, vs. Luther A. Cole, defendant in error. Error to supreme court of Colorado. Transcript of record.

(Indorsement on cover:) No. 385. John H. Martin, plaintiff in error, vs. Luther A. Cole. Colorado Terr'y sup. ct. Filed 4th February, 1878.

OFFICE SUPREME COURT U. S.
FILED
OCT 12 1881
JAMES H. McKENNEY, Clerk.

UNITED STATES OF AMERICA.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES,

October Term, 1877.

JOHN H. MARTIN, Plaintiff in Error,

vs.

LUTHER A. COLE, Defendant in Error.

Appeal from the Supreme Court

Of Late Territory of Colorado.

S. E. BROWNE & THOMAS G. PUTNAM with H. M. TELLER,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, ss.

In the Supreme Court of the October Term, A.D. 1877.

JOHN H. MARTIN,
Plaintiff in Error,
vs.
LUTHER A. COLE,
Defendant in Error.

Error to the Supreme Court of the late Territory of Colorado.

The Defendant in error sued the Plaintiff in error in the District Court of the county of Arapahoe, in the then Territory of Colorado, on an endorsement of a promisory note, and sought to make him liable as endorser under the statute of the Territory on the subject of "Bills of Exchange and promisory notes" page 84 of the revised statutes of Colorado, revision of 1868.

The declaration contained five special counts, and the common *indebitatus* counts, which with the copy of the note and the endorsment and account sued on (as required by the statute of the Territory) are found in the transcript of the record from folio 6 to folio 45.

In the first count Defendant in error avers that he exhausted the property of the maker of the note, John Webb, by suit and sale of all his property subject to execution.

In the second count, he avers the insolvency of Webb at all times after the maturity of the note, up to the institution of the action *vs.* Plaintiff in error.

In the third count the action is upon a guarantee of the payment of the note of Webb.

In the fourth count defendant in error counts upon a guarantee of said note by plaintiff in error, in exchange for certain ditch stock.

And in the fifth count upon a guarantee of the same note for a valuable consideration.

The sixth is the common counts.

To this declaration the Plaintiff in error plead the general issue upon which issue was joined and to the first and second counts wherein the Defendant in error counted on the endorsment he plead a special plea as follows:

"And for further plea in this behalf, as to the first and second counts in said declaration, by leave of the court first had and obtained, the defendant says *actio non* because he says that the several counts in said declaration are for one and the same thing, to-wit: The said supposed indorsement of said promisory note and for no other cause whatever, and that said defendant avers that he made the said endorsement, when it was made, in blank, that is to say by writing his name across the back of said promisory note, and that he made said endorsement with the express agreement by and between him and the said plaintiff, the said Luther A. Cole, that the said endorsement should never be filed up so as to make this defendant liable in any manner upon said endorsement, but only to enable the said Plaintiff to sue the said note in his own name, if suit thereon should become necessary; and this defendant avers, that he, relying upon the assurance of the said plaintiff, that his endorsement would not be filed up so as to render him liable as endorser thereon, he signed his name on the back of said note, which without said assurance he would not have done, and this he is ready to verify. Wherefore the defendant prays judgment etc.

By BROWNE & PUTNAM,
His Attorneys.

To this special plea the Defendant in error first replied, but subsequently by leave withdrew his replication, and demurred, which demurer was sustained. The Plaintiff in error stood by his plea and trial was had upon the plea of general issue.

The ruling of the court on the demurer to the special plea is the first error complained of.

We contend that the plea set up a perfect defense to the action, and in support of this view cite the following authorities:

2. Starkies Ev. 575 and N.
2. Parsons N. and B. page 24.
Anthons N. P. 4.
Hill *vs.* Ely 5, Sgt. and R. 363.
Folger *vs.* Dousmans Ex. 37, Wis. 619.
Chaddok *vs.* Qaurress 35 New Jersey 517.
Benton *vs.* Martin, 52 New York 570.
Riddle *vs.* Stevens, et al, 32 Conn. R. 378.
Schaffer *vs*: F. & M. Bank Penn. S.
Llewellyn *vs.* Hare Am. L. R. New series 9, 611 and notes.
Tenny *vs.* Prince 4 Pick. R. 385.
Perkins *vs.* Catlin 11 Conn. 213.
N. Y. Ex. Co. *vs.* DeWolf 31 New York 282.
Rey *vs.* Simpson 22, How. 341.
Bailey *vs.* Cromwell et al, 3 Scam. 71.
Scammon *vs.* Adams et al 11 Ill. R. 575.
Donner *vs.* Cheseborough 36 Conn. 39.
Dale *vs.* Gear 38 Conn. 15.
Dale *vs.* Gear 39 Conn. 89.
Barker *vs.* Prentiss 6 Mass. 430.
Story on promisory notes, sec. 459 and notes.
Lincoln *vs.* Anisey, 5I Ill. R. 435.

This great question is settled by the Supreme Court of Colorado against us and to support their opinion two causes from Illinois and one from Indiana are cited. Mr. Justice Stone then cites Dale *vs.* Gear 38 Conn., where he says a plea substantially like this, was held ill on demurrer, but fails to cite the authority in full. We call the special attention of the court to the entire opinion and also to the plea as amended and the very learned opinion of the same court on the same case found in the 39th Conn. 89.

We are prepared to admit that the presumption *prima facia* from a blank endorsement of a promisory note, is "that the note is due and payable, according to its tenor, that the maker is of the ability to pay it when due and that by the use of due diligence it is collectable." But we contend that this presumption is only *prima facia* and may therefore be rebutted by parol. To this effect are many of the modern authorities cited *supra* and not a few of the older cases. We contend that this is not contradicting a writing by parole because the *blank* endorsement rests in parol

only until it has been made full by the holders, and as we think if this filing is done in violation of the contemporaneous verbal agreement of the parties the person who so violates his agreement is guilty of a fraud upon the rights of the other, from which he may be relieved even at law.

At folio 159 Defendant in the District Court, offered to prove in defense, a contemporaneous agreement, such as was set up to his second plea, and at folio 165 he offered to prove under the general issue "that at the time the note was transferred by Martin to Cole, it was expressly agreed between Martin and Cole that Martin should endorse his name on the note in blank to enable Cole to collect in his own name, and that Cole agreed then in consideration of what he had given for the note that he, Martin, was never to be called upon as endorser or guarantor of its payment, in the event he failed to collect it from the maker of the note." To these offers Cole objected. The objection was sustained and Martin excepted.

This is the second error relied on.

Not only was the defense offered a good one, under the special plea, but should have been received under the general issue; and in support of this position, we cite the following authorities, showing that this fraud should have been received under the general issue.

Babcock *vs.* Tice, 18 Ill. 420

Murray *vs.* Carlin, 67 Ill. 286.

A total failure of consideration may be given in evidence under the general issue, why not the failure of consideration for an endorsement?

People exrel Fleming *vs.* Magaea C. P. 12 Wen. 246.

The question as to whether the property of the maker of the note had been exhausted or not, is dismissed by Mr. Justice Stone with the statement that "no exception was taken to the finding and judgment of the court." Folio 187.

Justice Stone evidently overlooked the stipulation found at folio 171 of the record which is as follows, to-wit:

It is hereby stipulated and agreed that the plaintiff in error on the trial of said cause in the District Court, and upon the announcement of the judgment of said court, excepted to the finding and judgment of said District Court.

No advantage is to be taken in the said Supreme Court of the

failure of said plaintiff in error to insert said exception in his bill of exceptions in said cause.

SAYER & WRIGHT,
Attorneys for Defendant in Error.

These gentlemen were the attorneys of record of the Defendant in error, and this stipulation was filed in the cause July 12th, 1875. The opinion of Justice Stone was filed in the cause March 28th, 1876.

This then brings us to the next error complained of in the record. The statute of Colorado, on the subject of the liability of endorsers of promisory notes is peculiar. See Revised Statutes of Colorado, Revision of 1868, section 7, page 85. This statute was copied into our laws from the statutes of Illinois, It had been frequently construed by the supreme court of that State before its adoption here, and has been construed since. The statute has also been construed in this court, in the late case of Mills et al, *vs.* Claflin, et al, 92 U. S. Supreme Court R. 135. The statute requires the assignee, if he would make the assignor liable, to use due diligence to collect the note from the maker.

Before Colorado had adopted this statute from Illinois the Supreme Court of that State had construed the statute in the following cases.

Bledsoe *vs.* Graves, 4 Scam. (Ill.) 382.
Schutlee *vs.* Piatt, 12 Ill. R. 417.
Pierce *vs.* Short, 14 Ill. R. 114.
Chalmers *vs.* Morse, 22 Ill. R. 359.
Reeves *vs.* Kamler, 26 Ill. R, 291.
Roberts *vs.* Haskell, 20 Ill. R. 59.
Nixon *vs.* Weghrich, 20 Ill. R. 600.

All of these cases had been decided before the statute was enacted in Colorado, and many others might be cited of a like nature. It will not be necessary to cite authorities to this court to show that when one state adopted into its statutes, a statute of another state which had been construed by the highest judicial tribunal of the latter, that this construction as well as the statute are adopted by the former. But see Sedg. on construction etc. 362.

The currant of Illinois authorities on this same subject since the adoption of the statute has been uniform with its construction before its adoption and this construction has been followed by this court.

The statute has also been construed by by our own Supreme Court in the case of

Watson *vs.* Hahn, ' Colo. R. 386.

We complain that the evidence of the maker of the note John Webb, found in the record, folio 141 to 156, on cross examination at folios 149, 150, 151, 155 and 156 shows that at the time the note matured and from that until the trial of this cause in the District Court, he was the owner of a house and lot in Georgetown of the value of five hundred dollars, on which there was an encumbrance of fifty dollars, and that for all of that period he had been in the quiet possession thereof. This equity was subject to sale on execution. Col. Rev. statutes page 370, Sec. 1.

The evidence of Cole shows that it had never been sold. The testimony of plaintiff in the District Court also shows that Webb was the owner of the Congress Lode, which had never been sold.

Defendant in error attempts to evade the effect of this testimony by proving that the lode was of but little value, but this excuse is not sufficient under the law to excuse the sale. The authorities require that *all* of the property of the maker of the note subject to execution shall *be sold.* No matter to what extent it may be encumbered, or however valuless it may appear. See cases cited *supra.*

Again the authorities require that the execution shall remain in the officers hands during its life, ninety days, before he returns it. In the case against Webb the execution was issued May 9th. 1870, and was returned June 1st, 1870.

Again the return shows that certain property was levied on and sold, but fails to return that Webb had not other property subject to execution.

The case was tried by the court, and Judge Wells to avoid a second non-suit of the case, deducted the value of the dwelling house, as he found it, from the gross sum due on the note, and rendered judgment for the balance. The note was for the payment of $1,414.15, dated July 17th, 1868, due in eighteen months, with interest from date until paid at three per cent. per month, the judgment of District Court was rendered June 6th, 1874. The judgment was for $2,478,17. By a calculation of the amount then due on the note it will be seen that there was due thereon, at the date of said judgment $3,386, and thereby taking the value of the property of Webb which had not been sold, as shown by the evidence, and the interest thereon, from the time it should have been sold, and deducting that from the sum due on the note you will have the amount for which judgment was rendered. This may have been a very equitable mode of disposing of the cause, but

we submit does not fill the law. Either Mr. Cole was entitled to the full amount due on the note, or Martin was entitled to judgment. Sometimes compromise verdicts of juries are sustained, but when the court compromises we submit that the judgment should not be sustained.

In the case of Hamlin *vs.* Reynolds, 22 Ill. R. 207, the court says that "if an execution is relied on, as proof of diligence used in the collection of a debt, the process should remain in the hands of the officer, for its whole life; or the fact of the uselessness of its so remaining should be pleaded. No presumption should be indulged that the money could not be made, during the remainder of the days it had to run, after the return was made." Here they do rely upon the execution as proof of diligence. They introduce it and the return in evidence and they did not plead the "uselessnes" of having it remain longer in the hands of the officer. When it was returned it still had sixty-eight days to run.

We complain therefore, that the due diligence required by our statute to change the evidence, was not exercised in said cause.

S. E. Browne & Thos. G. Putnam with H. M. Teller,
Attorneys for Plaintiff in Error.

14-41

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 470. ~~175~~ 20

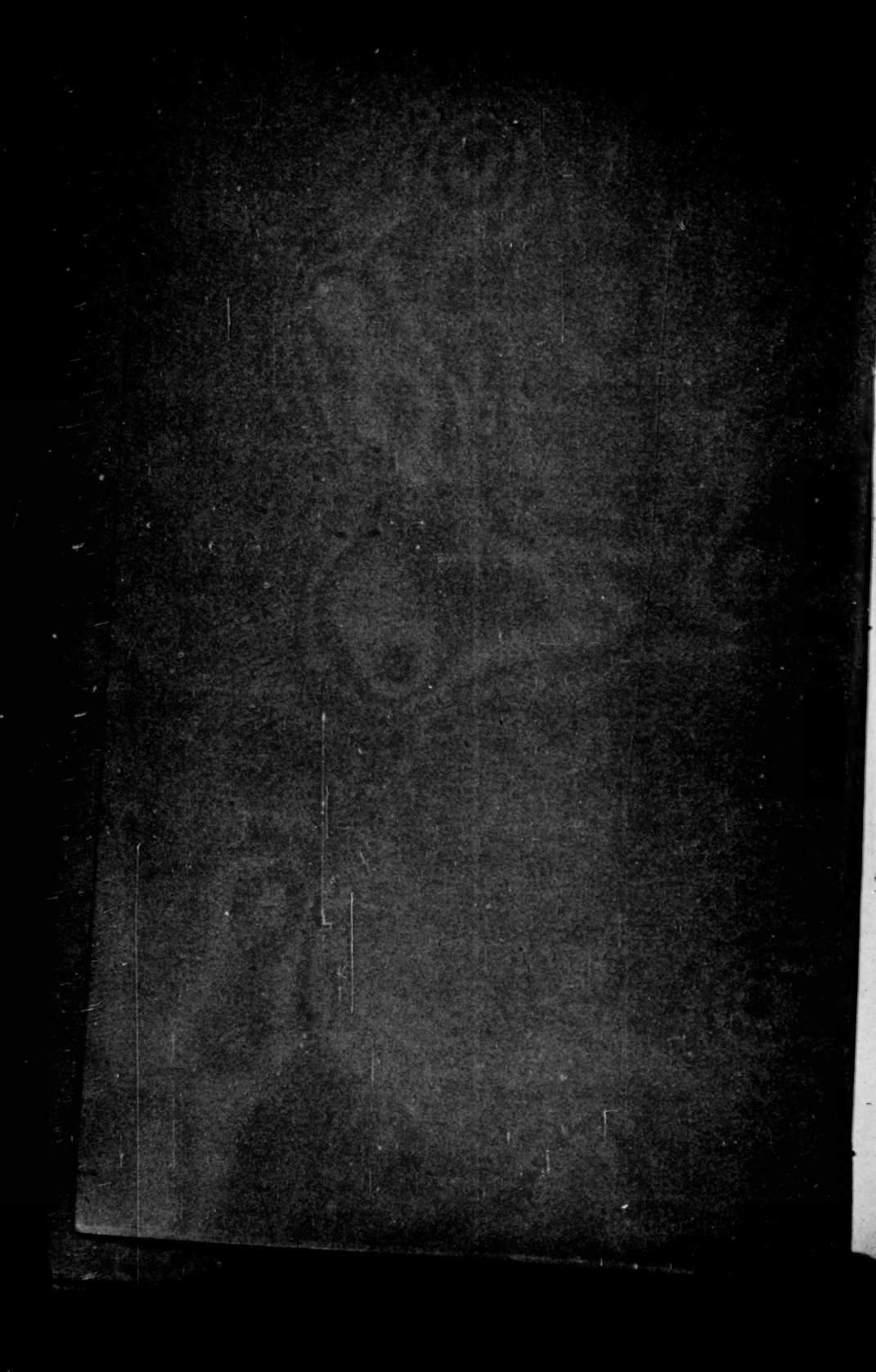
THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GEORGE W. JACKSON, EDWARD J. UNDERWOOD, JOHN HAWXHURST, WILLIAM A. DUNCAN, JOHN UNDERWOOD, AND LEWIS McKENZIE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED SEPTEMBER 10, 1878.



SUPREME COURT OF THE UNITED STATES.

No. 470.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GEORGE W. JACKSON, EDWARD J. UNDERWOOD, JOHN HAWXHURST, WILLIAM. A. DUNCAN, JOHN UNDERWOOD, AND LEWIS McKENZIE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

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1 In the circuit court of the United States for the fourth judicial circuit and eastern district of Virginia, at Richmond, in said district, this first day of May, A. D. 1878.

THE UNITED STATES *vs.* GEORGE W. JACKSON, EDWARD J. UNDERwood, John Hawxhurst, Wm. A. Duncan, John Underwood, and Lewis McKenzie.	No. 677.	Debt on bond.

Be it remembered that heretofore, to wit, on the thirteenth day of June, in the year of our Lord one thousand eight hundred and seventy-one, came the United States, and by its attorney sued out of the clerk's office of the said circuit court of the United States a summons against George W. Jackson, Edward J. Underwood, John Hawxhurst, Wm. A. Duncan, John Underwood, and Lewis McKenzie, which summons, with the return thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, eastern district of Virginia, ss:

The President of the United States of America to the marshal of the eastern district of Virginia, greeting:

2 We command you that you summon George W. Jackson, Edward J. Underwood, John Hawxhurst, Wm. A. Duncan, John Underwood, and Lewis McKenzie, if they shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the eastern district of Virginia, at rules to be holden at the said clerk's office in the custom-house in the city of Richmond, in the district aforesaid, on the first Monday of August next, to answer unto the United States in a plea of debt on bond of Geo. W. Jackson, late collector of internal revenue, 8th Virginia district, for fifty thousand dollars, to its damage, as it alleges, of $50,000.00 dollars. And have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 13th day of June, in the year of our Lord one thousand eight hundred and seventy-one, and of our Independence the 95th year.

[SEAL.] M. F. PLEASANTS, *Clerk.*

Marshal's return.

Executed this 11th day of July, 1871, by delivering to E. J. Underwood, one of the within-named defendants, in person, a true copy of this writ.

DAVID B. PARKER,
U. S. Marshal.

3 Also, by delivering to Lewis McKenzie on the 12th July, 1871, to Wm. A. Duncan on the 15th of July, 1871, to John Hawxhurst on the 21st of July, 1871, and to John Underwood on the 26th July, 1871, four of the within-named defendants, a true copy of this writ. G. W. Jackson, dec'd.

D. B. PARKER, *U. S. Marshal,*
By S. N. GARWOOD, *Dep'y.*

And at another day, to wit, at rules held in the clerk's office of the said circuit court of the United States, on the first Monday of August, 1871, came the plaintiff, by its attorney, and filed its declaration against the defendants, which declaration is in these words:

Declaration.

In the circuit court of the United States for the district of Virginia.
Rules 18.

The United States of America, plaintiffs, complain of George W. Jackson, Edward J. Underwood, John Hawxhurst, John Underwood, William A. Duncan, and Lewis McKenzie, defendants, who have been duly summoned, &c., of a plea that they render to the plaintiffs the sum of fifty thousand dollars, which the defendants owe to and unjustly detain from the plaintiffs, for that heretofore, to wit, on the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and sixty-six, in the district of Virginia, the said de-
4 fendants, namely, the said George W. Jackson, as principal, and the said Edward J. Underwood, John Hawxhurst, John Underwood, William A. Duncan, and Lewis McKenzie, as sureties, by their certain writing obligatory, sealed with their seals and to the court now here shown, the date whereof is the date and year aforesaid, acknowledge themselves to be held and firmly bound unto the said plaintiffs in the just and full sum of fifty thousand dollars, and for the payment thereof they bound themselves, their heirs, executors, and administrators, jointly and severally, firmly by their writing obligatory aforesaid; to which writing obligatory there was and is annexed a certain condition to the effect and purport following, to wit:

"Whereas the President of the United States hath, pursuant to law, appointed the said George W. Jackson collector of taxes under an act entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes':

"Now, therefore, if the said George W. Jackson shall truly and faithfully execute and discharge all the duties of the said office, according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the regulations of the Secretary of the Treasury, all public moneys which may come into his
5 hands or possession, and if each and every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the above obligation to be void and of no effect; otherwise it shall remain and abide in full force and virtue."

And the plaintiffs in fact say that after the making and delivering of the said writing obligatory the defendant engaged in the performance of the duties of the said office, and, being so engaged, did not in all respects comply faithfully with the provisions of law relative to his said office, and did not faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which came into his hands, but was afterwards, and on the twenty-seventh day of July, eighteen hundred and seventy, indebted to the United States, by balance of account, in the sum of forty-six thousand five hundred and ninety-four dollars and ninety-seven cents. Yet the said defendant, not regarding his duty in the premises, did not pay over the said amount or *or* any part thereof. By means of all which premises the plaintiffs have been greatly injured

and damaged, and an action hath accrued to demand and recover of the defendants the said sum of fifty thousand dollars. Yet the
6 said defendant, though often requested, has not paid to the plaintiffs the said sum of money above demanded, or any part thereof, but so to do ha always refused, and still do refuse, to the damage of the plaintiffs $50,000.00, and therefore they bring suit, &c.

HENRY H. WELLS, JR.,
Ass't United States District Attorney for Virginia.

Whereupon the defendants not appearing, on the motion of the plaintiff, by its attorney, it was ordered that judgment be entered for the plaintiff against all the said defendants except the said George W. Jackson, unless they, the said defendants, should appear and plead to issue at the then next rules.

At which day, to wit, at rules held in the office of the said circuit court of the United States on the first Monday of September, A. D. 1871, the said defendants still failing to appear, on the motion of the plaintiff, by its attorney, it was ordered that the last order made against them in this cause be confirmed, and that the damage which the plaintiff had sustained be ascertained by a jury at the next term.

7 And on another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on the 10th day of April, 1873—

On motion of the defendants, and for reasons appearing to the court, it is ordered that this case be continued until the first day of the July term, 1873, to be held in Alexandria.

And on another day, to wit, at a circuit court of the United States for the said district, held at Richmond, in said district, on the 20th day of April, A. D. 1875.

This day came the United States, by the district attorney, and the defendants not appearing, thereupon came the same jury as in the preceding case, who, being duly selected and sworn to enquire of damages in this suit, and, having heard the evidence, upon their oaths returned the following verdict, to wit: "We, of the jury, find for the plaintiff against the defendants the debt in the declaration mentioned, to be discharged by the payment of twenty-six thousand five hundred and one & $\frac{44}{100}$ dollars, with interest thereon from 4th December, 1872."

And on another day, to wit, at a court held as above on the 27th day of April, 1875.

For reasons appearing to the court, it is ordered that the defendants in the above case be allowed to enter a motion for a new trial,
8 which motion is docketed and continued.

And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Alexandria, in said district, on the 7th day of July, A. D. 1875.

This day came again, as well the United States, by the district attorney, as the defendants, by counsel, and the motion of the defendants, heretofore docketed, to set aside the verdict rendered in this case on April 20th last, and for a new trial being fully heard; it is thereupon ordered by the court that the same be, and it is hereby, granted.

And at another day, to wit, at a circuit court of the United States for the said district, held at Richmond on the 8th day of September, 1875.

This day came the defendants, by their attorney, and filed their motion for a bill of particulars.

And at another day, to wit, at a circuit court as aforesaid, held at Alexandria, in the district aforesaid, on the 14th day of September, A. D., 1875.

The motion for a bill of particulars heretofore filed in this case by the defendants was this day argued, as well by counsel for the
9 defendants as by the attorney of the United States, and, having been fully heard, it is thereupon ordered by the court that it be granted.

And at another day, to wit, at a circuit court of the United States for the district aforesaid, held at Alexandria aforesaid on the 8th day of January, 1877.

Ordered, That this cause be set down for peremptory trial on Wednesday, the 10th January, at 10 o'clock a. m.

RO. W. HUGHES,
U. S. Dist. Judge.

And at another day, to wit, at a court held as aforesaid on the 10th day of January, 1877.

This cause is ordered to be continued until the next regular term at Alexandria.

And at another day, to wit, at a circuit court as aforesaid, held at Alexandria aforesaid on the 6th day of July, 1877.

On motion of the plaintiff it is ordered by the court that this case be continued to the October term 1877, at Richmond.

And at another day, to wit, at a circuit court as aforesaid,
10 held at Richmond aforesaid, on the 3d day of April, 1878.

This day came the defendant, Lewis McKenzie, by his attorney, James Neeson, and craved oyer of the supposed writing obligatory in said declaration mentioned, and it was read to him in these words:

[$1 U. S. stamp cancelled.]

"Know all men by these presents that we, George W. Jackson, Edward J. Underwood, John Hawxhurst, John Underwood, William A. Duncan, and Lewis McKenzie, are held and firmly bound unto the United States of America in the full and just sum of fifty thousand dollars, money of the United States; to which payment, well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this twenty-ninth day of May, in the year one thousand eight hundred and sixty-six."

He also craved oyer of the condition of the said supposed writing obligatory, and it was read to him in these words:

"The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed
11 the said George W. Jackson collector of taxes under an act entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes.'

"Now therefore, if the said George W. Jackson shall truly and faith-

fully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States in compliance with the orders and regulations of the Secretary of the Treasury all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the above obligation to be void and of no effect; otherwise it shall abide and remain in full force and virtue."

Which being read and heard, the said Lewis McKenzie says that the said declaration is not sufficient in law, and by leave of the court filed a written demurrer to the plaintiff's declaration, and the plaintiff joined in the said demurrer.

Demurrer above referred to.

12 The said defendant, Lewis McKenzie, by his attorney, James Neeson, this 3d day of April, 1878, having craved oyer of the supposed writing obligatory and of the condition thereof in the said declaration mentioned, and the same having been read to and heard by him, he, the said Lewis McKenzie, says that the said declaration and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the plaintiff to have or maintain his aforesaid action thereof against him, the said Lewis McKenzie, and that the said Lewis McKenzie is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said Lewis McKenzie prays judgment, and that the plaintiff may be barred from having or maintaining the aforesaid action thereof against him, &c.

And the said McKenzie, by his said attorney, states and shows to the court the following causes of demurrer to the said declaration; that is to say:

1. Because the bond and condition in said declaration do not show the appointment of the said George W. Jackson to any office
13 known to the laws of the United States.

2. Because no State or collection district is named or described in the said bond or condition.

3. Because the supposed office of the said George W. Jackson, "collector of taxes," cannot be located in any particular place or district in the United States, according to the terms or import of the said bond and condition.

4. Because the said bond and condition are so vague, unintelligible, and ambiguous, that by law said bond is null and void.

5. Because in said declaration no place or time is stated wherein said Jackson became liable to the United States for supposed official delinquency, or that he became so liable by reason of any described official authority, or for any delinquency in any office known to the laws of the United States.

6. And because the said declaration is, in other respects, uncertain, informal, and insufficient, &c.

JAMES NEESON,
Attorney for def't McKenzie.

Filed in open court, April 3d, 1878.

14 And now at this day, to wit, at a circuit court of the United

States for the eastern district of Virginia, held at Richmond, in said district, this first day of May, A. D. 1878.

This day came the plaintiffs by their attorney, and the defendant Lewis McKenzie by his attorney, and thereupon the said defendant's demurrer to the plaintiffs' declaration being argued, it seems to the court that the said declaration is not sufficient in law for the plaintiffs to have and maintain their action against the said defendant.

Wherefore it is considered by the court that the plaintiffs take nothing by their summons and action, and that the said defendant, Lewis McKenzie, go thereof without day.

Opinion of the court.

The following is the "note of the judge on the demurrer to the declaration of the defendant, Lewis McKenzie":

This suit is brought by the United States against George W. Jackson and his sureties upon a penal bond given May 29th, 1866, for fifty thousand dollars. The condition set out in the bond is in the following words, viz:

15 Whereas the President of the United States hath, pursuant to law, appointed the said George W. Jackson collector of taxes under an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes:" Now, therefore, if the said George W. Jackson shall truly and faithfully execute and discharge all the duties of said office, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, &c., &c., then the obligation to be void, &c., &c. The declaration simply corresponds in its terms with the language of the bond.

It will be observed that the words "for the 8th collection district of Virginia," which should have followed after the words "collector of taxes," are omitted. So also are omitted the following words or their equivalent, which should have been inserted after those describing the act of Congress under which the bond was taken: "And in due form of law caused to be issued to him, as such, a commission bearing date the day of May, A. D. 1866."

Indeed, all words are omitted which should have been employed to identify the sort of taxes which Jackson was to collect, the dis-

16 trict in which he was to collect them, and exercise the office of collector of taxes, and the commission under which he was to act, its date, and either its general purport or precise terms. The date of the act of Congress referred to in the bond is not given. There is nothing to show whether Jackson was to collect taxes in a district yielding millions of dollars of revenue per annum, or in a district yielding next to no revenue at all.

There is nothing to show that he was to be collector of taxes for any particular district; but, on the contrary, on the principle, expressio unius est exclusio alterius, the bond, in mentioning Jackson generally as a collector of taxes, would seem to exclude the inference that he was to be a collector for a particular district, so as to render inadmissible any evidence showing default as collector in any particular district.

A reference in the bond to the commission might have identified the district for which he was collector, but even that is wanting.

There can be no office created by the President of the United States except by authority of some express act of Congress. There can be no

general collection of taxes under the authority, and no general collector of taxes under the appointment of the President of the United
17 States, because there is no law authorizing such a service or such an officer. All authority to act, and every office exercised, under the Government of the United States must have the sanction of express law.

Even if this were not strictly so, it is difficult to conceive of an office except as limited by some territorial jurisdiction. We cannot imagine a sheriff, except as sheriff of some particular county or town; or a marshal, except as marshal of some particular district. The designation of the district is an essential part of the style of such an office as this.

As neither Jackson himself nor his securities can be bound to the United States except by the authority of some express act of Congress, let us see whether any act applicable to this bond exists. There may be many other acts, but there is at least one act of Congress whose title corresponds with that set out in this bond; which is the act bearing that title approved July 1st, 1862. If we assume that the act intended to be referred to in the bond was that of the 1st July, 1862, and turn to the act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt," &c., &c., approved July 1st, 1862, we shall find that that act nowhere authorizes the appointment of collectors of taxes generally, but only authorizes (in sec-
18 tion 2) their appointment "for each collection district." The words collector of taxes generally, used in the bond, describe an officer not known to the law; and the bond is void, both for uncertainty of description, rendering it impracticable to prove a default by admissible evidence, and as describing an officer not known to the law of the United States, and therefore not capable of making default to the United States.

The demurrer of the defendant Lewis McKenzie is therefore sustained.

Assignment of errors.

It is insisted by the plaintiffs that the court erred in sustaining the demurrer of the defendant McKenzie, and in dismissing the declaration, for the following reasons, namely:

1. Because sufficient appeared upon the face of the proceedings to entitle the plaintiffs to a judgment upon the demurrer. It is alleged in the declaration that the defendant Jackson had been appointed by the President, pursuant to law, to the office of "collector of taxes," under the act of Congress referred to, and that he became liable to the
19 plaintiffs for public moneys collected and not accounted for by him. It is not necessary, in order to entitle the plaintiffs to a judgment upon the demurrer, that the particular district for which he had been appointed should be specified in the bond.

Upon the trial, it would be competent for the plaintiffs to show by parol testimony for what district he had been appointed, in order to apply the bond to its proper subject. (2 Parsons on Contracts, marg. p. 563; Greenleaf on Evidence, sections 288, 290; Starkie on Evidence, Part. IV, p. 1021; Noonan v. Lee, 2 Black, 504.)

2. If the court was of opinion that the demurrer should be sustained, because of any technical defect in the statement of the cause of action in the declaration, the demurrer should have been sustained with leave to the plaintiffs to amend the declaration.

I, M. F. Pleasants, clerk of the circuit court of the United States for

the eastern district of Virginia, do hereby certify that the foregoing is a true and complete copy of the record and proceedings in the above entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Richmond, in said district, this 4th day of June, A. D. 1878.

[SEAL.] M. F. PLEASANTS, *Clerk.*

20 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Virginia, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between the United States of America and George W. Jackson, Edward J. Underwood, John Hawxhurst, Wm. A. Duncan, John Underwood, and Lewis McKenzie, a manifest error hath happened to the great damage of the said plaintiffs, as by complaint appears. We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you may have the same at Washington City, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 4th day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

(Indorsed:) No. 677. United States circuit court, district of Virginia. United States vs. George W. Jackson. Writ of error. To U. S. circuit court, E. dist. of Va. Filed June 4, 1878. M. F. Pleasants, clerk.

21 UNITED STATES OF AMERICA, *to wit:*

To George W. Jackson, Edward J. Underwood, John Hawxhurst, Wm. A. Duncan, John Underwood, and Lewis McKenzie, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the court-room in the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein the United States of America is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] RO. W. HUGHES, *Judge.*

(Indorsed:) No. 677. United States circuit court, eastern district of Virginia. The United States vs. Geo. W. Jackson et als. Citation. Filed June 6th, 1878. M. F. Pleasants, clerk.

22 UNITED STATES OF AMERICA, *to wit:*

To George W. Jackson, Edward J. Underwood, John Hawxhurst, Wm. A. Duncan, John Underwood, and Lewis McKenzie, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be holden at the court-room in the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein the United States of America is plaintiff and George W. Jackson, E. J. Underwood, John Hawxhurst, Wm. A. Duncan, John Underwood, and Lewis McKenzie are defendants in error, to show cause, if any there be why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to parties in that behalf.

Witness the honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

RO. W. HUGHES, *Judge.*

A true copy. Teste:
[SEAL.] M. F. PLEASANTS, *Clerk.*

23 UNITED STATES OF AMERICA,
Eastern District of Virginia, to wit:

Executed the within as to Lewis McKenzie & John Hawxhurst by leaving a true copy thereof with each of the above-named persons July 20th, 1878. As to John Underwood & W. A. Duncan, by each accepting service as per copies enclosed.

C. P. RAMSDELL, *U. S. M.,*
By J. C. O'NEAL, *Dep't.*

(Indorsed:) No. 677. United States circuit court, east. district of Virginia. United States vs. George W. Jackson et als. Citation. Filed June 6, 1878. M. F. Pleasants, clerk.

24 UNITED STATES OF AMERICA, *to wit:*

To George W. Jackson, Edward J. Underwood, John Hawxhurst, Wm. A. Duncan, John Underwood, and Lewis McKenzie, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the court-room in the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Virginia, wherein the United States of America is plaintiff and George W. Jackson and others are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

RO. W. HUGHES, *Judge.*

A true copy. Teste:
[SEAL.] M. F. PLEASANTS, *Clerk.*

August the 10th, 1878. Occoquan, Prince Wm. Co., Va. Summons received & services acknowledge.

JOHN UNDERWOOD.

UNITED STATES OF AMERICA, *to wit:*

To George W. Jackson, Edward J. Underwood, John Hawxhurst, Wm. A. Duncan, John Underwood, and Levi McKenzie, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be holden at the court-room in the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Virginia, wherein the United States of America is plaintiff and George W. Jackson and others are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

RO. W. HUGHES, *Judge.*

A true copy. Teste:

[SEAL.] M. F. PLEASANTS, *Clerk.*

FALLS CHURCH, *August 29th*, 1878.

I hereby accept service on the within citation under protest, as I was not a party to the suit in the circuit court which is appealed, never having been notified by writ or paper of any kind, or orally, that any such suit was brought; therefore I had no opportunity to defend my rights or interest in the matter.

W. A. DUNCAN.

(Indorsed:) No. 67. United States court, district of Virginia. United States vs. Geo. W. Jackson et als. Citation. Filed 186 . , clerk.

(Indorsement on cover: No. 470. The United States, plaintiffs in error, vs. George W. Jackson, Edward J. Underwood, John Hawxhurst, Wm. A. Duncan, John Underwood and Lewis McKenzie. E. Virginia. C. C. U. S. Filed 10th September, 1878.

OFFICE SUPREME COURT U. S.
FILED
JAN 8 1881
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

THE UNITED STATES, PLAINTIFFS IN ERROR,
vs.
JACKSON AND ALS. } No. 195.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

THE UNITED STATES, PLAINTIFFS IN ERROR,
vs.
JACKSON AND ALS. } No. 195.

BRIEF FOR THE UNITED STATES.

This was an action brought June 13, 1874, upon the bond of a collector of internal revenue, executed May 29, 1866.

Upon demurrer the learned court below held the bond to be *void*.

The declaration, filed August 1, 1871, is for $50,000, the bond being subject to the following conditions:

Whereas the President of the United States hath, pursuant to law, appointed the said George W. Jackson collector of taxes under an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes":

Now, therefore, if the said George W. Jackson shall truly and faithfully execute and discharge all the duties of the said office, according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the regulations

of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the above obligation to be void and of no effect; otherwise it shall remain and abide in full force and virtue.

After thus setting forth the bond, the declaration proceeds:

And the plaintiffs in fact say that after the making and delivering of the said writing obligatory the defendant engaged in the performance of the duties of the said office, and, being so engaged, did not in all respects comply faithfully with the provisions of law relative to his said office, and did not faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which came into his hands, but was afterwards, and on the twenty-seventh day of July, eighteen hundred and seventy, indebted to the United States, by balance of account, in the sum of forty-six thousand five hundred and ninety-four dollars and ninety-seven cents. Yet the said defendant, not regarding, &c.

At the same term judgment by default *nisi*, for want of appearance, was taken against the sureties (the principal being dead before the writ was executed). This judgment was confirmed, and an inquisition by jury ordered, at September term, 1871. At April term, 1873, on motion by the defendants, the cause was continued to July term thereafter. At April term, 1875, a jury was empanelled, and damages were assessed at $26,501.44, with interest. At July term, 1875, this verdict was set aside. At September term, 1875, a bill of particulars was ordered, on motion of the defendants. At April term, 1878, McKenzie, one of the defendants, having craved oyer of the bond, &c., demurred thereto, because—

1. The bond does not show that Jackson, the princi-

pal, had been appointed to any office known to the laws of the United States.

2. No State or collection district is named or described in the bond.

3. The supposed office of Jackson, "collector of taxes," cannot be located in any particular place or district in the United States, according to the terms or import of the bond.

4. The bond is void for vagueness, &c.

5. No place or time is stated in the declaration as that wherein Jackson became liable for delinquency; and declaration does not show that he became so liable because of any described official authority, or for delinquency in any office known to the law.

6. The declaration is in other respects uncertain, &c.

After argument and consideration, the court sustained the demurrer, on the ground that the bond was "*void* both for uncertainty of description, rendering it impracticable to prove a default by admissible evidence; and as describing an officer not known to the laws of the United States, and therefore not capable of making default to the United States." (Record, p. 7.)

For error is assigned—

1. The ruling of the learned court that the bond sued upon is void; and,

2. The judgment that the plaintiffs take nothing, &c.

The statute referred to in the declaration by its title only, is seen to be that of 1864, ch. 173 (13 Stat., 223), which at that time was the only act in force having such

title, viz, "An act to provide internal revenue to support the government, to pay interest on the public debt, *and for other purposes.*" The title of the act of [July 1] 1862 c. 119 (12 Stat., 432), cited in the opinion of the learned court below as that probably intended, differs from the above by leaving out the words italicized, and by inserting the word "and" after the word "*government.*"

By the above act of 1864, section 7 (13 Stat., 224), the second section of the above act of 1862 was to "*remain and continue in full force;*" and besides, by section 173 (p. 303), which repealed the act of 1862 in general, *all provisions therein creating the offices of collector, &c., were retained.*

Section 2 of the act of 1862 (12 Stat., 433) is as follows:

That, for the purpose of assessing, levying, and collecting the duties or taxes hereinafter prescribed by this act, the President of the United States be, and he is hereby, authorized to divide, respectively, the States and Territories of the United States and the District of Columbia into convenient collection districts, and to nominate and, by and with the advice and consent of the Senate, to appoint an assessor and a collector for each such district, who shall be residents within the same: *Provided,* That any of said States and Territories and the District of Columbia may, if the President shall deem it proper, be erected into and included in one district: *Provided,* That the number of districts in any State shall not exceed the number of Representatives to which such State shall be entitled in the present Congress, except in such States as are entitled to an increased representation in the Thirty-eighth Congress, in which States the number of districts shall not exceed the number of Representatives to which any such State may be so entitled: *And provided, further,* That in the State of California the President may establish a number of districts not exceeding the number of Senators and Representatives to which said State is entitled in the present Congress.

The original provisions in respect to collector's *bonds* were inserted in section 4 of the act of 1862 (12 Stats.,

433), but these were superseded by the slightly differing provisions of section 9 of the act of 1864 (13 Stats., 225), which are as follows:

> That before any collector shall enter upon the duties of his office, he shall execute a bond for such amount as shall be prescribed by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, with not less than five sureties, to be approved by the Solicitor of the Treasury, conditioned that said collector shall faithfully perform the duties of his office, according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the order or regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession; which bond shall be filed in the office of the First Comptroller of the Treasury. And such collector shall, from time to time, renew, strengthen, and increase his official bond, as the Secretary of the Treasury may direct, with such further conditions as the said Commissioner shall prescribe.

1. The bond in question is valid, as either a *statutory* or a *common law* bond.

The declaration did not need to make any statements as to Jackson's appointment as collector, other than that quoted from the bond sued upon, in which the defendants allege as a reason for their executing it, that he had been appointed by the President, under an act entitled, &c.; *i. e.*, as appears above, the act of 1864, ch. 173. For, if appointed under that act it must have been "for some convenient collection district," and not *in the air*, as the defendants now *suggest*. As the record stands, the defendants are seen to have been privy to the very appointment which, by presumption, it will be taken that the President made *to some certain collection district*. If the appointment had been made otherwise than as by law allowed, or otherwise than as the sure-

ties had been led to believe, it would have been for them to allege it, and try how far they might have avoided the *estoppel* in this respect, created by their bond. As it is, *they reaffirm by demurrer what already they had asserted in their bond; but CONCLUDE with what seems a clear contradiction, viz, that whereas, in consideration of Jackson's having been duly appointed to office, they had given bond that he would discharge its duties, and pay over any public money he might collect; and whereas, also, he did not discharge, &c., and did not pay over, &c., therefore they are NOT responsible.*

It is submitted that the bond is valid as a statutory bond; the only clause in which it may vary from the conditions expressly required by the act of 1864, viz, that as to *deputy collectors*, being plainly *superfluous*, as implied in the previous conditions; and, even if not superfluous, still not destructive of such clauses as do pursue the statute. (10 Peters, 343.)

The bond appearing to be plainly good under the statute, it is needless to elaborate the proposition, that a bond given to the United States voluntarily, in consideration of an appointment to office, and to secure a performance of official duties incidental to such appointment, is obligatory, whether or not it pursue forms required by statute; or even if no bond be required by statute.

2. In regard to the assignment of breaches, the declaration is at least as particular as those which have been sanctioned in Virginia, in the similar cases of actions upon sheriffs' bonds. (3 Rob. Pract., 597; Craghill *v.* Page, 2 Hen. & Mun., 446.) I say *at least*, for here the

declaration goes farther, and gives the defendants notice that upon the *accounting* to which by law the collector was liable, a balance of $46,574.97 had been found against him, which he had not paid.

3. In other respects the declaration seems substantially to pursue the old rules which forbid the stuffing of pleadings with matters of mere *detail*, or of *evidence*. These rules have not long since been applied in a case quite analogous to the one in question, viz, Brown *v.* Champlin (66 N. Y., 214).

In that case a short count "alleged that the defendants covenanted with Breed & Young, under their hands and seals, to pay said Breed & Young $4,000, with interest, on or before August 16, thereafter; and that said covenantees, for a valuable consideration, sold and assigned the covenant to plaintiff." The defendants insisted that inasmuch as the proof showed that the pleading omitted material parts of the transaction which resulted in the contract, there was a variance, &c.

To this Church, Ch. J., in delivering judgment, said:

It is found that the defendants and Breed & Young were stockholders in a North Carolina gold mining company, and agreed with the plaintiff for a loan to the company of $4,000, to be secured by a mortgage of the company upon its real estate in North Carolina, and the bond of the defendants. The omission to state the relation of the parties to the company, and the application for the loan, or that Breed & Young were nominal obligees only, or all the terms of the assignment, or that the loan was made to the company, did not make a failure of proof of the cause of action set up in the complaint, nor a substantial variance, and certainly not one which could have misled the defendants. It is unnecessary to set forth the evidence or the circumstances attending the transaction. It is sufficient to charge the legal effect of a transaction, contract, or instrument in writing.

So in the present case, inasmuch as the bond upon its face appeared to be incidental to an appointment to a particular office, no *averment of circumstances* was wanting, other than, that upon an accounting incidental thereto a certain balance was due, and had not been paid.

S. F. PHILLIPS,
Solicitor-General.

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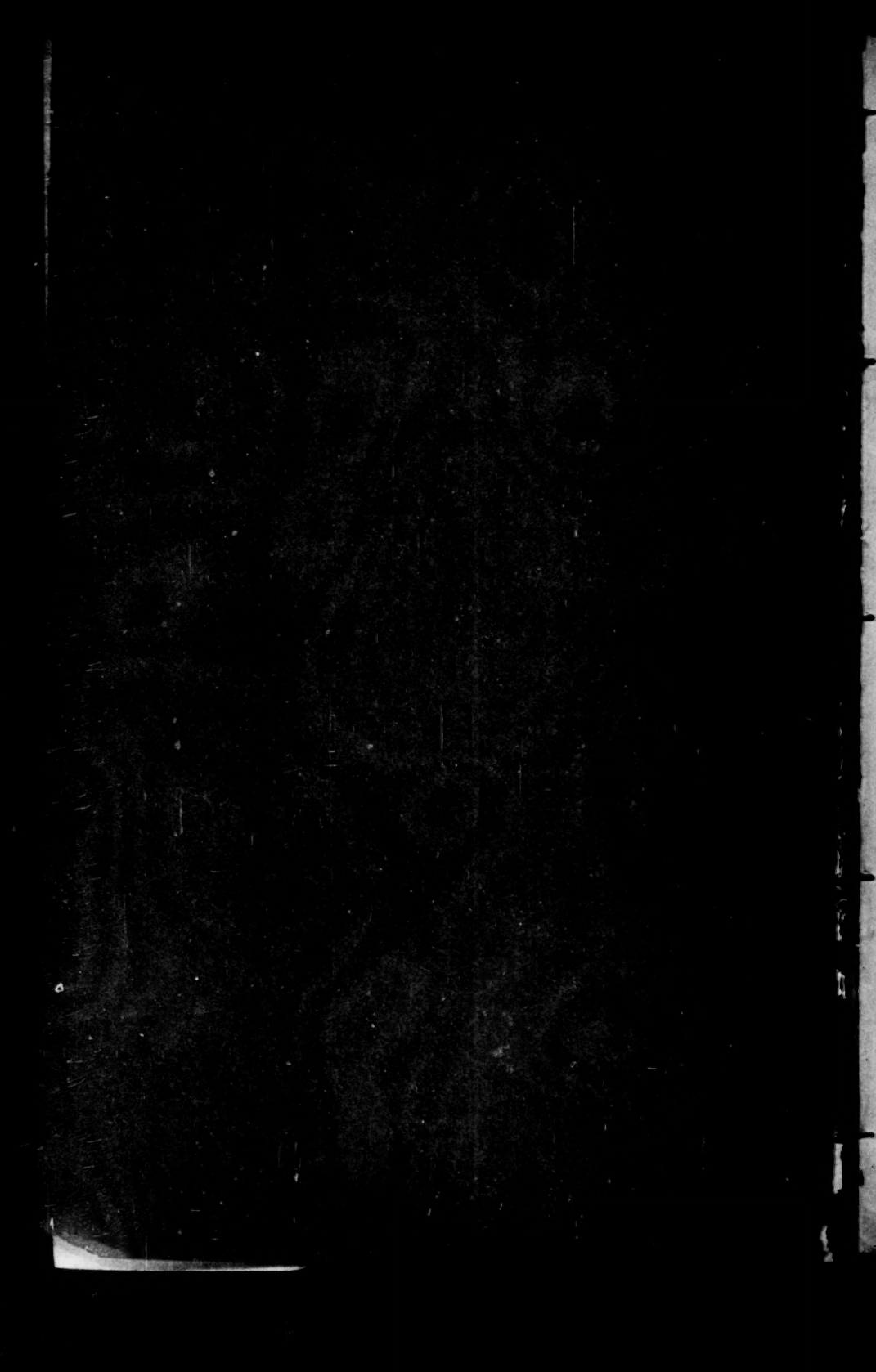

OFFICE SUPREME COURT U. S.
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1880.

THE UNITED STATES, *Plaintiff in Error*,

vs.

GEORGE W. JACKSON, PRINCIPAL, AND LEWIS McKENZIE, SURETY, AND OTHERS,

Defendants in Error.

No. 193.

BRIEF FOR DEFENDANT, McKENZIE.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1880.

THE UNITED STATES, *Plaintiff in Error*,

vs.

GEORGE W. JACKSON, PRINCIPAL, AND LEWIS McKENZIE, SURETY, AND OTHERS, *Defendants in Error.* } No. 195.

BRIEF FOR DEFENDANT, McKENZIE.

STATEMENT.

SUIT was brought in the Circuit Court of the United States for the Eastern District of Virginia against George W. Jackson, principal, and his sureties, Lewis McKenzie and others, upon a penal bond for fifty thousand dollars, dated May 29, 1866, with the following condition :

" The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed the said George W. Jackson Collector of Taxes under an act entitled " An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," now, therefore, if the said George W. Jackson shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and if each and every Deputy Collector, ap-

It has been frequently said by this Court that the parties to official bonds are estopped by the recitals contained therein. (*Bruce vs. The United States, 17 Howard, 442.*) Apply that principle here. The bond recites that Jackson had been appointed "Collector of Taxes" under an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes;" but it neither gives the date of the act nor the date of the commission. It is a general recital, of a general appointment, without date, to a general office, without limitation of territory, place, or period for beginning or termination, to an office that had indeed no existence in fact, and was neither authorized or provided for by any law of the United States.

Though it hardly needed the authority of an adjudged case, *United States vs. Maurice* does decide that a bond to perform the duties of an office is void if there be by law no such office in existence. (*2 Brock., C. C. 96.*)

An official bond which does not correctly describe the office is void. (*Jackson vs. Simonton, 4 Cranch, C. C. 259.*

This bond is also void, because of its indefiniteness, ambiguity, and uncertainty. It does not specify the date of the Internal Revenue Law under which Jackson's appointment was made, though the appointment of Collectors was authorized under various laws, from 1791 to June 30, 1864. It does not give the date of his appointment or commission, nor any other information in relation thereto. It does not specify what kind of taxes he was to collect, nor in what State or Territory his functions as Tax Collector were to be exercised, nor the number or other designation of any Collection District to which he had been appointed, although every Collection District had by law a legal name, number, and designation. The bond is indeed is so indefinite and ambiguous that it will apply to any Collection District in any State or Territory of the United States as well as to the Eighth District of Virginia, and therefore it applies to none of them.

Suppose the issue was on trial before a jury whether Jackson had received money on account of taxes in the First Collection District of Virginia which he had failed to account for, and it was objected that the bond was not given for the security of money or taxes collected in that District, and the Court should so decide, whereupon

the plaintiff should then offer to prove the receipt of taxes and the like defalcation in the *Eighth* Collection District of Virginia, and the like objection being made to that proof, would not the decision thereon necessarily be the same—that the bond, by its terms, was not given to secure taxes collected in the Eighth, or any other particular Collection District, and that it had no more reference to taxes collected in Virginia than to taxes collected in any other State or Territory of the United States?

Every valid official bond must, in order to bind sureties, be definite, precise, and explicit, to the extent at least of correctly describing the person to be bound and the office and duties for the faithful performance of which the surety agrees to become responsible.

In *Harrison vs. Tiernan, 4 Rand. 177*, a bond was held void that specified no penal sum. To the same point is *Austin vs. Richardson, 6 Grat., 310.* Omitting the name of the obligee was held to render the bond void. *Preston vs., Hall, (23 Grat., 600.)* In *Commonwealth vs. Jackson et al., (1 Leigh, 485)* it was held that a bond taken for taxes was void as to the sureties, because it was taken before a Court having no authority to take the same.

But it was said below, and it may be argued here, that it would be competent on the trial for the plaintiff to show by parol testimony for what Collection District Jackson was appointed a Collector. That, however, would not be enough, but it must first be shown—and in this respect the bond be contradicted—that he was not appointed a General Collector without restriction to any District, and then that he was appointed Collector of Taxes for the Eighth District of Virginia. In short, that a new contract can be made for the surety by parol without his consent, and that the new fact, not found in the writing, is to have the same force and effect, notwithstanding his protest, as though it had been incorporated in the bond, and subscribed to by him.

While it is familiar doctrine that latent ambiguity may in many cases be explained by parol, it was never supposed that under color of explanation a new contract could be made for the parties. But let us see what the true rule and its limitations are.

Starkie says: "In general, where the law requires a formal written instrument, if the document offered in evidence be defective, so that it cannot operate without collateral aid, the defect cannot be

supplied by oral testimony. * * * An ambiguity apparent on reading an instrument is termed *ambiguitas patens;* that which arises merely upon its application, *ambiguitas latens.* * * * By apparent ambiguity must be understood an ambiguity inherent in the words, and incapable of being dispelled either by any legal rules of construction applicable to the instrument itself, or by evidence showing that the terms, in themselves unmeaning or unintelligible, are capable of receiving a known, conventional meaning. The general principle on which the rule is founded is, that the intention of the parties should be construed, not by vague evidence of their intention, independent of the expressions which they have thought fit to use, but by the expressions themselves. * * * According to these principles, parol evidence is never admissible to explain an ambiguity which is not raised by *extrinsic facts.* Thus, upon a devise to one of the sons of J. S., who had several, evidence is not admissible to show that one in particular was meant, and the devise is void for uncertainty." *2 Starkie on Evidence, 753, 757.*

Greenleaf states the matter thus : " If the Court, placing itself in the situation in which the testator or contracting party stood at the time of executing the instrument, and with a full understanding of the force and import of the words, cannot ascertain his meaning and intention *from the language of the instrument thus illustrated,* it is a case of incurable and hopeless uncertainty, and the instrument therefore is so far inoperative and void." *1 Greenleaf Ev. sec. 300.*

In Parsons on Contracts it is said : " No contract will be enforced as a contract if it have no plain and natural or legal meaning by itself, and if admissible extrinsic evidence can only show that the intention of the parties was one which *their words do not express.*" *2 Parsons Contracts (2d edition) 566.*

In *Wright vs Pond, (10 Conn. 255,)* the deed in question granted property to B, B, and M, trustees, " to have and to hold the same, unto *them* or *either* of them." The deed was held void. The Court said : " Those who expound contracts and deeds must permit the language employed to control. If the language is so used as to import nothing ; if the words by the rules of law are senseless ; if there is an entire uncertainty of the meaning of an instrument, or an absolute repugnancy ; the Court is not at liberty to make a deed or con-

tract such as in their judgment ought to have been made; but all the Court can do is to declare it void."

In *Carter vs. Holman et al.*, (*60 Mo. 498*) H. made a bond to C. to execute a mortgage "on a farm owned by me in Townships 65 & 66 of Worth County, State of Missouri." The ambiguity was held to be *patent*, and the deed therefore void. The Court said: "The land is described as in two Townships, either of which would contain thirty-six times six hundred and forty acres, or upwards of twenty thousand acres. It *is impossible on the face of the deed to locate the land.*"

In the cases referred to above, the questions arose between principals and not sureties; but the rule is even more rigidly enforced, and for the best reason, where the rights of sureties are concerned.

In *McMicken vs. Webb*, (*6 Howard*, 298) this Court said: "How far any written contract may be explained, as between parties confessedly principals, by evidence *aliunde*, is a nice and difficult question, always approached with doubt and caution; but as against a surety, neither a Court of Law nor a Court of Equity will lend its aid to affect him beyond the plain and necessary import of his undertaking. Equity will not, as against him, assist in completing an imperfect or defective instrument, much less will it add a new term or condition to what he has stipulated. He must be permitted to remain in precisely the situation in which he has placed himself. * * * He is said to possess an interest in the *letter* of his contract. That this is the doctrine in England, we see in the cases of Nisbet vs. Smith, 2 Bro. Chancery Reports, 579; Rees vs. Berrington, 2 Ves. Jr. 540; and Boultbee vs. Stubbs, 18 Ves. 20. It is the doctrine of this Court, so declared in the case of Miller vs. Stewart et al, 9 Wheaton, 680. It is probably the doctrine of all the States."

In *United States vs. Knight*, (14 *Peters*, 301) and *United States vs. Boecker*, (21 *Wall*, 652) the same doctrine was held.

In Knight's case, the bond, though actually intended to conform to the statute, did not do so, and the plaintiff contended that the liability of the surety should be held to be co-extensive with the requirements of the law; but this Court said: "The suit being on the bond, the parties are bound for nothing whatsoever, but what is contained in the condition of the bond, *whether it be or be not conformable to the law.*"

It is therefore respectfully submitted that the appointment of Jackson as "Collector of Taxes," in the vague and indeterminate language recited in the condition of the bond, conferred no *official authority*, and described no office known to the laws of the United States.

That a bond to the United States, conditioned for the performance of official duties, is not binding upon the sureties thereto, unless it describes in unambiguous language, or indicates on its face, by plain and reasonable construction of its own terms, the particular office to be exercised.

That the bond in this action, not indicating or describing the office to be exercised by Jackson, is invalid, by reason of its ambiguity, and imposed no obligation or liability upon the surety, McKenzie; and that there was no error in the judgment of the Court below in this behalf.

SHELLABARGER & WILSON,

Counsel for the Defendant, McKenzie.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~295.~~ 52

EMILY A. KING, VERE B. KING, AND EMILY A. KING, GUARDIAN OF VERE B. KING, APPELLANTS,

vs.

RANDOLPH WORTHINGTON, JOHN T. AVERY, ABBY M. HOYT, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 295.

EMILY A. KING, VERE B. KING, AND EMILY A. KING, GUARDIAN OF VERE B. KING, APPELLANTS,

vs.

RANDOLPH WORTHINGTON, JOHN T. AVERY, ABBY M. HOYT, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and second.

WILLIAM H. BRADLEY, *Clerk.*

RALPH WORTHINGTON, JOHN T. AVERY, ABBY M. Hoyt, Mary B. Worthington, Clara C. Worthington, George Worthington, and Alice M. Worthington,
v.
EMILY A. KING, VERE BATES KING, AND EMily A. King, guardian of Vere Bates King. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 20th day of December, A. D. 1875, came the said complainants, by Messrs. Miller and Frost, their solicitors, and filed in the office of the clerk of the circuit court of the United
2 States for said northern district of Illinois, a transcript of the record of the proceedings had in the superior court of the county of Cook, and State of Illinois, together with the original certificate of evidence filed in said superior court on the 15th day of July, A. D. 1874, in said entitled cause, which said transcript of record and certificate of evidence are in the words and figures following, to wit:

TRANSCRIPT OF RECORD OF PROCEEDINGS AND CERTIFICATE OF EVIDENCE.

3 UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas before the honorable Samuel M. Moore, one of the judges of the superior court of Cook County, in the State of Illinois, holding a branch court of said court at a regular term of said superior court of Cook County, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the sixth day of December, in the year of our Lord one thousand eight hundred and
4 seventy-five, and of the Independence of the United States of America the one hundredth.

Present, the honorable Samuel M. Moore, judge of the superior court of Cook County, Charles H. Reed, prosecuting attorney, Francis Agnew, sheriff of Cook County.

Attest:

JOHN J. HEALY, *Clerk.*

Be it remembered that heretofore, to wit, on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy two, the same being one of the days of the July term of the superior court of Cook County, the following, among other proceedings, were had in said court and entered of record, to wit:

Bill.

GEORGE WORTHINGTON ET AL
vs.
EMILY A. KING ET AL.
} 479 a. 31146.

This day come the complainants hereto, by Miller, Van Arman and Lewis, their solicitors, on whose motion based on affidavit filed, leave is given them by the court to file a substantial copy of the original bill of complaint filed in this cause in lieu of the one destroyed by fire, and on like motion, leave is given the said complainants by the court to amend their said bill, by changing the name of the defendant, Vene Bates King, to Vere Bates King; and on like motion, it is ordered by the court that a rule be, and the same is hereby, entered herein of record, requiring Emily A. King, one of the said defendants, to plead, answer, or demur to the said bill the first day of the September term, 1872, and on like motion, it is further ordered by the court that an alias writ of summons issue herein to the balance of said defendants.

And on the day and year aforesaid, to wit, July 15th, 1872, George W. Worthington and John T. Avery, by Miller, Frost and Lewis, their solicitors, filed in the office of the clerk of said court their bill of complaint and affidavits, which are in the words and figures as follows, to wit:

To the honorable judges of the superior court of Cook County:

Humbly complaining, showeth unto your honors your orators, George W. Worthington and John T. Avery, of Cleveland, in the State of Ohio, that heretofore, to wit, on or about the thirtieth day of May, A. D. 1853, your orator, John T. Avery, purchased of one Ambrose L. Soulé, who was the then owner thereof in fee simple, the following described premises situate in the county of Cook and State of Illinois, to wit, the west half of the southwest quarter of section twenty (20), township thirty-eight (38) north of range thirteen (13) east of the third (3rd) principal meridian, and paid him therefor the sum of eight hundred (800) dollars, and the said Ambrose L. Soulé and Sophia M., his wife, thereupon, in pursuance of said purchase, by deed duly executed and acknowledged and bearing date on the day and year last aforesaid, conveyed said land to your orator, the said John T. Avery, which deed was duly filed for record in the recorder's office of Cook County on the 12th day of October, A. D. 1853, and recorded in book 64 of deeds at page 425.

Your orators would further show unto your honors that your orator, said John T. Avery, by deed bearing date November 23d, A. D. 1857, conveyed the south half of said land to Lucien H. Muzzy, which deed was filed for record in the recorder's office of Cook County on the fifth day of December, A. D. 1857, and recorded in book 133 of deeds at page 52, and that the said Muzzy afterwards, and on or about the second day of December, A. D. 1857, sold the said south half of said land to your orator, George W. Worthington, for the sum of seven hundred dollars, and the said Muzzy, by deed bearing date on the day and year last aforesaid, conveyed said south half of said land to your orator, the said George W. Worthington, which said last mentioned deed was filed for record in the recorder's office of Cook County on the fifth day of December, A. D. 1857, and recorded in book 133 of deeds at page 51, and your orators thereby became and were the purchasers in

good faith and the owners and holders of the legal title to
8 said land in fee simple, your orator, the said John T. Avery, of the legal title to the north half thereof, and your orator, the said George W. Worthington, of the south half thereof.

Your orators would further show unto your honors that heretofore, to wit, on and prior to the first day of June, A. D. 1843, one Herman Scott, of Marion, Ohio, was the owner of said west half of said southwest quarter of said section twenty (20) and seized thereof in fee simple, and being such owner, sold said land to one Isaac Bishop, of Tully, New York, for the sum of two hundred dollars, and the said Scott, by deed duly executed and acknowledged and bearing date on the day and year last aforesaid, in pursuance of said sale, conveyed said land to said Bishop, and the said Bishop afterwards, and on or about the 13th day of October, A. D. 1845, sold said land to one Porter L. Hinckley for the sum of two hundred and forty dollars ($240), and in pursuance of said sale, by deed bearing date on the day and year last aforesaid and duly executed and acknowledged, conveyed said land to said Hinckley.

9 Your orators would further show unto your honors, that afterwards and during the year A. D. 1845, the said Hinckley sold, and by deed duly executed and acknowledged, conveyed said land to John R. Bartholemew, and that said Bartholemew, on or about the twenty-second day of January, A. D. 1851, sold said land to Corydon Weeks, and by deed bearing date on the day and year last aforesaid, duly executed and acknowledged, conveyed said land to Corydon Weeks, which said last mentioned deed was filed for record on the 24th day of May, A. D. 1852, and recorded in the recorder's office of Cook County in book 45 of deeds at page 655, and that the said Corydon Weeks afterwards and on the 13th day of April, 1852, for a valuable consideration paid to him therefor, sold and conveyed said last mentioned premises to Ambrose L. Soulé, which last mentioned deed was filed for record in the office of the recorder of Cook County on the 20th day of May, A. D. 1853, and recorded in book 62 of deeds at page 619.

And your orators would further show unto your honors that
10 the said Soulé and the said Weeks and the said Bartholomew and the said Hinckley and the said Bishop, at the time of the conveyances to them, respectively, as above mentioned, acquired a title to said premises in fee simple in good faith and for a valuable consideration paid by them therefor.

Your orators would further show unto your honors that, since their purchase of said lands as aforesaid, said lands have been vacate and unoccupied, and they have paid all the taxes and assessments which have been levied or assessed upon said lands and every part thereof since the same were conveyed to them as aforesaid.

Your orators would further show unto your honors that, as they have recently learned, by the omission and mistake of the parties thereto, the said deed from the said Scott to said Bishop and said Bishop to said Hinckley, were neither of them filed for record or recorded in the recorder's office of Cook County prior to the 23d day of June, A. D.
11 1861, and that on or about the 21st day of June, A. D. 1861, the said Herman Scott executed and delivered to one John B. King, then of the city of Chicago, a deed of quitclaim purporting to convey and quitclaim unto said King all the right, title, and interest which the said Scott then had in and to all lands and real estate of every kind situated in said county of Cook, including the lands above mentioned and so purchased by and conveyed to your orators as aforesaid, which said last-mentioned deed was duly acknowledged and filed for

record in the recorder's office of Cook County on the twenty-second day of June, A. D. 1861, and recorded in book 216 of deeds at page 216, and thereby the apparent title to said lands of record was placed in the said John B. King.

Your orators further show unto your honors, and charge the fact to be, that the said last-mentioned deed was made and executed many years after said Scott had sold and conveyed said land to said
12 Bishop, as above stated, and that after said sale and conveyance to said Bishop as aforesaid, the said Scott never claimed any right, title, or interest in said land, or any portion thereof, nor did he, in fact, have any right, title, or interest in or to said land, or any portion thereof, at the time of the execution of said quitclaim deed to said King; and your orators expressly charge the fact to be that the said King never became, nor was he, the purchaser of said lands so conveyed by said Scott to said Bishop, as aforesaid, nor did he ever pay, or agree to pay, the said Scott, or to any other party, any consideration therefor; and your orators further allege that the said King, at the time and prior to the execution of said deed to him by said Scott as aforesaid, had notice that said Scott had previously sold and conveyed said land, and that at the time of the execution of said quitclaim deed the said Scott had no right, title, or interest in said land, or any part thereof.

13 Your orators further show unto your honors that the said John B. King departed this life on or about the 2d day of October, A. D. 1864, leaving him surviving his wife, Emily A. King, and his only child, Vere Bates King, a minor under the age of eighteen years, and that the said Emily A. King has been duly appointed by the county court of Cook County as guardian of the person and estate of said minor, and is now acting under such appointment.

That the said John B. King did not in his life-time exercise any acts of ownership over said land, or pay any of the taxes that were from time to time levied or assessed upon said land, nor did the said King in his life-time, so far as your orators are able to learn, claim any title to, or interest in, said land, or any portion thereof. and your orators charge that the execution of said quitclaim deed and the recording of the same in the recorder's office of Cook County has created a cloud upon the title of your orators to said land, and that in consequence
14 thereof your orators are unable to sell said land or dispose of the same as they otherwise might and could do.

In tender consideration whereof, and forasmuch as your orators are remediless in the premises by the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, to the end, therefore, that the said Emily A. King, in her own right, and the said Emily A. King, as guardian of the said Vere Bates King, and the said Vere Bates King, may be made defendants herein, and well and truly answer the premises, their answer under oath being hereby waived, and that the said quitclaim deed, so made and executed by the said Herman Scott to the said John B. King may, by the final judgement and decree of this honorable court, be decreed to be null and void so far as the same concerns a relation to the said west half of the south-
15 west quarter of section number twenty (20) in township thirty-eight (38), range thirteen (13), east of the third (3d) principal meridian, and that the same shall not be taken, had, or treated as a cloud upon, or in any manner affecting your orators' title to said lands, and that your orators may have such other and further or other and different relief as to your honors shall seem meet.

May it please your honors to grant unto your orators the peoples writ of summons, to be issued out of and under the seal of this honorable court, and directed to the said Emily A. King, Vere Bates King, and Emily A. King, as guardian of Vere Bates King, commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet.

And your orators will ever pray.

GEORGE W. WORTHINGTON.
JOHN T. AVERY,
per MILLER, VAN ARMAN & LEWIS.

16 MILLER, VAN ARMAN & LEWIS,
Sol'rs & of Counsel for Compl'ts.

Superior court of Cook County.

GEORGE W. WORTHINGTON & JOHN T. AVERY.
v.
EMILY A. KING, VERE BATES KING, & EMILY A. King as guardian of Vere Bates King.

STATE OF ILLINOIS,
Cook County, ss:

Henry G. Miller, being duly sworn, desposes and says that he was, in the month of July, A. D. 1870, a member of the firm of Miller, Van Arman and Lewis, attorneys and counsellors at law, of the city of Chicago, and that said firm did, on the 22d of July of that year, file a bill of complaint in the superior court of Chicago upon the retainer and in behalf of the above named George W. Worthington and John T.
17 Avery, as complainants, and against the above named Emily A. King, Vere Bates King, and Emily A. King, as guardian of Vere Bates King (although this deponent is not confident whether the name of said Vere Bates King was named in said bill of complaint as Vene Bates King or Vere Bates King); that said bill was filed and suit commenced for the succeeding August term of said court; that he drew said bill of complaint, and that, to the best of his knowledge, recollection, and belief, the paper hereto annexed is a substantial copy thereof, and that said suit was pending in said court at the time of the great fire in Chicago, on the night of the 8th and 9th of October, A. D. 1871.

Deponent further sa ys that all the records of said suit, with all the papers on file therein, were destroyed by said fire, and that all the papers in the office of said Miller, Van Arman & Lewis were also destroyed by said fire, so that no certified or literal copy of said bill of complaint, or of the summons, or of any of the papers on file in said cause can now be obtained; and deponent further says that such loss or destruction occurred without the fault or neglect of any of
18 the parties to said suit, or their solicitors, and that the loss and destruction of the record of said court and the pleadings therein, unless supplied, will result in damage to the complainants therein.

Deponent further says that Miller, Frost and Lewis are now the solicitors for the complainants in said suit, and all who may have succeeded to the rights of said complainants therein, and they have been instructed by their clients to procure the restoration thereof.

HENRY G. MILLER.

Subscribed and sworn to before me this 15th day of July, 1872.
A. JACOBSON, *Clerk.*

19 STATE OF ILLINOIS,
County of Cook, ss:

GEORGE WORTHINGTON AND JOHN T. AVERY
vs.
EMILY A. KING, VENE BATES KING, AND EMILY A. King, guardian of Vene Bates King. } In chancery.

Alfred H. Gordon, being duly sworn, deposes and says that during the year A. D. 1870 he was a clerk in the office of Miller, Van Arman and Lewis, the complainants' solicitors in the above entitled cause.

That said cause was commenced in the superior court of Chicago, upon the chancery side thereof; that a bill was filed and a summons issued, returnable upon the first day of the August term, A. D. 1875, of said court.

That after said summons was served and a return made thereon, he took the same from the sheriff of Cook County, examined it, and
20 filed the same with the clerk of said court, and that the copy of said summons, together with the sheriff's return thereon, hereto attached, is substantially correct, to the best of his knowledge, information, and belief.

Said deponent further says that his recollection of the above facts is assisted by the peculiarity of the name of the infant defendant, and by a conversation which he had with Deputy Sheriff Ayars with reference to the proper manner of serving infant defendants with summons.

And said deponent further says that was the invariable custom of said Miller, Van Arman and Lewis, in commencing suits for non-resident complainants, to execute a security for costs instrument; that such an instrument was filed in this case, and that the copy thereof hereto attached he believes to be substantially correct.

ALFRED H. GORDON.

Subscribed and sworn to before me this 15th day of July, 1872.
A. JACOBSON, *Clerk.*

21 STATE OF ILLINOIS,
Cook County, ss:

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that you summon Emily A. King, Vene Bates King, and Emily A. King, guardian of Vene Bates King, if they shall be found in your county, personally to be and appear before the superior court of Cook County on the first day of the term thereof, to be held at the court-house in Chicago, in said Cook County, on the first Monday of August next, to answer unto George Worthington and John T. Avery, in their certain bill of complaint filed in the said court, on the chancery side thereof.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Augustus Jacobson, clerk of our said court, and the seal thereof, at Chicago aforesaid, this day of July, A. D. 1870.

[SEAL.] (Signed) A. JACOBSON, *Clerk.*

22 (Endorsed:)

Served the within summons by reading and delivering a copy

thereof to each of the within named defendants this day of July, 1870.

(Signed) BENJ. L. CLEAVES,
Coroner and Ex-Officio Sheriff of Cook Co.,
By C. G. AYARS, *Deputy.*

Superior court of Chicago.

GEORGE W. WORTHINGTON AND JOHN T. AVERY
v.
EMILY A. KING, VENE BATES KING, AND EMILY A. King, as guardian of Vene Bates King.

We do hereby enter ourselves as surety for costs in the above-entitled cause, and acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State.
Dated July 22d, 1870.

MILLER, VAN ARMAN AND LEWIS.

23 And afterwards, to wit, on the thirteenth day of November, in the year last aforesaid, to wit, 1872, there issued out of the office of the clerk of said court the people's alias writ of summons, which said writ, with the return of the sheriff thereon endorsed, is in words and figures as follows, to wit:

STATE OF ILLINOS,
Cook County, ss:

The people of the State of Illinois to the sheriff of said county, greeting:

We again command you that you summon Emily A. King, Vere Bates King, and Emily A. King, guardian of Vere Bates King, if they shall be found in your county, personally to be and appear before the superior court of Cook County, on the first day of the term thereof, to be held at the court-house in Chicago in said Cook County, on the first Monday of December next, to answer unto George Worthington and John T. Avery in their certain bill of complaint filed in the said court,
24 on the chancery side thereof.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Augustus Jacobson, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 13th day of November, A. D. 1872.

[SEAL.] A. JACOBSON, *Clerk.*

(Endorsed:)

Served the within writ on the within named Vere Bates King by reading, delivering a copy, and explaining the contents thereof to Emily A King, at *his* usual place of abode, she being a white person, a member of the family, and over the age of ten years, this 22d day of November, 1872.

T. M. BRADLEY, *Sheriff*,
By T. E. STACY, *Dep.*

$1.10.

25 And afterwards, to wit, on the thirtieth day of December, in

the year last aforesaid (1872), Emily A. King and Emily A. King, guardian, by Waite and Clark, her solicitors, filed in the office of the clerk of said court her certain answer, which is in the words and figures following, to wit:

The separate answer of Emily A. King, and Emily A. King, guardian of Vere Bates King, to the bill of complaint filed against her and as guardian by George W. Worthington and John T. Avery, in a cause now pending in the superior court of Cook County.

Respondents not in any manner acknowledging that the matters and things contained in said bill are sufficient to require them to make answer thereunto, and saving and reserving all and all manner of exception to said bill, and the many and manifold errors therein contained, and insisting upon all advantages that would accrue to them had they demurred to said bill, as follows:

Respondents represent unto your honors that on or about the
26 second day of October, 1864, John B. King departed this life intestate, leaving him surviving Emily A. King, his wife, and Vere Bates King, an only child, and that after the said death of said John B King, his widow, Emily A. King, was duly appointed guardian of said Vere Bates King, who was a minor at the death of said John B. King.

Respondents further represent that during the lifetime of the said John B. King he, the said John B. King, did acquire of one Heman A. Scott, by absolute deed, the land in said bill of complaint mentioned and described as follows, namely: The west half of the southwest quarter of section twenty (20), township thirty-eight (88) north, of range thirteen (13) east of the third principal meridian.

Respondents further represent that said Heman A. Scott appeared by the records of said Cook County to be the owner of the premises so conveyed by him in and by his said deed, by which said John B. King so acquired of said Scott said land at the time said John B. King so acquired the same as aforesaid.

Respondents, further answering, say that they have no knowl-
27 edge or information in regard to the several deeds claimed in and by said bill to have been made anterior to the deed so made by said Scott to said John B. King.

And respondent, for herself and as guardian, denies all and singular the allegations contained in said bill in regard thereto, and she denies that in May, 1853, or at any time, that Ambrose L. Soulé was the owner of the land in said bill described, or that said Soulé and Sophia, his wife, as such owner, then or at any time, for the consideration of $800, or any consideration, conveyed, or pretended to convey, said premises to said complainant John T. Avery, and she denies that any such deed was ever made or was ever recorded as in said bill alleged.

Respondents, further answering, say that they have no knowledge or information in regard to the several deeds of said Avery to Lucien H. Muzzy, conveying to said Muzzy the south half of said land, and of said Muzzy to George W. Worthington, conveying said south half to said Worthington, one of complainants in said bill, and respondents
28 deny all and singular the allegations in said bill in regard thereto, denying the ownership and right to convey of said Avery to said Muzzy on November 23d, 1857, of said south half as in said bill alleged, and also the right of conveyance of said Muzzy to said Worthington on the 2d day of December, 1857, as in said bill alleged, of said south half. And respondents deny all and singular the allegations in said bill in

regard to said last-mentioned conveyances of Avery to Muzzy and Muzzy to Worthington, denying that they became and were the purchasers in good faith, and the owners and holders of the legal title to said land in fee simple by said deeds of conveyance aforesaid, as in said bill alleged.

And respondents deny that said Avery ever made said conveyance for a valuable consideration to said Muzzy, and represent unto your honors that no consideration is mentioned in said bill for the said conveyance of said south half by said Avery to Muzzy. And respondents deny the recording of said deed of conveyance; and respondents
29 deny that said Muzzy ever conveyed for the consideration mentioned in said bill of seven hundred dollars said premises to said Worthington, and deny that said deed was ever recorded, as alleged in said bill.

Respondents further answering, say that they have no knowledge, or information that on and prior to the first day of June, 1843, one Thomas Scott, of Marion, Ohio, was the owner of said west half of said southwest quarter of said section twenty (20), and seized thereof in fee simple; and respondents deny the same to be true; and respondents have no knowledge or information of the sale of said premises last mentioned by said Thomas Scott to one Isaac Bishop, of Tully, New York, and deny that said Thomas Scott ever made said sale for said consideration of two hundred dollars, as in said bill alleged; and respondents have no knowledge or information of the sale of said land last mentioned by said Bishop to one Porter L. Hinckley for the sum of two hundred and forty dollars, and deny the same, together with said Bishop's right of conveyance; and they deny all and singular the allegations in said bill
30 about the execution and acknowledgment of a deed purporting to convey said premises, as aforesaid.

Respondents, further answering, say that they have no knowledge or information of the sale of said last-mentioned premises by said Hinckley to one John K. Bartholomew, as in said bill alleged, and they deny the same, together with all and singular the allegations in said bill contained in regard to the execution and acknowledgment of said deed purporting to convey said premises to said Bartholomew, and they also deny the right of said Hinckley to convey, and his ownership of said premises. They also have no knowledge or information of the sale of said premises by said Bartholomew to Corydon Weeks, and they deny the same, together with all allegations in said bill in regard to the sale of said land by said Weeks to Ambrose L. Soulé, and they deny his right to convey the same, and all allegations in regard to the execution and acknowledgment and recording of the deed, as in said bill alleged; and they
31 deny all and singular the allegations in said bill contained in regard to all the conveyances by which said Soulé came into the title of said premises, and denies his title to the same in fee simple in good faith and for valuable consideration as in said bill alleged, and they deny all the allegations in said bill concerning the payment of all the taxes and assessments levied or assessed on said property by said persons so conveying and owning the same from time to time.

Respondents further answering say it is not true as in said bill alleged that said Soulé, or said Weeks, or said Bartholomew, or said Hinckley, or said Bishop, at the times mentioned in said bill, or at any time ever made or executed the several conveyances mentioned in said bill; nor is it true that they or either of them ever acquired in law or equity a title to a claim to said land or any interest therein; nor is it true that said land has been vacant or unoccupied as in said bill alleged; nor is

it true that during the period in said bill mentioned, or at
32 any time, said persons or either of them have paid the taxes thereon, or any part of the same.

Respondents further answering say that it is true that neither of said pretended deeds alleged to have been made by said Scott to said Bishop, or said Bishop to said Hinckley, have been recorded in the recorder's office of Cook County, Illinois; and she further denies that any such pretended deeds have ever been made or executed.

That it is true that said Herman Scott at some time, and she thinks about the second day of June, A. D. 1861, did, by deed duly made and executed, convey said land to said John B. King, and which was duly filed of record in the recorder's office of Cook County, Illinois, and was recorded in book 216 of deeds, page 276, and in and by which deed said King did acquire title to said land; and he, said John B. King, in his life, under and by virtue of said deed, and since his death his
33 son, Vere Bates King, has, and does now claim, title to said land and to own the same.

She further answering says that she denies that prior to the making of said deed to said John B. King said Scott had sold or conveyed said land to said Bishop or any one; and she denies that said Scott ever claimed any interest in or title to the same; nor is it true that at the date of said deed to said King said Scott had no interest in said land or any part of the same.

And she further says it is not true that said King as in said bill alleged never became the purchaser from said Scott of said land; and all and singular the allegations contained in said bill, that said John B. King, deceased, was not a purchaser of said land, or that he was not a bona fide purchaser, or that he never paid or agreed to pay any consideration for said land, or that the said King had notice of said alleged deeds, or that he had notice that said Scott had previously con-
34 veyed said land, are false and untrue, and she denies the same; but she claims and insists that when said King so purchased the said land the title of said land was in said Scott, and was so shown by the records; and he said King acquired the same from said Scott in good faith, and believing him to be the owner thereof.

And she further says that she claims and insists that said John B. King, when he so acquired title to said premises under the deed from said Scott, or at any time, never even had either actual or constructive notice that said Scott had previously conveyed said land, or of the existence of any of the several deeds alleged in said complainant's bill, and under which complainant's claim title by their said bill; and she denies that said Scott had ever conveyed, previously, said land, or that any such deeds exist or were ever made or executed as alleged and described in said complainant's bill except the one from said Scott to said John B. King; and she claims and insists that said John B. King
35 was a bona fide purchaser for value, without any notice, actual or constructive, and that the said Vere Bates King is a bona fide purchaser of said premises, for value, without notice.

Respondents further answering say that they have no personal knowledge in regard to the land and the occupancy thereof and to the payment of taxes thereon, but they are informed and believe and so charge that said John B. King, in his lifetime, and since his death the said Vere Bates King, as heir at law of said John B. King, has been in actual possession of said land under claim and color of title made in good faith for more than seven years successively, and during said seven successive years and while so in possession the said John B. King in his lifetime, and said

Vere Bates King since his death, has paid all taxes legally assessed on said land, and according to the statute in such cases made and provided said Vere Bates King is to be held and adjudged to be the legal owner of said land; and they claim and ask the benefit of and plead the
36 statute in such cases made and provided.

And they further answering say that if it should appear in proof, as alleged in complainants' bill, that said land was and is vacant and unoccupied, and has been so for seven years prior to the filing of the bill of complaint in this court, then they say that the said John B. King in his lifetime, and the said Vere Bates King since the death of the said John B. King, having color of title made in good faith to said vacant and unoccupied land, has paid all taxes legally assessed thereon for seven successive years according to the statute in such cases made and provided; the said Vere Bates King by virtue thereof is deemed to be the legal owner of such land, and she as guardian claims and insists in behalf of said Vere Bates King of the benefit of the section of the statute of the State of Illinois in such cases made and provided; and respondents deny the allegations in said bill that said John B. King did not in his lifetime, nor the said Vere Bates King since his death, exercise any acts of ownership over said premises or pay taxes or
37 assessments thereon. All the several allegations contained in said bill not herein answered are denied, and having hereby fully answered said bill respondents pray to be hence dismissed with costs.

WAITE AND CLARK,
Sols. for Respondents.

And afterwards, to wit, on the tenth day of January, in the year of our Lord one thousand eight hundred and seventy-three, the same being one of the days of the January term of said court, the following among other proceedings were had in said court and entered of record, to wit:

GEORGE WORTHINGTON ET AL.
vs.
EMILY A. KING ET AL. } Bill. 479 a. 31146.

This day again come the complainants hereto by their solicitors aforesaid, and it appearing to the court that Vere Bates King, one of said defendants, is a minor under age, on motion of said complainants' solicitor it is ordered by the court that Nicholas A. Lauer be, and he is here-
38 by, appointed guardian ad litem for said infant defendant above named to appear and defend this suit in his behalf, and thereupon comes the said Nicholas A. Lauer and accepts his appointment as such guardian ad litem and files herein the answer of said infant defendant, neither admitting nor denying any of the matters and things stated and charged in the bill of complaint filed in this cause, but requiring strict proof thereof.

And on the day and year last aforesaid, to wit, January 10th, 1873, there was filed in the office of the clerk of said court the answer of Vere Bates King, which is in words and figures as follows, to wit:

STATE OF ILLINOIS,
Cook County, ss:

In the superior court of Cook County of the July term, A. D. 1873. In chancery.

WORTHINGTON ET AL.
vs.
KING ET AL.

The answer of Vere Bates King, an infant under the age of twen-

39 ty-one years, by Nicholas A. Lauer, his guardian ad litem, one of the defendants to the bill of complainant of George W. Worthington and John T. Avery, plaintiffs.

Said defendant answering says, that he knows nothing of the matters and things set forth and charged in said bill of complaint, and therefore he neither admits or denies the same, but leaves the plaintiffs to prove the same, and throws himself upon the protection of this honorable court.

NICHOLAS A. LAUER.

And on the same day and year last aforesaid, to wit, January 10th, 1873, the said complainants, by their solicitors aforesaid, filed in the office of the clerk of said court their replication, which is in words and figures as follows, to wit:

STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County, January term, A. D. 1873. In chancery.

WORTHINGTON ET AL.
vs.
KING ET AL.

40 The replication of George W. Worthington and John T. Avery, plaintiffs, to the answers of Emily A. King, and Emily A. King, guardian of Vere Bates King, and to the answer of Vere Bates King, an infant under the age of twenty-one years, by Nicholas A. Lauer, his guardian ad litem, defendants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as
41 this honorable court shall direct; and humbly pray as in and by their said bill they have already prayed.

MILLER, FROST AND LEWIS,
Sol'rs for Comp'ts.

And afterwards, to wit, on the seventh day of April, in the year last aforesaid, to wit, 1873, the same being one of the days of the April term of said court, the following, among other proceedings, were had in said court and entered of record, to wit:

GEORGE WORTHINGTON ET AL.
vs.
EMILY A. KING ET AL.
Bill. 479 a. 31146.

This day again come the said parties to this suit by their solicitors

respectively, as aforesaid, and thereupon, on motion of said complainants, this cause is set down for hearing for the second day of July, A. D. 1873.

And afterwards, to wit, on the third day of July, in the year last aforesaid, to wit, 1873, there was filed in the office of the clerk of said court certain objections to deposition, which are in words and figures as follows, to wit:

42 THE STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County.

GEORGE WORTHINGTON ET AL.
vs.
VERE BATES KING ET AL.

And now comes the said defendant and moves to suppress the following parts of the deposition John T. Avery, because the said Avery is interested in the event of this suit, and because he is a party complainant, and as such cannot testify against the defendant, Vere Bates King, who is a minor, to each of the several matters and things contained in the answers to the following interrogatories, to wit:

1. Answer to interrogatory third.
2. Answer to interrogatory No. four.
3. Answer to interrogatory No. five.
4. Answer to interrogatory No. six.
5. Answer to interrogatory No. seven.
6. Interrogatory No. 9, answer to.
7. Answer to interrogatory No. 10.
9. All the several cases—interrogatories.

43 For the above reasons the defendants ask that said several answers be suppressed.

And the defendants, not waiving either of the above objections, ask to have said several answers suppressed as incomplete and irrelevant, and because no sufficient foundation is laid for secondary evidence in any answers speaking of the contents of written instruments, and because the execution of any such written instrument has not been proved.

HORACE F. WAITE,
Defendants' Att'y.

And afterwards, to wit, on the eighth day of July, in the year last aforesaid, to wit, 1873, the same being one of the days of the July term of said court, the following among other proceedings were had in said court and entered of record, to wit:

GEORGE WORTHINGTON ET AL.
vs.
EMILY A. KING ET AL.
Bill. 479 a. 31146.

This day again come the parties to this suit by their solicitors respectively, as aforesaid, and thereupon Messrs. Miller, Frost,
44 and Lewis, solicitors of record for said complainants, suggest the death of said complainant, George Worthington, and on their

39 ty-one years, by Nicholas A. Lauer, his guardian ad litem, one of the defendants to the bill of complainant of George W. Worthington and John T. Avery, plaintiffs.

Said defendant answering says, that he knows nothing of the matters and things set forth and charged in said bill of complaint, and therefore he neither admits or denies the same, but leaves the plaintiffs to prove the same, and throws himself upon the protection of this honorable court.

NICHOLAS A. LAUER.

And on the same day and year last aforesaid, to wit, January 10th, 1873, the said complainants, by their solicitors aforesaid, filed in the office of the clerk of said court their replication, which is in words and figures as follows, to wit:

STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County, January term, A. D. 1873. In chancery.

WORTHINGTON ET AL.
vs.
KING ET AL.

40 The replication of George W. Worthington and John T. Avery, plaintiffs, to the answers of Emily A. King, and Emily A. King, guardian of Vere Bates King, and to the answer of Vere Bates King, an infant under the age of twenty-one years, by Nicholas A. Lauer, his guardian ad litem, defendants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as
41 this honorable court shall direct; and humbly pray as in and by their said bill they have already prayed.

MILLER, FROST AND LEWIS,
Sol'rs for Comp'ts.

And afterwards, to wit, on the seventh day of April, in the year last aforesaid, to wit, 1873, the same being one of the days of the April term of said court, the following, among other proceedings, were had in said court and entered of record, to wit:

GEORGE WORTHINGTON ET AL.
vs.
EMILY A. KING ET AL. } Bill. 479 a. 31146.

This day again come the said parties to this suit by their solicitors

respectively, as aforesaid, and thereupon, on motion of said complainants, this cause is set down for hearing for the second day of July, A. D. 1873.

And afterwards, to wit, on the third day of July, in the year last aforesaid, to wit, 1873, there was filed in the office of the clerk of said court certain objections to deposition, which are in words and figures as follows, to wit:

42 THE STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County.

GEORGE WORTHINGTON ET AL.
vs.
VERE BATES KING ET AL.

And now comes the said defendant and moves to suppress the following parts of the deposition John T. Avery, because the said Avery is interested in the event of this suit, and because he is a party complainant, and as such cannot testify against the defendant, Vere Bates King, who is a minor, to each of the several matters and things contained in the answers to the following interrogatories, to wit:

1. Answer to interrogatory third.
2. Answer to interrogatory No. four.
3. Answer to interrogatory No. five.
4. Answer to interrogatory No. six.
5. Answer to interrogatory No. seven.
6. Interrogatory No. 9, answer to.
7. Answer to interrogatory No. 10.

9. All the several cases—interrogatories.

43 For the above reasons the defendants ask that said several answers be suppressed.

And the defendants, not waiving either of the above objections, ask to have said several answers suppressed as incomplete and irrelevant, and because no sufficient foundation is laid for secondary evidence in any answers speaking of the contents of written instruments, and because the execution of any such written instrument has not been proved.

HORACE F. WAITE,
Defendants' Att'y.

And afterwards, to wit, on the eighth day of July, in the year last aforesaid, to wit, 1873, the same being one of the days of the July term of said court, the following among other proceedings were had in said court and entered of record, to wit:

GEORGE WORTHINGTON ET AL.
vs.
EMILY A. KING ET AL.
Bill. 479 a. 31146.

This day again come the parties to this suit by their solicitors respectively, as aforesaid, and thereupon Messrs. Miller, Frost,
44 and Lewis, solicitors of record for said complainants, suggest the death of said complainant, George Worthington, and on their

motion it is ordered by the court that leave be, and the same is hereby, given them by the court, to make Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, George Worthington, and Alice M. Worthington, parties complainant, in place of said decedent, George Worthington.

And thereupon said defendant submits herein her motion to suppress the deposition of T. M. Avery. After argument of counsel and due deliberation by the court said motion is sustained; and on the agreement of the parties now here made in open court, this cause is set down for hearing for the nineteenth day of November, A. D. 1873.

And afterwards, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and seventy-four, the same being one of the days of the June term of said court, the following, among other proceedings, were had in said court and entered of record, to wit:

45 GEORGE WORTHINGTON ET AL. *vs.* EMILY A. KING ET AL. } Bill. 479 a. 31146.

This day again come the parties to this suit by their solicitors respectively, as aforesaid, and thereupon, on motion of complainants' counsel, leave is given them by the court to amend the bill of complaint filed in this cause.

And afterwards, to wit, on the seventh day of July, in the year last aforesaid, to wit, 1874, the same being one of the days of the July term of said court, the following, among other proceedings, were had in said court and entered of record, to wit:

JOHN T. AVERY ET AL. *v.* EMILY A. KING ET AL. } Bill. 479 a. 31146.

This day again come the parties to this suit by their solicitors respectively, as aforesaid, and thereupon, on the agreement of the parties now here, made in open court, it is ordered by the court that the original answer of said defendants stand as the answer of said defendants to the amended bill filed herein on the first day of July, instant.

46 And on the day and year last aforesaid, to wit, July 7th, 1874, the same being one of the days of the July term of said court, the following, among other proceedings, were had in said court and entered of record, to wit:

Decree.

JOHN T. AVERY, RALPH WORTHINGTON, ABBY M. Hoyt, Mary B. Worthington, Clara C. Worthington, George W. Worthington, Alice M. Worthington, children and heirs of George Worthington, deceased, *vs.* EMILY A. KING, VERE BATES KING, AND Emily A. King, guardian of Vere Bates King. } 479 a. 31146.

This cause having been brought to a hearing upon the bill, answers,

and replication thereto, and upon the evidence taken therein, the said defendant, Vere Bates King, having been duly served with process, and being a minor, having appeared and answered by his guardian ad litem, duly appointed for that purpose, and the said defendant, Emily A. King, having filed an answer in her own behalf and as guardian for said Vere Bates King, and counsel for the respective parties, having been heard, and the court being fully advised on the premises, finds
47 that one of the complainants, John T. Avery, did on the 30th day of May, A. D. 1853, for a valuable consideration paid by him therefor, purchase of one Ambrose L. Soulé the west half of the southwest quarter of section twenty (20), in township (38) thirty-eight north of range thirteen (13) east of the third principal meridian, situate in the county of Cook and State of Illinois, and the said Soulé then and there in pursuance of such sale and purchase conveyed said premises to said Avery; and the court further finds that the said Avery afterwards, to wit, on the 23d day of November, 1857, for a good and valuable consideration paid to him therefor, sold and conveyed the south half of said premises to Lucius H. Muzzy, and the said Muzzy afterwards and on the 2nd day of November, A. D. 1857, for a good and valuable consideration paid to him therefor, sold and conveyed said south half of said premises to George W. Worthington, the ancestor and father of the complainants Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington, George W. Worthington, and Alice
48 M. Worthington herein; the court further finds from the evidence aforesaid, that on and prior to the first day of June, A. D. 1843, one Heman Scott was the owner of said west half of said southwest quarter of said section twenty (20) and was seized thereof in fee simple, and being such owner on or about the day and year aforesaid, for a good and valuable consideration paid to him therefor, sold and duly conveyed said west half of said southwest quarter of said section to one Isaac Bishop, and that said Bishop afterwards and on the 13th day of October, A. D. 1845, for a good and valuable consideration paid to him therefor, sold and conveyed said premises last above mentioned to Porter L. Hinckley, and that afterwards and during the year 1845 said Hinckley, for a good and valuable consideration paid to him therefor, sold and duly conveyed said last mentioned premises to John R. Bartholomew, and that afterwards and on the 22d day of January, A. D. 1857, the said Bartholomew, for a good and valuable consideration paid to him therefor, sold and duly conveyed said last mentioned premises to Corydon Weeks, and that the said Corydon Weeks afterwards
49 and on the 13th day of April, A. D. 1852, for a good and valuable consideration paid to him, sold and conveyed said last mentioned premises to said Ambrose L. Soulé, the grantor of the complainant John T. Avery above mentioned.

And the court further finds that the said complainant John T. Avery and the said George W. Worthington, the said Muzzy, the said Soulé, the said Weeks, the said Bartholomew, the said Hinckley, and the said Bishop, at the time of the conveyances to them, respectively, as above mentioned as aforesaid, a title to the premises conveyed to them, respectively, as above mentioned in fee simple, in good faith, and for a valuable consideration paid by them therefor.

The court further finds that at the time of the commencement of this suit said premises were vacant and unoccupied, and had so remained from the time of the conveyance thereof by said Scott as above mentioned, and that the complainant John T. Avery paid all the taxes levied

or assessed on said premises for the years from A. D. 1856 to A. D. 1863, both inclusive, and all the intermediate years.

The court further finds that on or about the 21st day of June,
50 A. D. 1861, the said Heman Scott executed a quit claim deed to John B. King, since deceased, and the father of the defendant Vere Bates King, whereby he quit claimed to said King all the right, title, and interest he then had in and to said premises, which said deed was filed for record in the recorder's office of Cook County, on the twenty-second day of June, A. D. 1861, and recorded in book 39 of records, page 249; and that said deed from said Scott to said Bishop, made and executed as aforesaid, was not filed for record in the recorder's office of Cook County until the 7th day of January, A. D. 1870, when the same was filed for record in said office and recorded in book 554 of records, page 294, but the court finds that said King paid nothing for said quit-claim deed, nor has any one paid anything therefor since his decease, and that said was not a bona fide purchaser of said premises, and is not protected by the recording act of this State as against the prior grantee of said Scott and parties deriving title from such prior grantee.

The court therefore finds, adjudges, and decrees that said complainant John T. Avery and the said George W. Worthington were at
51 the time of the commencement of this suit the owners in fee simple of said premises; the said John T. Avery of the north half of said west half of said southwest quarter of said section twenty (20) and the said George W. Worthington of the south half thereof, notwithstanding said deed from said Scott to said King, and it is hereby ordered, adjudged, and decreed, that said deed from said Scott to said King shall be taken and treated as null and void, and the same is hereby declared to be null and void as respects said complainants and said persons above named, and that said John B. King took nothing thereunder against said complainants.

It is further ordered that said complainants, or either of them, may have a writ of possession of said premises, or any portion thereof, upon application to this court therefor, and this cause is retained in court for that purpose. It is further ordered that complainants pay the costs of this suit to be taxed.

The only and all the evidence upon which this decree is ordered or introduced on the hearing of this cause being contained on the certificate of proof made by S. M. Moore, the judge of the superior court of Cook County, who heard the cause.

52 And afterwards, to wit, on the thirty-first day of July, in the year last aforesaid, to wit, 1874, the same being one of the days of the July term of said court, the following among other proceedings were had in said court and entered of record, to wit:

JOHN T. AVERY ET AL.
vs. } Bill. 479 a. 31146.
EMILY A. KING ET AL.

This day again come the said defendants to this suit, by their solicitors aforesaid, and the defendants having entered their exceptions herein, pray an appeal from the decree of this court to the supreme court of this State, which is allowed them by the court, on filing their appeal bond herein, on the penalty of two hundred dollars, with security to be approved by one of the judges of this court, to be filed within thirty

days from this date, said appeal bond to be signed by the guardian in behalf of the infant.

53 And afterwards, to wit, on the thirteenth day of November, in the year of our Lord one thousand eight hundred and seventy-five, there was filed in the office of the clerk of said court a certain mandate, which is in words and figures as follows, to wit:

At a supreme court begun and held at Ottawa on Tuesday, the eighth day of September, in the year of our Lord one thousand eight hundred and seventy-four, within and for the northern grand division for the State of Illinois:

Present, Pinkney H. Walker, chief justice.
" Sidney Bruse, associate justice.
" John M. Scott, " "
" William K. McAllister, " "
" Benjamin R. Sheldon, " "
" Jno. Scholfield, " "
" Alfred M. Craig, " "

In term time, October 11th, A. D. 1875.

EMILY A. KING AND VERE BATES KING, AND Emily A. King, guardian of Vere Bates King,

54 *vs.*

JOHN T. AVERY, RALPH WORTHINGTON, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington, George W. Worthington, and Alice C. Worthington. } No. 626.

Appeal from the superior court of Cook County.

On this day came again the said parties, and the court having diligently examined and inspected as well the records and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error, therefore it is considered by the court that for that error, and others in the record and proceedings aforesaid, the decree of the superior court of Cook County in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the superior court of Cook County for such other and further proceedings as to law and justice shall appertain.

55 And it is further considered by the court that the said appellants recover of and from the said appellees their costs by them in this behalf expended, and that they have execution therefor.

I, Cairo D. Trimble, clerk of the supreme court of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above-entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said supreme court, at Ottawa, this twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL SUPREME COURT.] C. D. TRIMBLE,
Clerk of the Supreme Court.

And afterwards, to wit, on the twenty-third day of November, in the year last aforesaid, to wit, 1875, the same being one of the days of the November terms of said court, the following among other proceed-
56 ings were had in said court, and entered of record, to wit:

Bill.

RALPH WORTHINGTON ET AL.
vs.
EMILY A. KING ET AL. } 31146.

This day again come the parties to this suit by their solicitors respectively as aforesaid, and thereupon, on motion of said complainants, it is ordered by the court that this cause be, and the same is, hereby replaced upon the calendar and docket of this court, pursuant to the mandate from the supreme court of this State this day filed.

And afterwards, to wit, on the fourth day of December, in the year last aforesaid, to wit, 1875, the said complainants by their solicitors aforesaid filed in the office of the clerk of said court their petition for removal and bond, which are in words and figures following, to wit:

57 Superior court of Cook County, November term, A. D. 1875. In chancery.

STATE OF ILLINOIS,
Cook County, ss:

JOHN T. AVERY, RALPH WORTHINGTON, ABBY M. Hoyt, Mary B. Worthington, Clara W. Cole, (late Clara C. Worthington,) George W. Worthington, Alice C. Worthington,
vs.
EMILY A. KING, VERE BATES KING, AND EMILY A. King, guardian of Vere Bates King. } 31146.

To the honorable the superior court of Cook County, Illinois:

The petition of John T. Avery, Ralph Worthington, Abby H. Hoyt, Mary B. Worthington, Clara W. Cole, (late Clara C. Worthington,) George W. Worthington, and Alice C. Worthington, of Cleveland, in the State of Ohio, respectfully shows:

That your petitioners are the complainants in this suit, and that said complainants now are, and were, at the time of bringing
58 this suit, citizens of the State of Ohio, and that the said defendants now are, and were at the time of bringing this suit, citizens of the State of Illinois.

Your petitioners further show that the complainants in this suit claim the title to and ownership of the west half of the southwest quarter of section twenty, (20,) township thirty-eight north of range fourteen east of the third principal meridian, Cook County, Illinois, and that the matter in dispute in this suit exceeds the sum of five hundred dollars, exclusive of costs.

And your petitioners further respectfully represent that this suit has not yet been tried, but that the same is pending for trial in the superior court of Cook County, Illinois, and that said cause was docketed in this court on the 23d day of November, A. D. 1875, and that the present

term of said court is the first term at which said cause could have been tried since the date of docketing said cause in said superior court as aforesaid, and since the passage of the act of Congress, under which the petition is filed, and that your petitioners desire to remove this suit before the trial thereof into the next circuit court of the United
59 States, to be held in the northern district of Illinois, in the 7th circuit, in pursuance of the statutes of the United States in such case made and provided, and that they are ready and willing to give such good and sufficient surety as the court may direct for their doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States court, and they offer herewith their bond executed by Henry G. Miller, of Chicago, as surety, in the penal sum of two hundred dollars, conditioned that your petitioners shall enter in the next circuit court of the United States to be held in the northern district of Illinois, in the seventh circuit, on the first day of its session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto, and doing such other appropriate acts, as by the said acts of Congress are required to be done upon the removal of a suit into the United States court as good and sufficient surety according to the said provisions
60 of law upon the removal of a suit into the United States court.

And your petitioners therefore pray that the said bond may be accepted as good and sufficient security according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States, in such case made and provided, and that no further proceedings may be had therein in this court, and your petitioners will ever pray, &c.

JOHN T. AVERY.
RALPH WORTHINGTON.
ABBIE W. HOYT.
MARY B. WORTHINGTON.
CLARA W. COLE.
GEO. WORTHINGTON.

MILLER and FROST,
Solicitors for Complainant.

STATE OF OHIO,
County of Cuyahoga, ss:

John T. Avery, being duly sworn, upon oath deposes and says that he is one of the petitioners in the foregoing petition by him sub-
61 scribed, and that he knows the contents thereof, and that the same is true in substance and in fact, according to the best of his knowledge, information, and belief.

JOHN T. AVERY.

Sworn to before me, and subscribed in my presence by the said John T. Avery, the 1st day of December, 1875.

[NOT. SEAL.] ALEX. C. CASKEY,
Notary Public.

Superior court of Cook County, November term, A. D. 1875. In chancery.

STATE OF ILLINOIS,
Cook County, ss:

JOHN T. AVERY, RALPH WORTHINGTON, ABBY M. Hoyt, Mary B. Worthington, Clara W. Cole (late Clara C. Worthington), George W. Worthington, and Alice C. Worthington,
vs.
EMILY A. KING, VERE BATES KING, and Emily A. King, guardian of Vere Bates King.
62
} 31146.

Know all men by these presents that we, Henry G. Miller, of Chicago, Cook County, Illinois, as principal, and Hiram L. Lewis and Henry B. Bergen, of the same place, as sureties, are held and firmly bound unto Emily A. King, Vere Bates King, and Emily A. King, guardian of Vere Bates King, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Emily A. King, Vere Bates King, and Emily A. King, guardian of Vere Bates King, their heirs, executors, administrators, successors or assigns, for which payment well and truly to be made we hereby bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals, dated the third day of December, A. D. 1875.

Whereas a suit in which John T. Avery, Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington (since inter-married and now Clara W. Cole), George W. Worthington, and Alice C.
63 Worthington are complainants, and Emily A. King, Vere Bates King, and Emily A. King, guardian of Vere Bates King, are defendants, was docketed in the said superior court on the 23d day of November, A. D. 1875, and the same is now pending for trial in the superior court of Cook County, Illinois, and is removable into the circuit court of the United States for the northern district of Illinois, in the seventh circuit, under the laws of the United States, and particularly under the act of Congress approved March 3d, A. D. 1875, authorizing the removal of causes from State courts, and for other purposes; and whereas the said John T. Avery, Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, Clara W. Cole, George W. Worthington, and Alice C. Worthington have filed their petition in the said superior court of Cook County for the removal of such suit into the next circuit court of the United States to be held in the northern district of Illinois.

Now, therefore, the condition of the above obligation is such, that if the above-named John T. Avery, Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, Clara W. Cole, George W. Worthington,
64 and Alice C. Worthington shall enter in said circuit court on the first day of its next session a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said circuit court shall hold that such suit was wrongfully or improperly removed thereto, and shall do or cause to be done all such other necessary or appropriate acts required by said act of Congress, or by the laws of the United States to be done upon the removal of a suit into the

United States court, then the above obligation to be void, otherwise to remain in full force and virtue.

HENRY G. MILLER. [SEAL.]
HIRAM L. LEWIS. [SEAL.]
HENRY B. BERGEN. [SEAL.]

And afterwards, to wit, on the sixth day of December, in the year last aforesaid, to wit, 1875, there was filed in the office of the clerk of said court a certain bond, which is in words and figures as follows, to wit:

65 Superior court of Cook County, November term, A. D. 1876. In chancery.

STATE OF ILLINOIS,
Cook County, ss:

JOHN T. AVERY, RALPH WORTHINGTON, ABBY M. Hoyt, Mary B. Worthington, Clara C. Worthington, George W. Worthington, and Alice C. Worthington,
vs.
EMILY A. KING, VERE BATES KING, AND EMILY A. King, guardian of Vere Bates King. } 31146.

Know all men by these presents that we, John T. Avery, Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington, Clara W. Hale, George W. Worthington, and Alice C. Worthington, as principals, and Henry G. Miller and Thomas G. Frost, of Cook County, Ills., as surety, are held and firmly bound unto Emily A. King, Vere Bates King, and Emily A. King, guardian of Vere Bates King, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Emily A. King, Vere Bates King, and Emily A. King, guardian of Vere Bates King, their successors or assigns,
66 for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated the thirtieth day of November, A. D. 1875.

Whereas a suit has been brought on in the superior court of Cook County by the said John T. Avery, Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington, George W. Worthington, and Alice C. Worthington against the said Emily A. King, Vere Bates King, and Emily A. King, guardian of Vere Bates King, and the same is now pending for trial in the said superior court of Cook County, and was docketed in said superior court on the 23 l day of November, A. D. 1875, and is removable into the circuit court of the United States for the northern district of Illinois, in the seventh circuit, under the laws of the United States, and particularly under the act of Congress approved March 3d, A. D. 1875, authorizing the removal of causes from State courts, and for other purposes; and whereas the said John T.
67 Avery, Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington, George W. Worthington, and Alice C. Worthington have filed their petition in the said superior court of Cook County for the removal of such suit into the next circuit court of the United States to be held in the northern district of Illinois:

Now, therefore, the condition of the above obligation is such that if the above bounden John T. Avery, Ralph Worthington, Abby M. Hoyt,

Mary B. Worthington, Clara C. Worthington, George W. Worthington, and Alice C. Worthington shall enter in said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court, if said circuit court shall hold that such suit was wrongfully or improperly removed thereto, and shall do, or cause to be done, all such other or necessary or appropriate acts required by said act of Congress or by the laws of the United States to be done upon the removal of a suit into the United States court, then the above obligation to be
68 void, otherwise to remain in full force and virtue.

JOHN T. AVERY. [SEAL.]
RALPH WORTHINGTON. [SEAL.]
MARY B. WORTHINGTON. [SEAL.]
CLARA W. HALE. [SEAL.]
GEORGE WORTHINGTON. [SEAL.]
ALICE M. WORTHINGTON. [SEAL.]
ABBIE M. HOYT. [SEAL.]
HENRY G. MILLER. [SEAL.]
T. G. FROST. [SEAL.]

And afterwards, to wit, on the eleventh day of December, in the year last aforesaid, to wit, 1875, the said defendants, by their attorneys aforesaid, filed in the office of the clerk of said court their certain answer, which is in words and figures as follows, to wit:

In the superior court of Cook County.

The answer of Emily A. King and Vere Bates King, by Emily A. King his guardian, &c., to the petition of John T. Avery et al., for the removal to the United States circuit court in a cause where said Avery et al. are complainants and said respondents are defendants.

69 Respondents admit that they are citizens of Illinois, as stated in said petition, except that the said Vere Bates King is a minor, under the age of 15 years; and they admit that the matter in dispute exceeds the sum of $500; but they have no knowledge except as stated in the petition of the citizenship of petitioners; but they deny the allegation in said petition that the November term, 1875, of this court is the first term at which said cause could have been first tried, as stated in said petition, but they aver, and as will also appear by the records now remaining in this cause, that said cause was commenced at some time prior to the great fire of Oct., 1871, and said defendants duly brought into court and made answer to the bill filed in this cause, and that some testimony had been taken therein, when all of the record and proceedings in this cause were destroyed by said fire, and that subsequently to said fire said record and proceedings were restored in their present form; that some time prior to July, 1874, the said cause
70 was finally tried by this court upon the merits thereof, and the complainants at said final hearing recover' a decree against the respondents for the lands mentioned in said bill, and from which decree respondents prayed an appeal to the supreme court of the State of Illinois and which was allowed by this court, and which appeal was duly perfected and brought into the September term, 1874, of said supreme court, and the record of said cause with proper abstracts thereof were duly filed at said term of said supreme court and all the parties thereto duly appeared and filed their brief and arguments therein, and the hearing

of said appealed cause was duly submitted to said supreme court upon the merits thereof, and that said supreme court did finally hear and try said appealed cause upon the merits thereof, and did at such final hearing and trial adjudge and decree that the said decree rendered by said court in this cause was erroneous and inequitable, and did then and there enter an order or decree reversing and setting aside the said decree
71 entered by this court, and whereupon and thereafter the said petitioner and complainants did file in this court a mandate from said supreme court, as will appear from the files in this cause, and on a motion by them made, the said cause in this court was redocketed, and they further state that it is said cause so redocketed and so finally tried by this court and said decree so rendered therein and reversed by said supreme court that is sought by said petition to be removed into said Federal court, and they claim that for the reasons above stated and for the matters which appear of record in this cause, the petitioners are not entitled to have the same removed as prayed for, and they ask that said petition be dismissed and said removal refused.

EMILY A. KING,
By WAITE AND CLARK,
Her Sol'rs.
VERE BATES KING,
By EMILY A. KING,
His Guardian, &c.
By WAITE AND CLARK,
His Sol'rs.

And afterwards, to wit, on the fourteenth day of December, in the year last aforesaid, to wit, 1875, the same being one of the days of the December term of said court, the following among other pro-
72 ceedings were had in said court and entered of record, to wit:

Bill.

RALPH WORTHINGTON, ABBY M. HOYT, MARY B. Worthington, Clara C. Worthington, George W. Worthington, Alice M. Worthington, children and heirs of George Worthington, deceased, and John T. Avery,	3205, 31146.
vs.	
EMILY A. KING, VERE BATES KING, AND EMILY A. King, guardian of Vere Bates King.	

This day again come the parties to this suit by their solicitors respectively as aforesaid, and thereupon the said complainants file herein their petition based on affidavit for the removal of this cause to the United States circuit court in and for the northern district of the State of Illinois, and it appearing to the court that said complainants have filed herein their bond, conditioned according to the act of Con-
73 gress in such case made and provided, it is ordered by the court that this cause be, and the same is hereby, transferred to the said United States circuit court, and that the clerk of this court do forthwith transmit to said United States circuit court a complete transcript of all papers and pleadings in this cause, together with all orders of court made and entered herein.

STATE OF ILLINOIS,
Cook County, ss:

I, John J. Healy, clerk of the superior court of Cook County, in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete copy of a certain bill and affidavits, summons, two certain answers, replication, objections to deposition, mandate of supreme court, petition for removal, two certain bonds, and an answer to petition for removal, now on file herein, together with all orders made and entered of record in said court, in a certain cause lately pending in said court on the chancery side thereof, wherein Ralph Worthington et al. were complainants, and Emily A. King et al. were defendants.

74 In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 20th day of December, 1875.

{ SEAL OF CLERK OF SUPERIOR COURT OF COOK COUNTY. } JOHN G. HEALY, *Clerk.*

(Endorsed:) Filed Dec. 20, 1875. Wm. H. Bradley, clerk.

75 Superior court of Cook County. June term, A. D. 1874.

In chancery.

STATE OF ILLINOIS,
Cook County, ss:

JOHN T. AVERY AND RALPH WORTHINGTON, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington, George W. Worthington, & Alice M. Werthington
v.
EMILY A. KING, VERE BATES KING, & EMILY A. King, guardian of Vere Bates King.

Be it remembered that on the trial of this cause the following evidence was given in behalf of the complainants:

Filed July 15, 1874.

A. F. STEVENSON,
Clerk.

76 STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to C. M. Stone, esq., of Cleveland, in the State of Ohio.

Whereas it has been represented to us that John T. Avery, J. Canfield, Heman Scott, and John B. Bartholomew are material witnesses in a certain cause now depending in our superior court of Cook County in and for the county of Cook aforesaid, between John T. Avery and George Worthington, plaintiffs, and Emily A. King et al., defendants, and that the said witnesses reside without the said State of Illinois, and that their personal attendance cannot be procured at the trial of the said cause: Now know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witnesses, and do therefore authorize and require you to cause the said witnesses to come before you at such times and places as are designated in the annexed

notice, and diligently to examine the said witnesses on the oath or affirmation of the said witnesses by you first duly in that behalf
77 administered, and faithfully to take the deposition of the said witnesses upon all interrogatories to be propounded orally both on the part of the said plaintiffs and of the said defendants and none others; and the same when thus taken, together with this commission and the said interrogatories, to certify into our said superior court of Cook County with the least possible delay.

Witness Augustus Jacobson, clerk of our said court, and seal thereof, at Chicago, in said county, this 25th day of January, A. D. 1873.

A. JACOBSON,
Clerk.

The commissioner will please note the amount of his fees here, and whether paid or unpaid.

Commissioner's fee, $30.00.

Commissioner's fee, $30.00; mileage, $14.60; witness fees, $3.00; $47.60.

[SEAL.] Forty-seven & $\frac{60}{100}$ dollars, paid by pl'ff's att'ys.

78 Instructions as to the mode of taking, certifying, and return depositions according to the statute laws of Illinois.

1. Caption to the deposition.

The deposition of , of the county of and State (or Territory) of , a witness of lawful age, produced, sworn, and examined upon his corporal oath on the day of , in the year of our Lord one thousand hundred and seventy , at the office (or house) of in the town (or city) of the in the county of and State (or Territory) aforesaid by me, a commissioner (or "by us," if more than one commissioner. inserting all the names of the commissioners) duly appointed by dedimus potestatem or commission issued out of the clerk's office of the superior court of Cook County, in the State of Illinois, bearing teste in the name of , esq., clerk of the said superior court of Cook County, with the seal of said court affixed thereto, and to me (or "us," if more than one) directed as such commissioner (or "commissioners") for the examination of the said , a witness in a certain suit, and matter in controversy now pending and undetermined in the said superior court of Cook County, wherein is plaintiff, and
79 is defendant, behalf of the said as well upon the cross interrogatories of the , as on the interrogatories of the which were attached to or enclosed with the said commission and upon none others. The said being first duly sworn by me (or "by one of the said commissioners," if more than one) as a witness in the said cause previous to the commencement of his examination to testify the truth as well on the part of the plaintiff as the defendant in relation to matters in controversy between the said plaintiff and defendant so far as he should be interrogated, testified and deposed as follows:

"Interrogatory 1st." (Here insert the first interrogatory.)

"Answer to first interrogatory." (Here insert the answer.)

And so on successively in the order in which the interrogatories may be propounded and answered. Then follow "cross-interrogatories and answers thereto by the witness on the part of the defendant" (or plaintiff as the case may be). Here again write down the interrogatories and answers successively in the order aforesaid. After the deposition is taken, the interrogatories and answer should be read over to the

witness, and if he assents to the truth of the answers as written down, the witness will then sign his name at the bottom of the deposition and swear to the truth of it before the commissioner (or before one of the commissioners, if more than one). This oath is in addition to the preliminary oath which is administered previous to the commencement of this examination.

The commissioner should then certify as to the time, place, and manner of taking the deposition, as follows: I, of the county of and State (or Territory) of a commissioner duly appointed to take the deposition of the said , a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said as a witness in the suit between the said plaintiff and the said defendant, he was duly sworn by me as such commissioner (or "by , one of the commissioners," if more than one), to testify the truth in relation to the matters in controversy between the said plaintiff and the said defendant, so far as he should be interrogated concerning the same; that the said deposition was taken at my office, (or "at the house of ") in the city (or "town" of , in the county of and State (or "Territory") of on the day of , A. D. 187 , and that after said deposition was taken by me (or "us"), as aforesaid, the interrogatories and answers thereto as written down, were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent before me (or "us,") the oath being administered by one of said commissioners (where there are more than one), as such commissioner, at the place and on the day and year last aforesaid. (Signed) , commissioner.

(The foregoing certificate of the commissioner should be at the foot or bottom of the deposition, immediately following the signature of the witness.)

The commissioner should then fold up the deposition as thus taken and certified, together with the commission and interrogatories, and all exhibits (if any) produced on the examination, properly marked or lettered, as Exhibit A, Exhibit B, etc., and enclose the whole in a suitable wrapper or envelope, and then seal up the same securely with three seals, writing his name transversely across the middle seal; or, if two commissioners, they will each write their names, one on each of the outside seals; or, if three commissioners, then each one will write his name across one of the seals in manner aforesaid. The commissioner (or commissioners) will also endorse the names of the parties to the suit transversely across one end of the package thus sealed up, according to the proper title of the suit, and direct the same to the proper address of the clerk, who may issue the commission and transmit the same by mail to the proper post-office. Neither of the parties to the suit, or their attorneys or agents, or any person at all interested in the event of the suit, are permitted by law to dictate, write, or draw up any part of the deposition required to be taken as aforesaid.

N. B.—It is important to the validity of the deposition that these requirements and instructions should be strictly attended to.

P. S.—One caption will answer for the depositions of several witnesses, where they are all taken at the same time and place, to be read as evidence in the same suit, by so modifying the form here given as to make it applicable to the number of witnesses to be examined—as, for instance, at the commencement, say, "the depositions of A. B., C. D. and E. F., of the county of and State of , witnesses of lawful age, produced, sworn, and examined on their re-

spective corporal oaths," etc., and then, in the latter part of the caption, say, "The said A. B., C. D. and E. F., being first duly sworn by me as witnesses in the said cause," etc. Then at the commencement of each deposition say, "Interrogatories propounded to the said A. B., a witness produced and sworn as aforesaid on the part of the said and his answers thereto, as follows:

"Interrogatory 1st." (Here insert the first interrogatory.)

"Answer to 1st interrogatory." (Here insert the answer.)

And so on successively, with all the interrogatories to be propounded to that witness. Then insert the cross-interrogatories, as before directed. The deposition should then be read over to the witness, and signed, and sworn to by him before the next witness is examined. Then proceed, with the second and third witness in like manner to the end.

One certificate as to the time, place, and manner of taking
84 such depositions, and that each one was signed and sworn to by such witnesses, respectively, will be sufficient, provided due care be taken to insert the names of all the witnesses, and the certificate in other respects be in conformity with the form given in the first instance. Great care should always be taken to attach such depositions firmly together by means of tape or riband, and using wax or wafers when necessary.

In the superior court of Cook County, January term, A. D. 1873. In chancery.

STATE OF ILLINOIS,
Cook County, ss:

GEORGE WORTHINGTON & JOHN T. AVERY
vs.
EMILY A. KING ET AL.

To Messrs. Waite & Clarke, solicitors for said defendant, Emily A. King:

Please take notice that, in pursuance of the statute in such cases made and provided, we shall sue out of the office of the clerk of the superior court of Cook County a dedimus potestatum or commis-
85 sion, to be directed to C. M. Stone, esq., of Cleveland, Ohio, as commissioner, or to any judge, master in chancery, notary public, or justice of the peace, or other person authorized by law to take depositions, to take the testimony upon interrogatories to be propounded, orally, of the following witnesses to be used upon the trial of said cause upon the part of the said complainants, namely:

JOHN T. AVERY.
J. CANFIELD.
HERMAN SCOTT.
JOHN R. BARTHOLOMEW.

The testimony of the said John T. Avery & J. Canfield to be taken at the office of Messrs. Canfield & Caskey, att'ys in the city of Cleveland, Ohio, on the third day of February, A. D. 1873.

The testimony of Heman Scott to be taken at the office of John E. Davids, Marion, Ohio, on the fifth day of February, A. D. 1873; and the testimony of John B. Bartholomew to be taken at the residence of John R. Bartholomew, Rappids, Portage County, Ohio, on the seventh day of February, A. D. 1873, at which times & places you can appear

& cross-examine said witnesses if you see fit, the taking of said
86 testimony to be continued from day to day until concluded.
Yours, respectfully,

MILLER, FROST AND LEWIS,
Sol'rs for Compl'ts.

Service of a copy of the above notice accepted this 14th day of January, A. D. 1873.

WAITE & CLARKE,
Per DORMAN.
NICHOLAS A. LAUER,
Guardian ad litem.

In the superior court of Cook County. In chancery.

STATE OF ILLINOIS,
Cook County, ss:

GEORGE WORTHINGTON & JOHN T. AVERY
vs.
EMILY A. KING ET AL.

To Messrs. Waite & Clarke, solicitors for said Emily A. King, & to Nicholas A. Lauer, guardian ad litem of said defendant, Vere Bates King:

Please take notice that on the 25th day of January, A. D. 1873, at ten o'clock a. m., we shall sue out of the office of the clerk of the superior court a ded'mus potestatum, or commission, to be directed
87 to C. M. Stone, esq., to take the oral testimony of John T. Avery, J. Canfield, Heman Scott, & John B. Bartholomew, on the part of said complainants, pursuant to notice heretofore given of the time & place of the taking of said oral testimony.

MILLER, FROST & LEWIS,
Sol'rs for Compl'ts.

Service of a copy of the above notice accepted this 15th day of January, 1873.

WAITE & CLARKE,
Sol'r for E. A. King only.
N. A. LAUER,
Guardian ad litem.

To all persons to whom these presents shall come, greeting:

Know ye that I, L. H. Muzzy, of Springfield, Clark County & State of Ohio, for the consideration of seven hundred, to my full satisfaction of George W. Worthington, of Cleveland, Ohio, do give, grant, bargain, sell, and confirm unto the said Worthington the following described tract or lot of land, situate in the State of Illinois, in the county of Cook, and described as follows: It being the south half of the next half of the southwest quarter of section twenty (20), township thirty-eight (38), north of range thirteen (13), east of third principal meridian, containing forty acres of land, it being the south half of
88 eighty acres, deeded by A. L. Soule to John T. Avery, May, 1853.

To have and to hold the above granted and bargained premises, with the appurtenances thereof, unto the said Geo. W. Worthington, and to his heirs and assigns, forever, to his and their own proper use and be-

hoof. And also, I, the said L. H. Muzzy, do for myself, heirs, executors, or administrator covenant with the said Worthington, and with his heirs and assigns, that at and until the ensealing these presents, I am well seized of the premises as a good, indefeasible estate, in fee simple, and have good right to bargain and sell the same in manner and form as is above written; and that the same is free from all encumbrances whatsoever. And furthermore, I, the said L. H. Muzzy, do by these presents bind myself and my heirs forever to warrant and defend the above granted and bargained premises to him the said Worthington, and to his heirs and assigns, against all lawful claims and demands whatsoever.

In witness whereof I have hereunto set my hand and seal the second day of December, anno Domini, one thousand eight hundred and fifty-seven.

LUCIUS H. MUZZY. [L. S.]

89 Signed, sealed, and delivered in the presence of—
J. A. SPENCER.
C. ATWATER.

THE STATE OF OHIO,
Cuyahoga County, ss:

CLEVELAND, *Dec'r 2d*, 1857.

Before me, the subscriber, a notary public in and for said county, personally appeared the above-named Lucius H. Muzzy, who signed and sealed the foregoing deed, and acknowledged the signing and sealing thereof to be his free act and deed.

Given under my hand and seal of office this 2d day of December, A. D. one thousand eight hundred and fifty-seven.

[SEAL.] CALEB ATWATER,
Notary Public.

(Endorsed:) 95131. State of Illinois, Cook County. Filed for record December fifth, 1857, and recorded in book 133 of deeds, page 51. Wm. L. Church, cl'k.

Exhibit D. C. M. Stone, commissioner. Feb'y 3rd, 1873.

90 *Redemption certificate.*

STATE OF ILLINOIS,
Cook County, ss:

OFFICE OF THE CLERK OF THE COUNTY COURT OF COOK COUNTY.

I, Charles B. Farwell, clerk of the county court of Cook County, hereby certify that J. T. Avery has deposited in this office fourteen $\frac{84}{100}$ dollars for the redemption of undivided $\frac{1}{8}$ NW. $\frac{1}{4}$ section 34, town 39, range 13, which was sold to F. R. Wilson for the county, State, and taxes due and unpaid for the year 1855, on the 9th day of June, A. D. 1856, by the treasurer of said county.

Amount of sale	6 67
One hundred per cent	6 67
Subsequent taxes	
Interest	
Advertising fee	1 00
Cost	50
[SEAL.]	$14 84

Given under my hand and the seal of said court this 22 day of April, A. D. 1857.

C. B. FARWELL,
Clerk of the County Court.

Exhibit B. C. M. Stone, commissioner. Feb'y 3rd, 1873. $13.87.

91 The deposition of Heman Scott, of the county of Marion, and State of Ohio, witness of lawful age, produced, sworn and examined upon his corporal oath, on the 5th day of February, in the year of our Lord one thousand eight hundred & seventy-three, at the office of John E. Davids, Marion, in the county of Marion & State aforesaid, by me, C. M. Stone, a commissioner duly appointed by commission issued out of the clerk's office of the superior court of Cook County, in the State of Illinois, bearing teste in the name of A. Jacobson, esq., clerk of the said superior court of Cook County, with the seal of said court affixed thereto, and to me directed as such commissioner for the examination of the said Heman Scott, witness in a certain suit & matter in controversy now pending & undetermined in said superior court of Cook County, wherein John T. Avery and George Worthington are plaintiffs, and Emily A. King et al. are defendants, on behalf of the said plaintiffs, as well upon the oral cross-interrogatories of the defendants, by their counsel, W. L. Davis, esq., as on the oral interrogatories of the plaintiffs by Jason Canfield, esq., their counsel.

92 The said HEMAN SCOTT, being first duly sworn by me as a witness in said cause, previous to the commencement of his examination, to testify the truth as well on the part of the plaintiffs as the defendants in relation to the matter in controversy between the said plaintiffs & defendants, so far as he should be interrogated, testified and deposed as follows:

Interrogatory 1st. State your name, age, residence, and occupation.

Ans. to 1st interrogatory. Heman Scott; age, 75 years old; I reside at Marion, Ohio; and am in no active business.

Interrogatory 2nd. State if you ever owned any land outside of the city of Chicago, in the county of Cook, Illinois.

Ans. to 2nd interrogatory. I did, sir.

Interrogatory 3rd. State how much and from whom you derived the title.

Ans. to 3rd interrogatory. I cannot tell how much, but had the title from James S. Seymour, of Auburn, New York.

Interrogatory 4th. State whether you ever received a deed from James S. Seymour.

Ans. to 4th interrogatory. Yes; I did so.

93 Interrogatory 5. State whether you ever conveyed any part of the land to Isaac Bishop, of Tully, New York, which you received of James S. Seymour, of Auburn, New York.

Ans. to 5th interrogatory. I did, I am satisfied, for I have seen the deed. I would not have remembered it but for that.

Interrogatory 6th. When did you see the deed that you gave to Isaac Bishop, of Tully, New York?

Ans. to 6th interrogatory. I should think about two years ago, as near as can recollect. At the time I gave my deposition in this case before.

Interrogatory 7th. When, as near as you can recollect, was this deed made to Isaac Bishop, of Tully, New York?

Ans. to 6th interrogatory. I should think it was in the year 1844; sometime along in the spring of the year.

Interrogatory 8th. How much land did that deed convey to Isaac Bishop, of Tully, N. Y.?

Ans. to 8th interrogatory. I think it was eighty (80) acres.

Interrogatory 9th. Since your conveyance of the land to Isaac Bishop state whether or not you have been in possession of the land, or
94 exercised any control over it?

Ans. to 9th interrogatory. Not that I know of.

Interrogatory 10th. State whether to your knowledge you have paid any taxes on this land.

Ans. to 10th interrogatory. Not any that I know of.

Interrogatory 11th. Have you made a conveyance of this land subsequently to your conveyance to Isaac Bishop?

Ans. to 11th interrogatory. Not to my knowledge.

Interrogatory 12th. State whether you have made a quit-claim deed to John B. King, of Chicago, Ill.; and, if so, state the particulars in reference to that conveyance, when it was made, and the conversation that took place at the time.

Ans. to 12th interrogatory. I should think some four or five years ago, one Mr. Charles Ham, he called himself, who acted as the agent for Mr. King in the transaction of this business. He informed me that there was several pieces of land near Chicago, standing in my name, with the taxes unpaid, &c., and wished to know what I would
95 take—wanted to buy them. I told him I didn't think of taking any further trouble with it, as I supposed it was covered up with taxes, and didn't know that I owned it. He then made this proposition to me: "If you will give me a quit-claim I will look up these claims, and I will compromise with them the best I can; pay them a part, and divide the profits with you;" whereupon I gave him a quit-claim of those lots mentioned, which he had picked out.

Interrogatory 13th. State whether or not this Charles Ham was a stranger to you.

Ans. to 13th interrogatory. He was a stranger to me; never saw him before or since, to my knowledge.

Interrogatory 14th. State whether or not, at the time this quit-claim deed was made, Charles Ham, or any one beside, paid you anything for or on account of the land conveyed.

Ans. to 14th interrogatory. Not anything.

Interrogatory 15th. State whether you have ever received anything from John B. King, or from any one else, for or on account of this land conveyed to Isaac Bishop by deed heretofore referred to.

96 Ans. to 15th interrogatory. I never have received anything.

Interrogatory 16th. State, if you know, who showed you the deed which you made to Isaac Bishop, which you state having seen when your former deposition was taken, and state, if you know, what became of it.

Ans. to 16th interrogatory. The deed was shown me by Jason Canfield, esq. I do not , but suppose Mr. Canfield kept it.

Cross-examined by W. Z. DAVIS, esq., att'y for defendants:

Cross-interrogatory 1st. Have you any recollection of the sale & conveyance to Bishop apart from your inspection of the deed referred to?

Ans. to 1st cross-interrogatory. Well, I think I have some recollection of the transaction, but it is very indistinct, and I cannot tell for my life how he paid me.

Cross-interrogatory 2nd. Do you know that the deed which you saw was a genuine deed, executed and delivered by you to Mr. Bishop?

Ans. to 2nd cross-interrogatory. I think it was. I recognized my signature and remember of signing it.

97 Cross-interrogatory 3rd. Do you know what consideration, if any, passed between you and Bishop?

Ans. to 3rd interrogatory. I cannot tell whether there was anything—what he paid me, or anything about it.

Cross-interrogatory 4th. Can you remember independently of that deed precisely what land you conveyed to Bishop?

Ans. to 4th cross-interrogatory. I cannot.

Cross-interrogatory 5th. Are you positive concerning the genuineness of the signature of the deed you saw?

Ans. to 5th cross-interrogatory. I think I am.

HEMAN SCOTT.

I, C. M. Stone, of the city of Cleveland, county of Cuyohoga, and State of Ohio, a commissioner duly appointed to take the deposition of the said Heman Scott, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Heman Scott as a witness in the

98 suit between the said John L. Avery and George Worthington, plaintiffs, and Emily A. King et al., defendants, he was duly sworn by me as such commissioner, to testify the truth in relation to the matters in controversy between the said John T. Avery and George Worthington, plaintiffs, and Emily A. King et al., defendants, so far as he should be interrogated concerning the same. That the said deposition was taken at the office of John E. Davids, at Marion, in the county of Marion, & State of Ohio, on the 5th day of February, A. D. 1873, and that after said deposition was taken by me, as aforesaid, the interrogatories and answers thereto as written down were read over to the said witness, and that, thereupon, the same was signed and sworn to by the said deponent, Herman Scott, before me, the oath being administered by me as such commissioner, at the place and on the day and year last aforesaid.

C. M. STONE, *Commissioner.*

The deposition of John R. Bartholomew, of Rappids, Hiram Township, Portage County, Ohio, witness of lawful age, produced, sworn, and examined upon his corporal oath, on the seventh (7) day of February, in the year of our Lord one thousand eight hundred & seventy-

99 three, at the residence of John R. Bartholomew, Rappids, Portage County, and State of Ohio, by me, C. M. Stone, a commissioner duly appointed by commission issued out of the clerk's office of the superior court of Cook County, in the State of Illinois, bearing teste in the name of A. Jacobson, esq., clerk of said superior court of Cook County, with the seal of said court affixed thereto, and to me directed as such commissioner for the examination of the said John B. Bartholomew, witness in a certain suit and matter in controversy now pending and undetermined in said superior court of Cook County, wherein John T. Avery and George Worthington are plaintiffs, and Emily A. King et al. are defendants, on behalf of the said plaintiffs, as well upon the oral cross-interrogatories of the defendants by their counsel, O. C. Ferris, esq., as on the oral interrogatories of the plaintiffs, by Mess. Canfield & Caskey, their counsel.

The said JOHN R. BARTHOLOMEW being first duly sworn by me as a witness in said cause previous to the commencement of his examination to testify the truth, as well on the part of the plaintiffs as the defend-

ants in relation to the matters in controversy between the said
100 plaintiffs and defendants, so far as he should be interrogated, testified and deposed as follows:

Examined by CANFIELD & CASKEY, counsel for plaintiffs:

Interrogatory 1st. What is your name, age, residence and occupation?

Answer to 1st interrogatory. My name is John R. Bartholomew; am 70 years old; reside at Rappids, Hiram Township, Portage County, Ohio; and am engaged in farming.

Interrogatory 2nd. How long have you lived in this place?

Ans. to 2nd interrogatory. Fifteen years.

Interrogatory 3rd. At what other places have you lived since 1845?

Answer to 3rd interrogatory. I have lived in Troy, Geauga County, Ohio, which is about one & one-half miles from where I now live, and at Chagrin Falls, Cayohaga County, Ohio, and here.

Interrogatory 4th. Did you ever own any land in Cook County, Illinois?

Ans. to 4th interrogatory. I think that was the name of the county. I suppose I owned eighty (80) acres of land. Porter Hinckley
101 told me it lay twelve (12) miles from Chicago. Don't remember whether he said it was one & one-half miles or two & one half miles from the canal—at all events he said it was near the canal.

Interrogatory 5th. Was this land to which you refer deeded to you; and if so, by whom and when?

Ans. to 5th interrogatory. I took a deed of Porter Hinckley of eighty acres of pra'rie land near Chicago; had a warranty deed of it, and he said it was free from all incumbrances. Could not for my life tell the year it was deeded to me, but think it was twenty one or twenty two years ago; that is as near as I can come at it. I was living at Chagrin Falls, Ohio, at the time. Porter Hinckley made out the deed in Chester, Geauga County, Ohio, and brought it to me. We did not go before any justice of the peace for he brought the deed all ready for me.

Interrogatory 6th. State, if you recollect, in what year you moved to Chagrin Falls, and how long was it after you moved there before you got the deed from Hinckley?

Ans. to 6th interrogatory. I think I moved there twenty-four
102 years ago this spring; I think I got the deed the third year after I went there; it may have been the fourth year.

Interrogatory 7th. Do you recollect the description, or any part of it, of the land that was contained in the deed from Hinckley to you?

Ans. to 7th interrogatory. I could not tell anything about the description or boundary; I could not say positively that it was in Cook County, but am satisfied it was. I cannot read writing and only know what was told me about it. I know I paid Hinckley three hundred & fifty (350) dollars for some Indiana land which he took back and gave me this Chicago land instead, and Hinckley gave me back seventy-five (75) dollars. I know the deed of the Chicago land was read to me for I would not take it until it was read to me; I could read the printed portion of the deed myself.

Interrogatory 8th. Did Porter Hinckley ever deed to you more than one piece of land near Chicago or in Illinois?

Ans. to 8th interrogatory. No, sir.

103 Interrogatory 9th. Did you ever own more than one piece of land near Chicago or in Illinois?

Ans. to 9th interrogatory. No, sir.

Interrogatory 10th. Do you know where Porter Hinckley now lives?

Ans. to 10th interrogatory. I do not; have heard he lived up West somewhere in Wisconsin, I think.

Interrogatory 11th. State, if you know, what became of the deed of this Chicago land from Hinckley to you.

Ans. to 11th interrogatory. I gave it to Mr. Weeks to be put on record. Mr. Wicks is the man I deeded the land to. I gave him Hinckley's deed to me at the same time I deeded to him and I have not seen or heard of it since.

Interrogatory 12th. Do you recollect Mr. Weeks' first name?

Ans. to 12th interrogatory. I do not. He was a man I was not much acquainted with.

Interrogatory 13th. Do you think you would recollect his first name if you heard it spoken?

(Objected to by def'ts' counsel.)

Ans. to 13th interrogatory. I rather think I would.

104 Interrogatory 14th. Was his name Corydon Weeks?

Ans. to 14th interrogatory. I could not say whether it was or not.

Interrogatory 15th. Have you any knowledge as to the present whereabouts of the man Weeks to whom you gave this deed?

Ans. to 15th interrogatory. No, sir.

Interrogatory 16th. When was the last time you saw this man Weeks?

(Objected to by counsel for defence.)

Ans. to 16th interrogatory. I should think it was some two (2) months after the time I deeded to him. This is the last time I remember of seeing him. It seems to me as though I had heard that he was dead; some 18 or 20 years ago I heard it.

Interrogatory 17th. How long was it after Hinckley deeded this Chicago land to you before you deeded it to Weeks?

Ans. to 17th interrogatory. I could not tell how long it was; I do not recollect; I think it must have been within two (2) years. That is as near as I can recollect about it.

105 Interrogatory 18th. Did you ever deed any other land besides this Chicago land to this man Weeks?

Ans. to 18th interrogatory. No, sir.

Interrogatory 19th. Did you ever deed any land to any other man by the name of Weeks?

Ans. to 19th interrogatory. No, sir.

Interrogatory 20th. What consideration passed between you & Weeks when you deeded him this land?

Ans. to 20th interrogatory. We exchanged. He deeded me forty (40) acres of timbered land in Michigan, and I deeded him the Chicago land, and gave him the $75.00 note which Hinckley paid back to me upon the exchange of the Indiana land.

Interrogatory 21st. Was the $75.00 which you refer to in interrogatory 7th, as being paid back to you by Hinckley, in a note?

Ans. to 21st interrogatory. Yes; it was a note.

Interrogatory 22nd. Could you say whether or not the deed to Weeks was made within one year from the time Hinckley deeded to you?

Ans. to 22nd interrogatory. I could not.

106 Interrogatory 23rd. Did you ever go to see the Cook County land, or Chicago land?

Ans. to 23rd interrogatory. I never did.

Cross examined by O. S. FERRIS, Esq., counsel for defendant:

Cross interrogatory 1st. Did you carefully examine this deed of the Chicago land that Hinckley gave you?

Ans. to 1st cross-interrogatory. I took it and looked at it, and saw that it was a warranty deed. I could read the print and saw that it was a warranty deed. They read the whole deed to me.

Cross interrogatory 2nd. Do you know who deeded this Chicago land to Hinckley?

Ans. to cross-interrogatory 2nd. I do not.

Cross-interrogatory 3rd. Did you see the deed of the Chicago land that Hinckley had?

Ans. to 3rd cross-interrogatory. I did not.

Cross-interrogatory 4th. Did you have any other means of knowing that this Chicago land was free from incumbrance, only what Hinckley told you?

107 Ans. to 4th cross interrogatory. None at all.

Cross-interrogatory 5th. Did you ask for any abstract of title from Hinckley?

Ans. to 5th interrogatory. I did not.

Cross interrogatory 6th. How much did you pay for this land?

Ans. to 6th cross-interrogatory. I made the exchange as I have stated. I first took the Indiana land; but the title was not good, & made him give me this Chicago land in the place of it.

Cross-interrogatory 7th. Did you have your deed put on record?

Ans. to 7th cross interrogatory. No, sir; not the Chicago land.

Cross-interrogatory 8th. Do you positively know that this deed of your Chicago land was ever put on record?

Ans. to 8th cross-interrogatory. No, sir.

Cross-interrogatory 9th. How long did you own this Chicago land?

108 Ans. to 9th cross-interrogatory. I cannot tell whether it was one, two, or three years; don't think it was more than three years or less than one year. I did not pay any taxes, but thought once I ought to send some money to pay the taxes, but let it go; did not think it was worth it.

Cross-interrogatory 10th. How much did Mr. Weeks give you for this Chicago land?

Ans. to 10th cross interrogatory. He deeded me forty acres of land in Michigan, and I gave him $75.00 to boot.

Cross-interrogatory 11th. What did you consider the Michigan land worth at that time?

Ans. to 11th cross interrogatory. I did not call it worth anything. Weeks claimed the land was worth ten (10) dollars per acre.

Cross interrogatory 12th. Had you a warranty deed of the Michigan land?

Ans. to 12th cross-interrogatory. Yes, sir.

Cross-interrogatory 13th. How much money then did you actually receive for this Chicago land?

Ans. to 13th cross-interrogatory. All I got was what I derived from the Michigan land, which was forty (40) dollars.

109 Cross-interrogatory 14th. All the means you have of knowing that you had any legal title to this Chicago land is simply this warranty deed of Hinckley to you?

Ans. to 14th cross-interrogatory. Exactly.

Redirect examination:

Interrogatory 1st. Was the Porter Hinckley referred to you in your answer to interrogatory 4th, as telling you where this Chicago land was, the same Porter Hinckley referred to in your answer to interrogatory 5th as having deeded this land to you?

Ans. to 1st interrogatory redirect. Yes; the same.

T. R. BARTHOLOMEW.

I, C. M. Stone, of the city of Cleveland, county of Cayohoga, and State of Ohio, a commissioner duly appointed to take the deposition of the said John R. Bartholomew, a witness, whose name is subscribed to the foregoing deposition, do hereby certify, that previous to the commencement of the examination of the said John R. Bartholomew as a witness in the suit between the said John T. Avery & George Worthington, plaintiffs, and Emily A. King et al. defendants, he was duly sworn by me as such commissioner, to testify the truth in relation
110 to the matters in controversy between the said John T. Avery and George Worthington, plaintiffs, and Emily A. King et al., defendants, so far as he should be interrogated concerning the same; that the said deposition was taken at the residence of John R. Bartholomew, at Rappids, Hiram Township, in the county of Portage and State of Ohio, on the 7th day of February, A. D. 1873, and that after said deposition was taken by me as aforesaid the interrogatories and answers thereto as written down were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent, John R. Bartholomew, before me, the oath being administered by me as such commissioner, at the place and on the day and year last aforesaid.

C. M. STONE,
Commissioner.

(Endorsed:) Depositions of John T. Avery, Jason Canfield, & Herman Scott, & John R. Bartholomew, opened & filed Feb'y 12, 1873. A. Jacobson, clerk.

Dedimus.

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to William A. Babcock, esq.,
111 of the city of Cleveland and State of Ohio, or to any judge, justice of the peace, or other person authorized by law to take depositions:

Whereas it has been represented to us that John R. Bartholomew, Jason Canfield, and Alexander C. Caskey are material witnesses in a certain cause now depending in our superior court of Cook County, in and for the county of Cook aforesaid, between George Worthington et al., complainants, and Emily A. King et al., defendants, and that the said witnesses reside at Cleveland aforesaid, without the said State of Illinois, and that their personal attendance cannot be procured at the trial of the said cause. Now, know ye, that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witnesses, and do therefore authorize and require you to cause the said witnesses to come before you at such time and place as you may therefor designate and appoint, and diligently to examine the said witnesses on the oath or affirmation of the said witnesses by you first duly in that behalf administered, and faithfully to take the deposition
112 of the said witness upon all interrogatories inclosed with or attached to these presents, both on the part of the said plaintiff and of the said defendant, and none others; and the same, when thus taken, together with this commission and the said interrogatories, to

certify into our said superior court of Cook County with the least possible delay.

Witness Augustus Jacobson, clerk of our said court, and seal thereof, at Chicago in said county, this 28th day of October, A. D. 1873.

[SEAL.] A. JACOBSON, *Clerk.*

(The commissioner will please note the amount of his fees here, and whether paid or unpaid.)

Commissioner's fees, $5.00; paid by plaintiff.

N. B.—If deposition is to be taken orally, change to "upon interrogatories to be propounded to the witness orally," and strike out "and none others."

113 Superior court of Cook County, in chancery.

STATE OF ILLINOIS,
Cook County, ss:

GEORGE WORTHINGTON & JOHN T. AVERY
vs.
EMILY A. KING, VERE BATES KING, & EMILY A. King, guardian of said Vere Bates King.

To Messrs. Waite & Clarke, solicitors for said defendants, & to Nicholas Lauer, esq., guardian ad litem of Vere Bates King:

Please take notice that on Monday, October 27th inst., at 10 a. m., we shall sue, out of the office of the clerk of said court, a dedimus potestatem, or commissioner to be directed to William A. Babcock, esq., a notary public of the city of Cleveland & State of Ohio, or to any judge, justice of the peace, notary public, master in chancery, or other person authorized by law to take the depositions of witnesses, to take the depositions of John R. Bartholomew, Jason Canfield, and Alexander C. Caskey, witnesses on behalf of said complainants residing in said
114 city of Cleveland & State of Ohio, upon the interrogatories hereto annexed, together with such cross-interrogatories as you may see fit to file, said depositions to be read in evidence upon the trial of the above entitled cause on behalf of the complainants.

Respectfully,

MILLER & FROST,
Solicitors for Compl'ts.

Interrogatories to be propounded to John R. Bartholomew under a commission to be issued to William A Babcock, esq., of Cleveland, O.

Int. 1st. Have you previously been examined as a witness in this case; if so, when?

Int. 2d. Did you ever purchase the land in controversy from any one? If so, from whom & when did you purchase it?

Int. 3rd. If you say you purchased it from Porter L. Hinckley, state whether said Hinckley ever executed to you a deed of said land; state all you know with regard to the execution of said deed, and the contents thereof, and state what you did with said deed—whether you
115 have ever seen it since. If you say you delivered said deed to Corydon Weeks, state how you happened to deliver the same to said Weeks.

Int. 4th. Did you ever sell and convey said land to any one; if so, to whom & when?

Int. 5th. If you say you sold and conveyed said land to Corydon Weeks, state all you know about having executed a deed of said land to said Weeks. State fully the contents of said deed, so far as you are able to do so.

Int. 6th. State all you know upon the subject as to whether the description of the lands as contained in the deed executed by you to Weeks was the same as that contained in the deed executed by Hinckley to you?

Int. 7th. Where are the deeds above referred to, to wit, the deed executed by Hinckley to you and the deed executed by you to Weeks, and where were they when you last saw them?

Int. 8th. Where did said Weeks live when you executed said deed to him? Where is he now, and where was he when you last knew or heard of him? If you say he is dead, what reason have you for thinking so?

116 Int. 9th. Do you know of any other matter which may be of benefit or advantage to the complainants in this suit? If so, please state the same as fully and particularly as if specially interrogated in respect thereto.

Interrogatories to be propounded to each of the witnesses Jason Canfield & Alexander C. Caskey, of Cleveland, Ohio, under a commission to issue to William A. Babcock, esq., of Cleveland aforesaid:

Int. 1st. What is your name, age, and occupation, & where do you reside, & state whether you are a member of the firm of Canfield & Caskery, Cleveland, Ohio.

Int. 2. Have you or your firm acted, and are you now acting as the attorneys for the complainants in the above entitled cause? If so, to what extent have you so acted?

Int. 3rd. Have the complainants, or either of them, in their possession or under their control the deed executed by Porter L. Hinckley to John R. Bartholomew of the property in controversy and the deed of the same property executed by John R. Bartholomew to Corydon Weeks,

117 or either of them, so that the same, or copies of the same, can be used on the said cause? and if you say they have not, how do you know they have not, and what efforts have been made to procure said deeds or copies of them?

4th. State all you know with regard to the present whereabouts of said Corydon Weeks, and what efforts have been made, and with what results, to find said Weeks, or obtain any clue to the deeds above mentioned.

Int. 5th. Have the complainants, or either of them, any or either of the following deeds of said property in their possession or under their control, to wit: Deed from Heman Scott to Isaac Bishop; deed from Isaac Bishop to Porter L. Hinckley; and from Corydon Weeks to A. L. Soulé; and is it in the power of complainants, or either of them, to produce said deeds, or either of them, on the hearing of said cause; & if not, why not?

Int. 6. Do you know of an abstract ever having been made of the title to said property? If so, when & by whom was the same made, and what was done with said abstract?

118 Int. 7th. Did you read and examine said abstract, and can you give the contents thereof? If you can, do so, as far as you are able to.

Int. 8th. Do you know of any other matter which may be of benefit

or advantage to the complainants in this suit? If so, please state the same as fully & particularly as if specially interrogated in respect thereto.

Service of a copy of the above notice & interrogatories accepted this 16th day of Oct., 1873.

WAITE & CLARKE.
N. A. LAUER.

Superior court of Chicago. In chancery.

GEORGE WORTHINGTON, JOHN T. AVERY
vs.
EMILY A. KING ET AL.

Cross-interrogatories to be administered to John R. Batlet, under a dedimus to be issued to William A. Babcock, &c.:

First cross-interrogatory. Have you had any conversation with
119 any person—if so, when—in regard to the subject-matter of this controversy?

Second. State of your own knowledge, without asking any one or examining any papers not made by you, the exact description of the land.

Third. Did any one make any suggestions to you in regard to the answer of the above interrogatory? If so, who? Who is present when your deposition is being taken? In answering the above interrogatory, did you examine any paper? If so, by whom & when was the same made?

Fourth. If you speak of a deed from Porter L. Hinckley to any one, have you stated all you know in regard to said deed, or its acknowledgment, in answer to interrogatory third?

Fifth. Has your deposition been taken alone, or has other persons aside from the commissioner been present when it is being taken? Has any one but the commissioner taken any part in taking of your deposition? If so, who? Has any one made any suggestion to you or
120 the commissioner while your deposition is being taken? If so, what has been suggested?

Cross interrogatories to be administered to Jason Canfield & Alexander C. Caskey:

Cross-interrogatory first. If either of you speak of being attorneys for the complainants, or other of them, when were you so retained? What contingent fee, if any, have you, in either this suit or the land in controversy?

Second. Are your fees, or either of your fees, in anywise contengent or dependant upon the result of complainants' holding the land?

Third. If the complainant should succeed, or had the land in controversy, what effect, if any, will it have upon your fees? What interest have you in the land in controversy?

Fourth. If any bargain has been made between complainants, or either of them, or any one for & in them?

WAITE & CLARKE.

121 The depositions of John R. Bartholomew and Alexander C. Caskey, of the county of Cuyahoga and State of Ohio, witnesses of lawful age, produced, sworn, and examined on their respective corporal oaths, on the 12th day of November, in the year of our Lord one thousand eight hundred and seventy-three, at the residence of

John R. Bartholomew and the office of Canfield and Caskey, in the city of Cleveland and county of Cuyahoga, and State aforesaid, by me, W. A. Babcock, a commissioner duly appointed by dedimus potestatem, a commission issued out of the clerk's office of the superior court of Cook County, in the State of Illinois, bearing teste in the name of A. Jacobson, esq., clerk of the said superior court of Cook County, with the seal of said court affixed thereto, and to me directed, as such commissioner, for the examination of the said John R. Bartholomew and Alexander C. Caskey, witnesses in a certain suit and matter in controversy now pending and undetermined in the said superior court of Cook County, wherein George Worthington et al. are complainants, and Emily A. King defendant, in behalf of the
122 said complainants, as well upon the cross interrogatories of the defendants as on the interrogatories of the complainants which were attached to or enclosed with the said commission, and upon none others.

The said JOHN R. BARTHOLOMEW and ALEXANDER C. CASKEY, being first duly sworn, by me, as witnesses in the said cause previous to the commencement of their examination, to testify the truth as well on the part of the plaintiffs as the defendants in relation to the matters in controversy between the said plaintiffs and defendants, so far as they shall be interrogated, testified and deposed as follows:

Interrogatories propounded to the said John R. Bartholomew, a witness produced and sworn as aforesaid on the part of the said complainants, and his answers thereto:

Answer to first interrogatory. I have been examined before as witness in this case. I think it was during the winter of 1872 & '73.

Answer to second interrogatory. I purchased eighty acres of land in Cook Co., Ill., near Chicago. I suppose it to be the land in controversy. I purchased it of Porter S. Hinckley about 20 years ago, as near as I can remember.

123 Answer to third interrogatory. He executed and delivered to me a warranty deed of the land for which I gave him $345.00. He gave me the deed in Chagrin Falls, Ohio, at which place I think it was acknowledged before Gen. Knox. I gave the deed to Corydon Weeks to have him get it recorded, and have not seen it since. I gave Corydon Weeks a deed of the same land in exchange for a deed of land in Michigan, which he owned, and also gave him $75 beside.

Answer to fourth interrogatory. I conveyed the land to Corydon Weeks, and I think about six months after I bought it of Hinckley.

Answer to fifth interrogatory. I executed a deed of the land to Corydon Weeks. It was a warranty deed and executed and acknowledged before Gen. Knox, I think. It contained the same description as the deed from Hinckley to me.

Answer to sixth interrogatory. It was bounded and described exactly the same in the deed from me to Weeks as in the deed from Hinckley to me.

Answer to 7th interrogatory. I cannot say where they are. I
124 have not seen them since I gave them to Corydon Weeks. They were handed over to him at Chagrin Falls, Ohio.

Answer to eighth interrogatory. I do not know where he lived when I gave him the deed, nor do I know where he is now. The last I knew of him he was at Chagrin Falls, Ohio. I think he is dead, because I have been so informed.

Answer to ninth interrogatory. I know of nothing more in regard to it.

Answer to first cross-interrogatory. I do not know that I ever had any conversation in regard to it with any one.

Answer to second cross-interrogatory. I cannot describe the land. Hinckley told me that it was pra'rie land, situated about 12 miles from the harbor and about 2 miles from the canal.

Answer to third cross-interrogatory. No one has made any suggestion to me. No one is present but myself, the commissioner, and my family. In answering the interrogatory I examined no paper.

Answer to fourth cross-interrogatory. I have stated all I know about it.

Answer to fifth cross-interrogatory. No one has been present
125 but my family. No one has taken any part but the commissioner. No suggestion has been made.

J. R. BARTHOLOMEW.

Dedimus.

Superior court of Cook County.

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to L. L. Ainsworth, esq., of West Union, Fayette County, Iowa, or to Charles H. Millar, of said county and State, or to any judge, master in chancery, notary public of justice of the peace of said county & State.

Whereas it has been represented to us that Porter L. Hinckley is a material witness in a certain cause now depending in our superior court of Cook County, in and for the county of Cook aforesaid, between George Worthington and John T. Avery, plaintiffs, and Emily A. King et al, defendants, and that the said witness reside' at West Union aforesaid, without the said State of Illinois, and that his personal attendance cannot be procured at the trial of the said cause: Now know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witness, and do therefore
126 authorize and require you to cause the said witness to come before you at such time and place as you may therefor designate and appoint, and diligently to examine the said witness on the oath or affirmation of the said witness by you first duly in that behalf administered, and faithfully to take the deposition of the said witness upon all interrogatories inclosed with or attached to these presents both on the part of the said plaintiff and of the said defendant, and none others; and the same, when thus taken, together with this commission and the said interrogatories, to certify into our said superior court of Cook County with the least possible delay.

Witness Augustus Jacobson, clerk of our said court, and seal thereof, at Chicago, in said county, this 25th day of January, A. D. 1873.

[SEAL.] AUGUSTUS JACOBSON, *Clerk.*

(The commissioner will please note the amount of his fees here, and whether paid or unpaid.)

Commissioner's fee, $.

127 STATE OF ILLINOIS,
Cook County, ss:

In the superior court of Cook County. In chancery.

GEORGE WORTHINGTON & JOHN T. AVERY
vs.
EMILY A. KING ET AL.

To Messrs. Waite & Clarke, solicitors for said Emily A. King, & to Nicholas A. Lauer, guardian ad litem of said defendant Vere Bates King.

Take notice that on the 25th day of January, A. D. 1873, at ten o'clock in the forenoon of said day, we will sue out of the office of the clerk of the superior court of Cook County a dedimus protestatem on commissioner under the seal of said court and directed to L. L. Ainsworth, esq., of West Union, Fayette County, Iowa, or to any judge or justice of the peace of the county & State last above mentioned, or any other person authorized by law to take depositions, to take the deposition of Porter L. Hinckley upon the interrogatories hereto attached, to be read in evidence on the part of the complainants on the trial of the above-
128 entitled cause now pending in the said superior court on the chancery side thereof, when & where you can appear & file cross-interrogatories & join in said commission if you so wish.

Dated January, A. D. 1873.

MILLER, FROST & LEWIS,
Sol'rs for Comp'l'ts.

Interrogatories referred to in the foregoing notice & to be answered by Porter L. Hinckley, a witness to be produced, sworn, & examined under & by virtue of the annexed commission on the part & behalf of said complainants, as follows, to wit:

Interrogatory 1st. What is your name, age, occupation, & place of residence?

Interrogatory 2nd. Do you know the parties to this suit, or either & which of them, & how long have you known them respectively?

Interrogatory 3rd. Do you know the west half of the southwest quarter of section 20, township 38 north, range 13 east of 3rd principal meridian, Cook Co., Illinois? Did you ever own said 80 acres of land? If so, state from whom you purchased the same & when you so purchased said land.

129 Interrogatory 4th. If, in answer to the last interrogatory, you have stated that you purchased said land of one Isaac Bishop, please state whether or not said Bishop executed & delivered to you a deed of said land. If so, give as nearly as you can the date of said deed & the consideration named in it, & state whether, at the time you purchased said land, said Bishop delivered to you any other title papers to said land; &, if so, what they were, and particularly whether he ever delivered to you a deed for this land from one Heman Scott to him, said Bishop.

Interrogatory 5th. If in answer to the last interrogatory you have stated that said Bishop delivered to you a deed from himself to you of said land, & also a deed from Heman Scott to him. said Bishop, for the same land, please state how long said deeds remained in your possession, & when & to whom & under what circumstances you parted with the possession of said deeds.

Interrogatory 6th. State whether you ever sold & conveyed the above described lands. If so, to whom & when; and did you execute a deed for the same?

130 Interrogatory 7th. State whether you have ever before given your deposition in this case; if so, when, and state whether you attached as an exhibit to your said deposition said deed of said Isaac Bishop to you of this land; and if you say you did, state how said deed came into your possession at the time said deposition was taken.

Interrogatory 8th. Do you know any other matter or thing in reference to this suit or the title to the above described land which would be of advantage to the said complainants? If so, please state the same as fully & particularly as though specially interrogated with respect thereto.

Service of a copy of the above notice & interrogatories accepted this 15th day of January, A. D. 1873.

WAITE & CLARKE,
Solicitors E. A. King only.

N. A. LAUER,
Guardian ad litem.

THE STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County. In chancery.

GEORGE WORTHINGTON, JOHN T. AVERY,
vs.
EMILY A. KING ET AL.

131 Cross-interrogatories to be administered to Porter L. Hinckley.

First. If you speak of any deed as being made to you by any one of the west half of the southwest quarter of section 20, T. 38 north, of range 13 east of the 3d P. M., in your interrogatories in-chief, state whether or not the same was a warrantee deed or not.

Second. If you, in answer to the interrogatories-in-chief, speak of a deed of having been made by you to any one of said land described in the last interrogatory, or any land, state whether or not said deed was a warrantee deed.

X-interrogatory 3d. Who is present in the room while your said deposition is being taken, and what is the business of and the name of each of said persons so present, what have said persons to say or do about the taking of your said deposition?

X interrogatory 4. What is your present age?

X interrogatory 5th. If you, in your interrogatories in-chief, speak of any deed from Heman Scott, were you present when the same was executed—did you see the same acknowledged—who witnessed the

132 same—who acknowledged the same—was the same acknowledged before any officer, if so, the kind of an officer & his name? In what form was the same acknowledged? How many witnesses were there to said deed?

X interrogatory 6. Have you answered fully each of the above questions; if not, will you do so?

X-interrogatory 7th. If to any of the above interrogatories you speak of a deed from Herman Scott, what consideration was named therein? What was the form of the acknowledgement? How long have you been

personally acquainted with Herman Scott? When did you first become acquainted with him? Who was present at the time of the execution of said deed? Who acknowledged the same?

X-interrogatory 8. If in answer to any of the interrogatories in chief you refer to a deed from Isaac Bishop, before whom was the same acknowledged? Give the officer's name and office. How many witnesses, if any, did said deed have? When was said deed executed? Who was present at the time of its execution? What was the names of
133 the witnesses to such deed?

X-interrogatory 9. If in answer to the interrogatories in chief you speak of a deed from yourself to any one, when was the same executed? Who was present at the execution of the same? Who acknowledged the same? In what form was the same acknowledged? Give the form of the acknowledgement. Give the names of the witnesses to such deed.

X-interrogatory 10. Have you answered each part of the three last interrogatories; if not, will you now answer each part of the same fully?

X-interrogatories 11. Do you know of any matter or thing of importance to the defendant? If so, answer the same fully and at large.

WAITE & CLARKE,
Defendant's Solicitors.

(Endorsed:) Filed Jan'y 2d at 11.05 a. m., 1873. A. Jacobson, cl'k. Opened and filed Feb'y 14, 1873. A. Jacobson, clerk.

134 In the superior court of Cook County, State of Illinois.

GEORGE WORTHINGTON & JOHN T. AVERY
vs.
EMILY A. KING ET AL.

The deposition of Porter L. Hinckley, of the county of Fayette, and State of Iowa, a witness of lawful age, produced, sworn, and examined upon his corporal oath on the 8th day of February, in the year of our Lord one thousand eight hundred and seventy-three, at the office of Ainsworth & Millar, in the town of West Union, in the county of Fayette, and State of Iowa aforesaid, by me, Chas. H. Millar, a commissioner duly appointed by dedimus protestatem, issued out of the superior court of Cook County in the State of Illinois, bearing teste in the name of Augustus Jacobson, esq., clerk of said superior court of Cook County, with the seal of said court affixed thereto and to me directed as such commissioner for the examination of the said Porter L. Hinckley, a witness in a certain suit and matter in contro-
135 versy now pending and undetermined in the said superior court of Cook County, wherein George Worthington and John T. Avery are plaintiffs and Emily A. King et al., are defendants, in behalf of the said plaintiffs as well as upon the cross-interrogatories of the defendants as on the interrogatories of the plaintiffs which were attached to and enclosed with the said commission and upon none others.

The said PORTER L. HINCKLEY, being first duly sworn by me as a witness in the said cause previous to the commencement of his examination to testify the truth as well on the part of the plaintiffs as on part of the defendant in relation to the matters in controversy between the said plaintiffs and defendants so far as he shall be interrogated, testified and deposed as follows:

Interrogatories on the part and behalf of said complainants.

Interrogatory 1st. What is your name, age, occupation, and place of residence?

Answer. Porter L. Hinckley; 52 years; justice of the peace; West Union, Fayette County, Iowa.

Interrogatory 2d. Do you know the parties to this suit or either
136 and which of them, and how long had you known them, respectively?

Answer. Don't know any of them.

Interrogatory 3rd. Do you know the west half of the southwest quarter of section 20, township 38 north, range 13 east of 3d principal meridian, Cook County, Illinois? Did you ever own said 80 acres of land? If so, state from whom you purchased the same, and when you so purchased said land?

Answer. I do know said land; I did own it; I purchased the same from Isaac Bishop, October 13th, 1845.

Interrogatory 4th. If in answer to the last interrogatory you have stated that you purchased said land of one Isaac Bishop, please state whether or not said Bishop executed and delivered to you a deed of said land; if so, give as nearly as you can the date of said deed and the consideration named in it, and state whether at the time you purchased said land said Bishop delivered to you any other title papers to said land; and if so, what they were, and particularly whether he ever delivered to you a deed for this land from one Heman Scott to him said Bishop.

137 Answer. Said Bishop executed a deed of said land to me dated October 13th, 1845; the consideration named in said deed I cannot recollect. Said Bishop at that time delivered to me other title papers to said land, to wit, a warranty deed from Heman Scott to Isaac Bishop. Dated September 20th, 1848.

Interrogatory 5th. If in answer to the last interrogatory you have stated that said Bishop delivered to you a deed from himself to you of said land, and also a deed from Heman Scott to him said Bishop for the same land, please state how long said deeds remained in your possession and when and to whom and under what circumstances you parted with the possession of said deeds.

Answer. Said deeds was in my possession from October 13th, 1845, to December 26th, 1860. At the request of Canfield & Caskey, attorneys at Cleveland, Ohio, I sent said deeds to them Dec. 26th, 1869. The reason why I parted with said deeds were as follows: Said attorneys wrote to me enquiring about said deeds. Up to that time I had supposed that my deed was on record, but on looking over my papers I found
138 the deeds from Scott to Bishop and from Bishop to me and discovered that they had not been recorded, which fact I gave said Canfield & Caskey notice of; they replied to me and said if I would send the deeds to them they would see that they were recorded in Chicago, and would then return them to me without expense to me. I forwarded the deeds to the said attorneys on the 26th day of Dec., 1869, as above stated, and have never to my knowledge or recollection received them back.

Interrogatory 6th. State whether you ever sold and conveyed the above described lands; if so, to whom, and when, and did you execute a deed for the same?

Answer. I sold the above-described land and gave a deed therefor to

John R. Bartholomew, the time I do not remember; but think it was between 1848 and 1850.

Interrogatory 7th. State whether you have ever before given your deposition in this case. If so, when, and state whether you attached as an exhibit to your said deposition said deed of said Isaac Bishop to you of this land, and if you say you did, state how said deed came
139 into your possession at the time said deposition was taken.

Answer. I have. I gave my deposition in this case before in December, 1870, I think. Don't remember whether I attached a deed of said land from Bishop to me as as an exhibit or not to said deposition.

Interrogatory 8th. Do you know any other matter or thing in reference to this suit, or the title to the above-described land which would be of advantage to the said complainants? if so, please state the same as fully and particularly as though specially interrogated with respect thereto.

Answer. I know nothing further.

THE STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County. In chancery.

GEORGE WORTHINGTON & JOHN T. AVERY
vs.
EMILY A. KING ET AL.

Cross-interrogatories and answers thereto by the witnesses, Porter L. Hinkley, on the part of the defendants.

X interrogatory 1st. If you speak of any deed as being made
140 to you by any one of the west half of the southwest quarter of section 20, T. 38 north, of range 13 east of the 3rd p. m., in your interrogatories in chief, state whether or not the same was a warranty deed or not.

Answer. Can't say positively, but I think it was a warranty deed that I gave of said land.

X interrogatory 2d. If you, in answer to the interrogatories-in chief, speak of a deed as having been made by you to any one of said land described in the last interrogatory, or any land, state whether or not said deed was a warranty deed.

Answer. I gave John R. Bartholomew a deed of said land; can't say whether it was a warranty or quit claim deed.

X interrogatory 3rd. Who is present in the room while your said deposition is being taken, and what is the business of and the name of each of said persons so present? What have said persons to say or do about the taking of your said deposition?

Answer. Chas. H. Miller, the commissioner, J. F. Clark, who is doing the writing for said commissioner, and Wm. Riley, a town constable. Mr. Riley has nothing to say or do about it. The others as stated
141 above.

X interrogatory 4th. What is your present age?

Answer. Between 52 and 53 years of age.

X interrogatory 5th. If you, in your interrogatories-in-chief, speak of any deed from Heman Scott, were you present when the same was executed; did you see the same acknowledged; who witnessed the same;

who acknowledged the same; was the same acknowledged before any officer; if so, the kind of an officer, and his name; in what form was the same acknowledged; how many witnesses to said deed?

Answer. Was not present when the deed from Heman Scott was executed. Did not see it acknowledged. Can't remember the names of witnesses. It was acknowledged by Curtis Allen, a justice of the peace, in Marion County, Ohio, August 12th, 1844. Can't recollect the form of the acknowledgment. Can't say how many witnesses there were to said deed.

X interrogatory 6th. Have you answered fully each of the above questions; if not, will you do so?

Answer. I have answered the above questions as fully as I can, to the best of my recollections. The transaction was so long ago I cannot recollect all the minute forms of the deeds.

142 X interrogatory 7th. If, to any of the above interrogatories, you speak of a deed from Heman Scott, what consideration was named therein; what was the form of the acknowledgment; how long have you been personally acquainted with Heman Scott; when did you first become acquainted with him; who was present at the time of the execution of said deed; who acknowledged the same?

Answer. Don't remember the consideration in the deed from Heman Scott. Don't remember the form of acknowledgment. Never saw the Heman Scott referred to in the deed to my knowledge. Don't know who was present when said deed was executed. In answer to 5th interrogatory I have stated who acknowledged the same.

X interrogatory 8th. If, in answer to any of the interrogatories-in-chief, you refer to a deed from Isaac Bishop, before whom was the same acknowledged? Give the officer's name and office. How many witnesses, if any, did said deed have; when was said deed executed; who was present at the time of its execution; what was the names of the witnesses to said deed?

143 Answer. The deed from Isaac Bishop was acknowledged before Cyrus McLouth, justice of the peace in and for Geauga County, State of Ohio. Don't remember how many witnesses said deed had, nor who they were; said deed was executed October 13th, 1845. Don't remember who were present at the time of the execution of said deed aside from the parties and the justice who took the acknowledgment.

X interrogatory 9th. If, in answer to the interrogatories-in-chief, you speak of a deed from yourself to any one, when was the same executed; who was present at the execution of the same; who acknowledged the same; in what form was the same acknowledged? Give the form of the acknowledgement. Give the names of the witnesses to said deed.

Answer. Can't remember the exact date of the deed. I executed a deed to John R. Bartholomew some time between 1848 and 1850. Don't remember who was present at the execution of the same except the parties interested in the deed, and the justice before whom it was acknowledged; his name I do not recollect, but he was a justice of the peace in Chagrin Falls, Cuyahoga County, State of Ohio. Don't remember the form of acknowledgement. Cannot give the names of witnesses to said deed.

144 X interrogatory 10th. Have you answered each part of the 3 last interrogatories; if not, will you now answer each part of the same fully?

Answer. I have answered the last 3 interrogatories as fully as I can.

X interrogatory 11th. Do you know of any matter or thing of importance to the defendants? If so, answer the same fully and at large.

Answer. I do not.

PORTER L. HINKLEY.

Subscribed by the said Porter L. Hinkley and by him sworn to before me & in my presence this 10th day of February, A. D. 1873.

[SEAL.] CHAS. H. MILLER.
Notary Public & Commissioner.

I, Chas. H. Miller, of the county of Fayette, and State of Iowa, a commissioner duly appointed to take the deposition of the said Porter L. Hinkley, a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said Porter L. Hinkley, as a witness in the suit between the said George Worthington & John T. Avery, plaintiffs, and the said Emily A. King et al., defendants, he was duly sworn by me as such commissioner,
145 to testify the truth in relation to the matters in controversy between the said George Worthington & John T. Avery, plaintiffs, and the said Emily A. King et al., defendant', so far as he should be interrogated concerning the same; that the said deposition was taken at the office of Ainsworth & Millar, in the town of West Union, in the county of Fayette, and State of Iowa, on the eighth day of February, A. D. 1873, and that after said deposition was taken by me as aforesaid, the interrogatories and answers thereto as written down, were read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent Porter L. Hinkley, before me, the oath being administered by me, Chas. H. Miller, as such commissioner at the place and on the day and year last aforesaid.

CHAS. H. MILLAR,
Commissioner.

Witness fee, 2 days, $5.00; commissioner's fee, 15.00.

(Endorsed:) Opened & filed Feb. 14, 1873. A. Jacobsen, cl'k.

146 The deposition of Louisa L. Weeks and Carlos C. Weeks, of the city of Mt. Vernon, county of Knox, and State of Ohio, witness' of lawful age, produced, sworn, and examined upon their respective oaths, on the 14th day of April, in the year of our Lord one thousand eight hundred and seventy-four, at the office of Will. A. Coulter, in the city of Mt. Vernon, in the county of Knox, and State aforesaid, by me, Will. A. Coulter, a commissioner duly appointed by dedimus potestatem or commission issued out of the clerk's office of the superior court of Cook County, in the State of Illinois, bearing teste in the name of A. T. Stevenson, esq., clerk of the said superior court of Cook County, with the seal of said court affixed thereto, and to me directed as such commissioner for the examination of the said Louisa L. Weeks and the said Carlos C. Weeks, witnesses in a certain suit and matter in controversy now pending, and undetermined in the said superior court of Cook County wherein Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington, George Worthington, and Alice M. Worthington, and John T. Avery, are plaintiffs, and Emily A. King and Vere Bates King and Emily
147 A. King, guardian of Vere Bates King, are defendants, on behalf of the said plaintiffs, as well upon the cross-interrogatories of the defendant, as upon the interrogatories of the plaintiffs, propounded to the said witnesses orally, by the attorneys of the said parties, plaintiff, as well as defendant.

The said LOUISA L. WEEKS and CARLOS C. WEEKS, being first

duly sworn by me as witnesses in the said cause, before the commencement of their examination, to testify the truth, as well on the part of the plaintiff as the defendant in relation to the matter in controversy between the said plaintiff and defendant, so far as they should be interrogated, testified and deposed as follows:

Interrogatories propcunded to the said Carlos H. Weeks, a witness produced and sworn as aforesaid, on the part of the plaintiff, and the answers of the said Carlos H. Weeks thereto, as follows:

Interrogatory. 1st. State your name, age, residence, and occupation.

Answer. My name is Carlos H. Weeks; age, 24 years; residence, Mt. Vernon, Ohio; occupation, telegraph operator.

Inter'og. 2. State what relation there is between you and Corydon Weeks, of Summit County, Ohio, formerly, now a resident of the
148 State of Michigan.

Ans. My father.

Inter'og. 3rd. At what time, if you know, did Corydon Weeks leave Summit County, Ohio, to go to Michigan?

Ans. In 1866.

Inter'og. 4. Where did you reside at the time your father left Summit County, Ohio, and who composed your household at that time?

Ans. I resided in the township of Stow, Summit County, Ohio. My mother, two brothers and a sister composed household.

Inter'og. 5th. At the time your father left, do you recollect of their being in the possession of your family a bureau with drawers? And, if so, state what became of it, if you know.

Ans. We had a bureau at that time; it was sold, but I do not remember who we sold it to, now. It was sold in 1871, I think.

Interrog. 6th. State whether you had access to that bureau after your father left, and while in your possession; and, if so, state whether you ever saw in it or about it any deeds.

Ans. I had access to the bureau. I never saw any deeds in the bureau.

149 Interrog. 7th. If, at the time your father left, deeds of land had been left in that bureau, state whether your access to the bureau or your knowledge of the contents would have brought them to your attention.

Ans. Yes; I should have known it if they were there.

Inter'og. 8th. State what you know, if anything, with reference to two deeds, one of Porter L. Hinckley to John R. Bartholomew, and the other, John R. Bartholomew to Corydon Weeks, of eighty acres of land in Cook County, Illinois.

Ans. I know nothing of them.

Inter'og. 9th. You may state whether you have made your home with your mother since your father left Summit County.

Ans. I have, with the exception of one year, part of 1871 and 1872.

Inter'og. 10th. You may state if your attention has been called to these two deeds before this time; and, if so, by whom, and what effort if any, you have made to find them.

Ans. In November, 1873, my attention was called to these deeds by Canfield and Caskey, of Cleveland, and John Caskey, of Millersburg. I have made no search for them.

Inter'og. 11th. State whether or not these deeds referred to
150 have ever been in your possession or under your control.

Ans. They never have.

Inter'og. 12th. State what knowledge, if any, you have as to where these deeds might be found, or any knowledge or information you have or suppose you have which would lead to their discovery.

(This question objected to by the defendant's att'y.)

Ans. I have no knowledge.

Inter'og. 13th. State who had the possession and control of the family furniture and effects which were left with the family at the time Corydon Weeks left Summit County.

Ans. My mother, Mrs. L. L. Weeks.

Cross-interrogatories on the part of the defendant, and answers thereto by the said Carlos H. Weeks.

Inter'g. 1st. Where is Corydon Weeks at the present time?

Ans. He is in Alleghan, Michigan.

Inter'og. 2. How many times have you seen him since he left Summit County, Ohio, in 1866?

Ans. I have not seen him.

Inter'og. 3d. How many times have you had access to the
151 bureau you have described, and for what purpose; I mean after your father left Summit County, and prior to the date of the sale in 1871?

Ans. I can't tell how many times I have had access to it.

Inter'og. 4th. Who carried the keys to the bureau; or was it ever locked?

Ans. It was not locked.

Inter'og. 5th. How many times did you examine it for the purpose of searching for deeds?

Ans. I never searched for any deeds.

Inter'og. 6th. When did you first have access to it, if you know, after your father left?

Ans. I can't tell. Shortly after he left.

Inter'og. 7th. How many bureaux were there in your house after your father left, or at the time?

Ans. One.

Inter'og. 8th. How many drawers were there in it?

Ans. Five.

Inter'og. 9th. Who sold that bureau?

Ans. My mother.

Inter'og. 10th. Was it a public or a private sale?

Ans. Private.

Inter'og. 11th. Were you present at the time it was sold?

Ans. No, I was not.

152 Inter'og. 12th. How do you know it was sold in the year 1871?

Ans. We sold most of our furniture then.

Inter'og. 13. Have you any knowledge of who purchased that bureau, and when it was sold?

Ans. It was sold in Hudson to C. W. Farrar & Co., I think; I am not sure.

Inter'og. 14th. Who else beside yourself had access to that bureau after your father left?

Ans. All that were in the family.

Inter'og. 15th. Did your father use it as his bureau also before he left?

Ans. He used one drawer for his papers.

Inter'og. 16th. Had he any other place for keeping his papers beside that one drawer in the bureau?

Ans. No.

Inter'og. 17th. Had he no trunk?

Ans. No.

Inter'og. 18. Which one of the five drawers was it that he kept all his papers and deeds in?

Ans. An upper and small drawer.

Inter'og. 19th. Did he have any key to the drawer?

Ans. Yes.

Inter'og. 20th. Who carried that key?

Ans. He carried it.

153 Inter'og. 21st. What property, papers or deeds did your father take with him when he left?

Ans. He took all he had.

Interrog. 22nd. How many papers and how many deeds did he carry with him, and how did he carry them?

Ans. I don't know how many papers he had; he carried them in a sachel.

Inter'og. 23rd. Did you ever see any papers in his possession, or in his sachel?

Ans. Yes; I have seen him look at his papers.

Inter'og. 24th. Did you see any deeds or papers in his possession on the day he left home, or did you see him put any in his sachel?

Ans. I don't remember seeing put any in his sachel. I did not see any in his possession that day.

Inter'og. 25th. Did you ever see any of the deeds referred to in your examination-in-chief, or did you ever hear of them until your attention was called to them by Canfield and Caskie, of Cleveland, last fall?

Ans. I never did.

Inter'og. 26th. What care have you ever had of your father's private papers, deeds, &c.?

Ans. Never have had any care of them.

154 Inter'og. 27th. Have you ever read any of his deeds, so as to be able to describe the property they referred to, and where located?

Ans. I never have.

Inter'og. How long have you been residing at Mt. Vernon?

Ans. Since November last.

C. H. WEEKS.

Interrogatories propounded to the said Louisa L. Weeks, a witness produced and sworn as aforesaid on the part of the plaintiff, and the answer of the said Louisa L. Weeks thereto, as follows:

Interrogatory 1st. State where you reside, and what relation you sustain, if any, to Mr. Corydon Weeks, formerly of Summit County, Ohio?

Ans. I reside at present in Mt. Vernon, Ohio. I am the wife of Mr. Corydon Weeks, formerly of Summit County.

Inter'og. 2nd. State as near as you can when Mr. Weeks left, and where you have resided since.

Ans. He left seven years ago last December. I resided on the old place, in Stone Township, until two and a half years ago. I then lived six months in the town of Hudson. After visiting my children in the West I came back and lived in Millersburg until November last, at which time I came here.

155 Inter'og. 3rd. State, if you know, where Mr. Corydon Weeks kept his deeds and papers before he left you.

Ans. He kept his deeds in a bureau drawer, a small upper drawer.

Inter'og. 4th. Please to state what you know about that bureau, and what you know, if any thing, as to their being deeds or papers left in that bureau after Mr. Corydon Weeks left you. Go on and give all the particulars as near as you can.

Ans. Well, I know all about the bureau, and I know, too, that it was his custom to keep his papers and deeds in the drawer that I mention; and also, for some time before he went away; I often noticed him at that drawer looking over papers, seeming to select some. At the time he went away I was sick and confined to my bed. It was some time before I was able to go to the room where this bureau was kept; when I did so, curiosity prompted me to examine this drawer, previously suspecting his selecting papers that were valuable for his own use and not returning them. I found quite a number of old papers, old notes with names torn off, and one old deed of our old home in Storr Town-
156 ship, but I found no papers of value, and have no recollection of seeing any other deed or deeds either then or at any other time.

Inter'og. 5th. State if your attention has been called to two deeds, one of Porter L. Hinckley to John R. Bartholomew, and the other John R. Bartholomew to Corydon Weeks; and, if so, state at what time and what search, if any, you have made for them; whether or not they are in your possession or under your control.

Ans. Yes, recently, this winter, when my son received a letter from Cleveland and one from Millersburg in regard to them. I have made no search; I thought it useless; the papers were all gone; the bureau was gone; they are not in my possession or under my control.

Inter'og. 6th. State whether you have any knowledge, and, if so, what, as to where these deeds might be found?

Ans. Having never seen such deed, and no recollection of having seen them, I could not tell you where they could be found.

Inter'og. 7th. State if the deeds referred to had been in that bureau at the time you made the search you would have found them and recollected the deeds?

157 Ans. I feel confident I would, as I found one deed of our old place and recollect that distinctly; I think I would recollect the other if I had seen them.

Inter'og. 8th. State what knowledge, and the circumstances which lead you to believe that the deeds referred to are not in your possession or with your household goods?

Ans. Mr. Weeks left no other papers except those in the drawer, and I have no recollection of any other papers or seeing such. I looked over the drawer, and this was the only place where he kept papers, and finding none of value, they were thrown away—waste paper—some two or three years after he left, except the old deed of the farm. This is my reason for supposing a search for the deeds would be vain.

Cross-interrogatories on the part of the defendant, and answers thereto by the said Louisa L. Weeks.

Inter'og. 1st. How long after your husband left did you examine the drawer of this bureau you have described?

Ans. I can hardly tell; from four to six weeks. I was a long time sick.

Inter'og. 2. Did you ever know of your husband having any deeds

158 from Porter L. Hinckley to John R. Bartholomew, and from John R. Bartholomew to himself?

Ans. I have not the least recollection of any such deeds. I have tried to recall some incident or recollection and I cannot.

Inter'og. 3rd. Did you have access to the drawer in which your husband kept his papers before his departure; and, if so, how often?

Ans. I nearly always had access to it. Sometimes, when he had money in it, he kept it locked, but as a usual thing it was not locked.

Inter'og. 4. Were you in the habit of looking over his deeds and other papers when you had access to it?

Ans. I was not. I did not look over his deeds and papers, except after he went away.

Inter'og. 5th. What knowledge have you of any one having access to that drawer and looking over the deeds and paper before you did after he left?

Ans. I have no knowledge of any one opening the drawer before myself after he went away.

Inter'og. 6th. Who remained in the house with you while you were sick after your husband left?

Ans. My daughter and my three little sons.

Inter'og. 7. How old was your daughter?

159 Ans. She was then eighteen years old.

Inter'og. 8th. What knowledge have you of your husband having deeds or title papers to eighty acres of land in Cook County, Illinois?

Ans. I have none whatever.

LOUISA L. WEEKS.

I, Will A. Coulter, of the county of Knox, and State of Ohio, a commissioner duly appointed to take the depositions of the said Louisa L. Weeks and the said Carlos H. Weeks, witnesses whose names are subscribed respectively to the foregoing depositions, do hereby certify that previous to the commencement of the examination of the said Louisa L. Weeks and Carlos H. Weeks as witnesses in the suit between the said Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington, George Worthington, and Alice M. Worthington, and John T. Avery, plaintiff, and the said Emily A. King, and Vere Bates King, and Emily A. King guardian of Vere Bates King, defendants, they were duly sworn by me as such commissioner to testify the truth in relation to the matters in controversy between the said plaintiffs and the said defendants so far as they should be interrogated

160 concerning the same; that the said deposition' were taken at my office in the city of Mt. Vernon, in the county of Knox, and the State of Ohio, on the 14th day of April, A. D. 1874, and that after said deposition' were taken by me as aforesaid, the interrogatories and answers thereto as written down were read over to the said witnesses, and that thereupon the same were signed and sworn to by the said deponents respectively before me, to wit, Louisa L. Weeks and Carlos H. Weeks, the oath being administered by me, Will. A. Coulter, as such commissioner, at the place and on the day and year last aforesaid.

WILL. A. COULTER,
Commissioner.

Commissioner's fee $6.00; paid by plaintiff.
2 witnesses " 1.50; " " "

161 STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County. In chancery.

RALPH WORTHINGTON, ABBY M. HOYT, MARY B. Worthington, Clara C. Worthington, George Worthington, & Alice M. Worthington, and John T. Avery
vs.
EMILY A. KING, AND VERE BATES KING, & EMILY A. King, guardian of Vere Bates King.
} In chancery. 479*a*.

Messrs. Waite & Clarke, solicitors for said defendants, and N. A. Lauer, esq., guardian ad litem of Vere Bates King:

Please take notice that on the 30th day of March, A. D. 1874, at 10 a. m. of said day, we shall sue out of the office of the clerk of the superior court of Cook County a dedimus potestatem or commission to be directed to Will H. Coulter, esq., of Mt. Vernon, Ohio, or to some judge, master in chancery, notary public, justice of the peace, or other person
162 authorized by law to take the depositions of witnesses, to take the testimony of Louis L. Weeks and Carlos C. Weeks, of Mt. Vernon, Ohio. The testimony so taken to be read in evidence upon the trial of the above entitled cause on the part of the complainants, said testimony to be taken upon interrogatories to be propounded to the witnesses orally, and to be taken on the 14th day of April, A. D. 1874, at the office of said Will A. Coulter, esq., in Mt. Vernon, Ohio, at the hour of 2 o'clock p. m., at which time & place you may appear & cross examine said witnesses if you see fit.

Chicago, March 20th, 1874.

Respectfully,

MILLER & FROST,
Complainants' Solicitors.

Service of a copy of the foregoing notice accepted this 20th day of March, A. D. 1874.

WAITE & CLARKE,
NICHOLAS A. LAUER,
Guardian ad litem for Vere Bates King.

163 *Dedimus.*

STATE OF ILLINOIS,
County of Cook, ss:

The people of the State of Illinois to Will. A. Coulter, esq., of Mount Vernon, Ohio, or to some judge, master in chancery, notary public, justice of the peace, etc:

Whereas it has been represented to us that Louisa L. Weeks and Carlos C. Weeks are material witnesses in a certain cause now depending in our superior court of Cook County, in and for the county of Cook aforesaid, between Ralph Worthington, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington, George Worthington, and Alice M. Worthington, and John T. Avery, plaintiffs, and Emily A King and Vere Bates King, and Emily A. King, guardian of Vere Bates King, defendants, and that the said witness' reside at Mount Vernon aforesaid

without the said State of Illinois, and that their personal attendance cannot be procured at the trial of the said cause.

Now know ye, that we, in confidence of your prudence and fidelity, have appointed you commissioner to examine the said witnesses, and do therefore authorize and require you to cause the said witnesses to come before you, at your office, in Mt. Vernon, Ohio, on the 14th day of
164 April, A. D. 1874, at the hour of 2 o'clock p. m., and diligently to examine the said witnesses on the oath or affirmation of the said witnesses by you first duly in that behalf administered, and faithfully to take the deposition of the said witnesses upon all interrogatories to be propounded to the said witnesses orally, both on the part of the said plaintiff and of the said defendant, and the same, when thus taken, together with this commission and the said interrogatories, to certify into our said superior court of Cook County with the least possible delay.

Witness Alexander F. Stevenson, clerk of our said court, and seal thereof at Chicago, in said county, this 30th day of March, A. D. 1874.
[SEAL.] A. F. STEVENSON, *Clerk.*

(The commissioner will please note the amount of his fees here, and whether paid or unpaid.)

Commissioner's fees, $6.00, paid by the plaintiffs.

N. B.—If deposition is to be taken orally change to, upon interrogatories to be propounded to the witness orally, and strike out, and none others.

(Endorsed:) Opened & filed Apr. 16, 1874. A. F. Stevenson.

165 STATE OF ILLINOIS,
Cook County, ss:

In the superior court of Cook County, November term, A. D. 1873.

JOHN T. AVERY AND RALPH WORTHINGTON, Abby M. Hoyt, Mary B. Worthington, Clara C. Worthington, George Worthington, & Alice M. Worthington, heirs at law of George Worthington, deceased,
vs.
EMILY A. KING & VERE BATES KING, & Emily A. King, guardian of Vere Bates King. } In chancery.

The deposition of Corydon Weeks, of the county of Allegan and State of Michigan, a witness of lawful age, produced, sworn, and examined upon his corporal oath on the nineteenth day of November, in the year of our Lord one thousand eight hundred and seventy-three, by me James M. Wetherell, a notary public of Cook County, in the State
166 of Illinois, at my office, in the city of Chicago, Cook County, Illinois, by agreement of parties to be used in a certain suit and matter in controversy now pending and undetermined in the said superior court of Cook County, in the State of Illinois, on behalf of the said complainants.

The said CORYDON WEEKS, being first duly sworn by me as witness in the said cause, previous to the commencement of his examination, to testify the truth in relation to the matters in controversy so far as he should be interrogated, testified and deposed as follows

Direct examination by Mr. MILLAR, counsel for said complainant:

Int. 1. What is your name, age, occupation, & place of residence?

Ans. Corydon Weeks is my name; shall be 56 years old the last day of next March; and farmer for the present; Allegan, Allegan Co., Michigan, is my place of residence.

Int. 2d. Do you know the parties to this suit, or either or any of them; if so, which, & how long have you known them respectively?

Ans. I do not know any of the parties to this suit. I knew George Worthington by reputation in his lifetime, but not personally.

167 Int. 3rd. Did you ever own any property in Cook County? If so, describe it as well as you can & from whom & when did you receive your title to it.

Ans. I did own property in Cook County. I don't know the number of the lot; it was 80 acres of land lying somewhere within eight or ten miles of Chicago. I received my title to it from a man by the name of Bartholomew, somewhere about 1851 or 1852, I should think.

Int. 4th. Do you recollect the first name of this Bartholomew?

Ans. I don't now. I was well acquainted with him at the time. I think I should recollect it if I should hear it. I am pretty confident I should.

Int. 5th. Was his name John R. Bartholomew?

Ans. I should think that was the name.

Int. 6th. Did he ever give you any deed of the land?

Ans. Yes, sir.

Int. 7th. Did he give you any other deed than the one conveying the property to you? If so, what deeds did he give you?

168 Ans. He gave me a deed running from Mr. Hinckley—Porter Hinckley, I think—to Mr. Bartholomew, of the same land.

Int. 8th. State what, if any, acquaintance you had with Porter Hinckley & Bartholomew, or either of them, & state all you recollect in regard to the negotiation & purchase of this land by you from Bartholomew?

Ans. At the time I purchased this land I was in the employ of the same man that Mr. Bartholomew was, & he told me about this land & wanted to swap with me for land in the State of Michigan, in Van Buren Co., timbered land. Mr. Hinckley was at that time at Chagrin Falls, & I told him that I would talk the matter over with Mr. Hinckley & look the matter over & see that the title was good in Mr. Hinckley. Mr. Hinckley went on to state then the circumstances how he came by it, &ct. It appeared that Mr. Hinckley's deed wasn't on record at this time. We talked it over, & Bartholomew gave me the deed from Hinckley to Bartholomew, which was not on record. He also gave me some other papers. I think some receipts for taxes, &ct. I gave him—Bartholomew—some land in Michigan for this property.

169 Int. 9th. What did Hinckley say, if anything, in regard to the deed from him to Bartholomew & which Bartholomew handed to you as to whether he had executed it or not?

Ans. Yes; he said he executed that deed to Bartholomew, & that it was all straight.

Int. 10th. Where in what State did that deed from Hinckley to Bartholomew purport to have been executed?

(Objected to as not the best evidence.)

Ans. In the State of Ohio.

Int. 11th. Were you then familiar with the mode of executing & acknowledging deeds as prescribed by the laws of that State?

Ans. I think I was.

Int. 12th. State whether this deed appeared to have been executed & acknowledged in accordance with those laws?

Ans. I think it was.

Int. 13. Did you ever own any other land in Cook County, Illinois, than that conveyed to you, as you have stated, by John R. Bartholomew?

Ans. No, sir; I never did; that is the only land I ever owned in Cook County, Illinois.

Int. 14th. Where did you live at this time?

170 Ans. In the town of Storr, Summit Co., Ohio.

Int. 15th. How long did you live there?

Ans. Twenty-eight years. Removed from there six years ago; the last day of the coming December I went to Allegan, Mich., where I now reside.

Int. 16. What did you do with the deed from Hinckley to Bartholomew, & which you say Bartholomew handed to you?

Ans. I took that, together with the deed which Bartholomew executed to me, home to my residence & put them with my other papers in a bureau drawer.

Int. 17. When did you last see the deed that Porter L. Hinckley executed to John R. Bartholomew, & state all you know about its present existence & whereabouts?

Ans. I couldn't say when I last saw it exactly. I saw it quite a number of times amongst my other papers. Haven't made any efforts to find it. When I left Ohio to come to Allegan, Michigan, I left all my old papers, deeds, & all, in the bureau drawer; they went into the possession of my wife at that time, Louis L. Weeks. I then sepa-

171 rated from my wife & left this bureau in her possession. She was living the last information I had from her in Millersburg, in the State of Ohio.

Int. 18. You may state whether you have ever seen that bureau since you left it in her possession?

Ans. I have not.

(Objected to.)

Int. 19. State whether this deed of Hinckley to Bartholomew was in that bureau when you so left it in her possession, & state whether it is in your possession, or in any manner under your control, or has been since that time?

Ans. The last time I saw it, it was in that bureau; there's where I left it last. It is not & has not been since in my possession; or under my control.

Cross examined by Mr. DORMAN on behalf of the defendants:

Cross-int. 1st. Have you any interest in the result of this suit?

Ans. No, sir; not at all.

Int. 2nd. Do you know whether this deed from Bartholomew to you has been destroyed in any way?

Ans. I don't know. I think not.

Int. 3rd. Why did you leave a deed conveying this property to you in the bureau drawer that you have spoken of in the State of

172 Ohio, when you went to Michigan, to Allegan?

Ans. Well, I left it there with a good many other deeds, old titles.

Int. 4th. Would you have left anything of any value in that bureau drawer?

Ans. I left everything in that bureau drawer; that is, all of my old papers.

Int. 5th. Did you consider the deed that you so left was of any value at the time you left it?

Ans. I left it with other old papers, & did not consider it of any particular value, & they were all left in the possession of my wife.

Int. 6th. Do you remember the description of the land conveyed by that deed, as it was described in the deed?

Ans. I can't recollect at the present time the description of that land as described.

Int. 7th. Do you know whether that deed of Bartholomew to you was ever acknowledged, &, if so, by whom?

Ans. It was, but by whom I could not tell. Some justice of the peace at Chagrin Falls, Cuyahoga Co., Ohio.

Int. 8th. Do you know whether that deed was ever recorded in any recorder's office?

173 Ans. I could not be positive.

CORYDON WEEKS.

Subscribed and sworn to before me this 19th day of November, A. D. 1873, at my office in the city of Chicago, at which time and place the above deposition was taken.

[SEAL.] JAMES M. WETHERELL.

And thereupon complainants introduced in evidence a deed of the premises in question from Ambrose L. Soulié to John T. Avery, also a deed from John T. Avery to Lucius H. Muzzy, as follows:

174 THE STATE OF OHIO,
Cuyahoga County, ss:

I, James D. Cleveland, clerk of the court of common pleas in and for said county, do hereby certify that Amos Upham, esq., before whom the foregoing acknowledgment was taken, and who has thereunto subscribed his name officially, in his own proper handwriting, was at the date of the said acknowledgment and now is an acting justice of the peace within and for said Cuyahoga County, authorized by the laws of the State of Ohio, to take acknowledgments as aforesaid, and duly commissioned and sworn, and to all whose official acts full faith and credit are due and ought to be given, throughout the United States and elsewhere, and that said deed is executed and acknowledged according to the laws of the State of Ohio.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at Cleveland, this 1st day of October, in the year of our Lord one thousand eight hundred and fifty-three.

JAS. D. CLEVELAND, *Clerk.*
———, *Deputy Clerk.*

175 [Garrett & Briggs, Real Estate, Life and Fire Insurance Agents. Money negotiated on mortgage. Stocks bought and sold. Good paper discounted. City lots, houses and lots, improved farms, and wild lands for sale. Herald Building, Bank street, Cleveland, Ohio.]

Warranty deed.—C. M. Stone, commissioner. Feb'y 3, 1873.

Know all men by these presents, that we, Ambrose S. Soulé and Sophia M. Soulé, of the township of Russell, Cuyahoga County, Ohio, for and in consideration of the sum of eight hundred ($800) dollars to us in hand paid by John T. Avery, have bargained and sold, and do hereby grant, bargain, sell, and convey, unto the said John T. Avery and his

heirs and assigns forever the following described premises, stuate in the State of Illinois, Cook County, being the west ½ of southwest quarter of section 20, township 38 north, of range 13 east of 3d principal meridian, containing 80 acres; to have and to hold the aforesaid premises, with the appurtenances, unto the said John T. Avery & his heirs and assigns forever.

176 And we, the said Ambrose S. & Sophia M. Soule, do hereby covenant with the said John T. Avery, for ourselves and our heirs & his heirs and assigns, that we are lawfully seized of said premises, and have good right to sell and convey the same, and that said premises are free and clear of all incumbrances, and that said Ambrose L. and Sophia M. and our heirs will forever warrant and defend the same unto the said John T. Avery and his heirs and assigns against the lawful claims and demands of all persons. And the said Sophia M. Soulé hereby releases all right of dower in said premises unto the said John T. Avery and his heirs and assigns forever.

In witness whereof we have hereunto set our hands and seals this thirtieth day of May, A. D. one thousand eight hundred and fifty-three.

A. L. SOULE. [L. S.]
S. M. SOULE. [L. S.]

Signed, sealed, and delivered in presence of—
L. McFARLAND.
AMOS UPHAM.

177 THE STATE OF OHIO,
Cuyahoga County, ss:

On this 30th day of May, 1853, before me, Amos Upham, j. peace in and for said county, personally came the above-named Ambrose L. Soule & Sophia M. Soule, who signed and sealed the foregoing instrument, and acknowledged the same to be their free act and deed, and the said Sophia M. Soule, being by me privately examined separate and apart from her said husband, acknowledged that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith.

Before—

AMOS UPHAM, [SEAL.]
J. Peace.

No. 45294.

STATE OF ILLINOIS,
County of Cook, ss:

Filed for record October 12th, 1853, & recorded in book 64 of Deeds, p. 425.

L. D. HOARD, *Clerk.*

178 *Quitclaim deed.*

Know all men by these presents, that we, John T. Avery and Sarah A. Avery, husband & wife, of Cleveland City, Ohio, for divers good causes and considerations thereunto moving, especially for the sum of one dollar received, to our full satisfaction, of Lucius H. Muzzy, of Springfield, Ohio, have given, granted, remised, released, and forever quitclaimed, and do by these presents absolutely give, grant, remise, release, and forever quitclaim unto the said Muzzy, to his heirs and assigns, forever, all such right and title as we, the said John T. Avery, have or

Int. 5th. Did you consider the deed that you so left was of any value at the time you left it?

Ans. I left it with other old papers, & did not consider it of any particular value, & they were all left in the possession of my wife.

Int. 6th. Do you remember the description of the land conveyed by that deed, as it was described in the deed?

Ans. I can't recollect at the present time the description of that land as described.

Int. 7th. Do you know whether that deed of Bartholomew to you was ever acknowledged, &, if so, by whom?

Ans. It was, but by whom I could not tell. Some justice of the peace at Chagrin Falls, Cuyahoga Co., Ohio.

Int. 8th. Do you know whether that deed was ever recorded in any recorder's office?

173 Ans. I could not be positive.

CORYDON WEEKS.

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In witness whereof we have hereunto set our hands and seals this thirtieth day of May, A. D. one thousand eight hundred and fifty-three.

A. L. SOULE. [L. S.]
S. M. SOULE. [L. S.]

Signed, sealed, and delivered in presence of—
L. McFARLAND.
AMOS UPHAM.

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Before—

AMOS UPHAM, [SEAL.]
J. Peace.

No. 45294.

STATE OF ILLINOIS,
County of Cook, ss:

Filed for record October 12th, 1853, & recorded in book 64 of Deeds, p. 425.

L. D. HOARD, *Clerk.*

178 *Quitclaim deed.*

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Before the trial of the cause exceptions were filed & exceptions taken at the date of taking to the depositions of John R. Bartholomew, Alexander C. Caskey, Porter L. Hinckley, & Corydon Weeks, and by consent no disposition of such exceptions were had until the trial of the cause, when all of such several exceptions were overruled & exception taken to the ruling of the court.

STATE OF ILLINOIS,
Cook County, ss:

Superior court of Cook County. Chancery.

GEORGE WORTHINGTON & JOHN T. AVERY
vs.
EMILY A. KING. EMILY A. KING, GUARDIAN OF Vere Bates King, & Vere Bates King.

135 And now come the said defendants, by Waite & Clarke, their solicitors, and move the court to suppress the following parts of the following depositions for causes of exception hereafter set up:

First. The following parts of the deposition of John R. Bartholemew, because the said Bartholemew is interested in the event of this suit, and cannot testify to each of the several matters and things contained in the answers to the following interrogatories, to wit:

Answers to interrogatories No. two, three, five, six, seven, eight, and all answers to cross-interrogatories.

(Exceptions overruled, and exception.)

And said defendants ask to have said answers suppressed for the further reasons that they are incompetent and irrelevant, and because no sufficient ground appears for introducing secondary evidence in any of the answers concerning the contents of written instruments; also because the execution of all or any of the written instruments has not been proved, and therefore no evidence of their contents is admissible.

(Exceptions all overruled, and exception.)

186 Defendants also take exception to and move the court to suppress the following answers to interrogatories in the deposition of Corydon Weeks, because the said Weeks is an interested party, to wit:

The answer to interrogatories No. six, seven, eight, nine, eleven & twelve, and all cross-interrogatories.

(Overruled, and exception.)

And the defendants not waiving any objections that may be made ask to have said several answers suppressed as incompetent and irrelevant, and because the loss of the deed or deeds therein mentioned is not proved and secondary evidence is inadmissible, and because the execution of such deeds has not been sufficiently found.

(Overruled, and exception.)

They also object to the following answers in the deposition of Alexander C. Caskey, because the said Caskey is an interested party, to wit:

Answers to the interrogatories No. one, two, three, four, five, six, and all cross-interrogatories.

(Deposition not read, and exception.)

And for further causes of exception show that the deposition makes no proof of the execution of said deed or deeds therein mentioned, and also that the evidence therein of the contents of said deed or deeds is

187 too vague and uncertain, and because the testimony therein is incompetent and irrelevant.

HORACE F. WAITE,
Defendant's Att'y.

Filed Nov. 26, 1873.

A. F. STEVENSON, *Clerk.*

STATE OF ILLINOIS,
Cook County, ss :

Superior court of Cook County. In chancery.

GEORGE WORTHINGTON, JOHN T. AVERY,
vs.
EMILY A. KING. EMILY A. KING, GUARDIAN OF Vere Bates King.

And now come the said defendants and move the court to suppress the following parts of the following depositions:

First. The following parts of the deposition of Heman Scott, because the said Scott is interested in the event of this suit, and therefore cannot testify to each of the several matters and things contained in the answers to the following interrogatories, to wit:

188 Answers to interrogatories No. two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen & sixteen; also all the several cross interrogatories.

(Overruled; exception.)

And the defendants not waiving the aforesaid objection ask to have said several answers suppressed as incompetent and irrelevant, and because no sufficient foundation is laid for secondary evidence in any answers speaking of the contents of written instruments, and because the execution of any such written instrument has not been proved.

(Overruled, and exception.)

And the said defendants also move to suppress the following parts of the deposition of John R. Bartholomew, because the said Bartholomew is interested in the event of this suit and cannot testify to each of the several matters and things contained in the answers to the following interrogatories, to wit:

Answers to interrogatories No. four, five, six, seven, eight, eleven, fifteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three; also all the several cross interrogatories.

(Overruled, and exception.)

189 And said defendants ask to have said answers suppressed for the further reasons that they are incompetent and irrelevant, and because no sufficient ground appears for introducing secondary evidence in any of the answers speaking of the contents of written instruments, and because the execution of any such written instrument has not been proved.

(Overruled, and exceptions taken.)

The said defendants also move the court to suppress the following parts of the deposition of Porter Hinckley, because the said Hinckley is an interested party in the event of this suit and cannot testify to each of the several matters and things contained in the answers to the following interrogatories, to wit:

Answers to interrogatories No. three, four, five, six, seven, eight; also all the several cross-interrogatories.

(Overruled of exception.)

And for further reasons they ask that said several answers be suppressed as being incompetent and irrelevant, and because there
190 is no sufficient ground for introducing secondary evidence of the contents of the written instruments, and because the execution of any written instrument has not been proved.

HENRY H. HANDY, a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. MILLER:

Q. What was your business during the year 1870?
A. I was clerk for the firm of Shortall & Hoard.
Q. What was it in 1869?
A. The same, the same for the last fifteen years.
Q. What was their business; the business of Shortall & Hoard?
A. Making abstracts of title from records in Cook County.
Q. What do their books embrace?
A. Embrace conveyances of land in the county.
Q. Where were they made up from?
A. From the records of the county.
Q. Recorded deeds?
A. Recorded deeds, judgments, tax sales.
191 Q. What do they contain?
(Objected to. Taken subject to objection.)
A. The books themselves contain an entry of every deed that is recorded and a short memorandum of all judgments rendered, taken from the record.
Q. How much of the deeds did it contain, these abstracts?
A. The books themselves, the original entry books contained the names of the parties, grantor and grantee, the dates, and the property conveyed, and in a great many cases the consideration. These [indicating] are the books themselves.
Q. Your abstract book?
A. Yes, sir; indexes.
Q. And abstracts of title were made from these books?
A. No, sir; the chain was taken from those books; the abstract was made from the record itself.
Q. From the records in the county clerk's office?
A. Yes, sir.
Q. Did you or did Shortall & Hoard, in 1869, make an abstract of the title to the west half of the southwest quarter of section 20, township 38, range 13?
192 A. Yes, sir.
Q. Is that the receipt [handing paper to witness] for the bill rendered for the abstract?
A. This bill is in the handwriting of Mr. Fuller, who was at that time cashier for Shortall & Hoard, and it is a bill of abstract 9316, of which this is a letter-press copy (refer'ing to book).
Q. You made that abstract and delivered it to Mrs. Avery?
A. It was made by Shortall & Hoard. I could not state to whom it was delivered.
Q. But such an abstract was made?
A. Such an abstract was made in the office.
Q. That was before the fire, of course?
A. Yes, sir.
Q. Have you got the letter-press copy of that abstract?

A. Yes, sir.
Q. Will you now produce it?
A. I have it here (producing book).
Plaintiffs' counsel offers abstract book in evidence, and a copy of it, made by the witness.
The WITNESS. This is not a copy of this; this is an abstract brought down to a much later date, and contains some conveyances that
193 are not in here at all.
Q. But so far as it goes it is a copy of it?

Mr. MILLER:

A. They are all taken from here except those that were recorded since, I suppose; I have not compared it since.

Mr. WAITE:

Q. You don't know whether this is a copy of this?
A. No, sir. I would have to compare it first. It is not a copy of this in fact; there are certain deeds in here that are not in here.

The COURT:

Q. There is more in this abstract than there is in your letter-press copy?
A. Yes, sir; it is a later date.

Mr. MILLER:

Q. But it is a copy of that down to the time the abstract was made?
A. Yes, sir; down to the date of this it is a copy of it; that is, I suppose it is. I don't say positive.
Q. Will you be kind enough to read that abstract, so that the reporter can take it down?
A. It will be very lengthy.
Mr. WAITE. It can be done afterwards.
The COURT. If this is a copy, you have no objections to its
194 being used in place of that?
Mr. WAITE. I have no objections if it is competent. Of course I cannot admit that the book itself would be evidence.

Mr. MILLER:

Q. Everything that is put on the record since the date of that is in that?
A. Yes, sir.
Q. Everything that is put on record before the date of that is contained there?
A. Yes, sir.
Q. And this shows it, don't it?
A. I suppose it does; I should have to compare it first to see. I suppose it is copied; that was made by Shortall & Hoard a short time after the fire.
(Defendants' counsel objects to the introduction of the abstract: first, because the ground has not been laid for the introduction of the document; and second, because the document is not within the statute; this being a suit against a minor, such evidence is not nor is the original evidence under the burned record act.)
Q. This certified copy, where was it made from?
A. As I said before, that is not a certified copy.
195 Q. I mean this letter-press copy?
A. You understand the chain is first taken from the book, and

(Overruled of exception.)

And for further reasons they ask that said several answers be suppressed as being incompetent and irrelevant, and because there
190 is no sufficient ground for introducing secondary evidence of the contents of the written instruments, and because the execution of any written instrument has not been proved.

HENRY H. HANDY, a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. MILLER:

Q. What was your business during the year 1870?
A. I was clerk for the firm of Shortall & Hoard.
Q. What was it in 1869?
A. The same, the same for the last fifteen years.
Q. What was their business; the business of Shortall & Hoard?
A. Making abstracts of title from records in Cook County.
Q. What do their books embrace?
A. Embrace conveyances of land in the county.
Q. Where were they made up from?
A. From the records of the county.
Q. Recorded deeds?
A. Recorded deeds, judgments, tax sales.
191 Q. What do they contain?
(Objected to. Taken subject to objection.)
A. The books themselves contain an entry of every deed that is recorded and a short memorandum of all judgments rendered, taken from the record.
Q. How much of the deeds did it contain, these abstracts?
A. The books themselves, the original entry books contained the names of the parties, grantor and grantee, the dates, and the property conveyed, and in a great many cases the consideration. These [indicating] are the books themselves.
Q. Your abstract book?
A. Yes, sir; indexes.
Q. And abstracts of title were made from these books?
A. No, sir; the chain was taken from those books; the abstract was made from the record itself.
Q. From the records in the county clerk's office?
A. Yes, sir.
Q. Did you or did Shortall & Hoard, in 1869, make an abstract of the title to the west half of the southwest quarter of section 20, township 38, range 13?
192 A. Yes, sir.
Q. Is that the receipt [handing paper to witness] for the bill rendered for the abstract?
A. This bill is in the handwriting of Mr. Fuller, who was at that time cashier for Shortall & Hoard, and it is a bill of abstract 9316, of which this is a letter-press copy (refer'ing to book).
Q. You made that abstract and delivered it to Mrs. Avery?
A. It was made by Shortall & Hoard. I could not state to whom it was delivered.
Q. But such an abstract was made?
A. Such an abstract was made in the office.
Q. That was before the fire, of course?
A. Yes, sir.
Q. Have you got the letter-press copy of that abstract?

A. Yes, sir.
Q. Will you now produce it?
A. I have it here (producing book).
Plaintiffs' counsel offers abstract book in evidence, and a copy of it, made by the witness.
The WITNESS. This is not a copy of this; this is an abstract brought down to a much later date, and contains some conveyances that
193 are not in here at all.
Q. But so far as it goes it is a copy of it?

Mr. MILLER:

A. They are all taken from here except those that were recorded since, I suppose; I have not compared it since.

Mr. WAITE:

Q. You don't know whether this is a copy of this?
A. No, sir. I would have to compare it first. It is not a copy of this in fact; there are certain deeds in here that are not in here.

The COURT:

Q. There is more in this abstract than there is in your letter-press copy?
A. Yes, sir; it is a later date.

Mr. MILLER:

Q. But it is a copy of that down to the time the abstract was made?
A. Yes, sir; down to the date of this it is a copy of it; that is, I suppose it is. I don't say positive.
Q. Will you be kind enough to read that abstract, so that the reporter can take it down?
A. It will be very lengthy.
Mr. WAITE. It can be done afterwards.
The COURT. If this is a copy, you have no objections to its
194 being used in place of that?
Mr. WAITE. I have no objections if it is competent. Of course I cannot admit that the book itself would be evidence.

Mr. MILLER:

Q. Everything that is put on the record since the date of that is in that?
A. Yes, sir.
Q. Everything that is put on record before the date of that is contained there?
A. Yes, sir.
Q. And this shows it, don't it?
A. I suppose it does; I should have to compare it first to see. I suppose it is copied; that was made by Shortall & Hoard a short time after the fire.
(Defendants' counsel objects to the introduction of the abstract: first, because the ground has not been laid for the introduction of the document; and second, because the document is not within the statute; this being a suit against a minor, such evidence is not nor is the original evidence under the burned record act.)
Q. This certified copy, where was it made from?
A. As I said before, that is not a certified copy.
195 Q. I mean this letter-press copy?
A. You understand the chain is first taken from the book, and

the records were then examined for the purpose of getting the particulars of each deed, and made out in pencil minutes. Those were copied by the copyists and afterwards compared by the abstract maker himself.

Q. Compared with what?

A. These original minutes of the record.

Q. Then it was made from the records of Cook County?

A. The abstracts after the fire were made from the records.

Q. The records of Cook County?

A. Yes, sir.

Q. Read number one on that paper.

(Objected to.)

Plaintiffs' counsel proposes to show that the original records were burned up, and proposes to show the contents of the records.

After argument the above question is waived.

Q. I will call your attention to number three, and ask you to read what this letter-press copy contains.

(Objected to. Objection sustained.)

The COURT:

Q. Did you make this abstract yourself?

196 A. I could not state positively. The custom was in the office to mark the name of the examiner on the paper. I find my initials here, and I find my check-marks here, opposite each deed in here, and the certificate was made out in my form, which was rather different from that of most abstractors. At the same time I could not state positively that I made the abstract, although I feel sure that I did.

Q. Have you any recollection, having examined those books—have you any recollection of the contents of the records at all?

A. I cannot say that—not in this case. I could in a great many.

The court sustains the objection to the admission of the abstract. Plaintiffs' counsel offers to prove by the witness that he himself made the abstract, of which he now has a letter-press copy; that so far as that abstract purports to be an abstract of deeds on record in Cook County, in accordance with the law, himself supervised the making of the abstract from those records, in the regular course of business in the office of Shortall & Hoard; that he checked off each conveyance

197 as it was compared with the original record; that the initials of his name are appended to the abstract; that the certificate of the examination was made out by himself in a form peculiarly his own; asking the court from these facts to infer that he was the party who made the abstract while in the office of Shortall & Hoard in the regular course of business; and that the abstract was made from the records of conveyances in Cook County. The counsel also proposes to prove that the abstract itself, from which the letter-press copy was taken, was destroyed by fire, and that the records were destroyed by the fire.

It is admitted that the deeds in the recorder's office of Cook County were burned in the great fire.

Mr. MILLER:

Q. Then I will put this question to the witness: Did you check off the different conveyances appearing upon the abstract, of which you have a letter-press copy?

A. I should say I did, as appears by my check-mark.

Q. What did you compare that with?

198 A. That is merely the check-mark—taking it off from the

chain for the purpose of making an abstract from the records of the office.

Q. As they were found in the recorder's office?

A. Yes, sir.

Q. Did you verify the making of this paper?

A. I could not say positively. I could not say positively that I did.

Q. What reason have you for thinking that you did, or did not?

A. O, from my initials being on the top of the abstract, and from the check-mark, I feel very sure they are my own, and the track book and the certificate that was made in the shape that I generally make them.

Q. Would these appear there unless you had supervised the making of the abstract?

A. No, sir; I don't think they would. If they did, they would get there by mistake, which was something that very seldom happened.

Q. From these facts, what do you say as to whether you did or did not make the abstract?

(Objected to as incompetent. Taken, subject to objection.)

199 A. I should say, to the best of my knowledge and belief, I did. I would not say positively.

Q. Now, what did the records contain at the time this abstract was made, so far as they affect the title of this property?

(Objected to as incompetent and irrelevant, and also on the ground that it appears that the witness has no personal recollection aside from the memoranda. Objection sustained.)

Q. What do you say with regard to the destruction of the records of Cook County?

A. I should say, to the best of my knowledge and belief, they were destroyed. I saw the court-house on fire.

Q. They were all destroyed by the fire of October 9th, 1871?

A. Yes, sir; to the best of my knowledge and belief.

Q. You have not any doubt about it, have you?

A. They may have been carried away for what I know. I know the books of Shortall & Hoard were saved.

Q. Don't you know as a fact they were destroyed?

A. I know the books of record might have been saved if they

200 had men enough there to carry them away.

Q. Did you ever hear of their being saved?

A. No, sir.

Q. Did you ever hear of one of them being saved?

A. No, sir.

Q. The court-house burned up, didn't it?

A. Yes, sir.

Cross-examination by Mr. WAITE:

Q. You have no recollection of having made this abstract?

A. No personal recollection.

Q. Or any of the facts contained in it?

A. No, sir; in many cases I could have a recollection, but in this case I could not.

HENRY G. MILLER, a witness called on behalf of counsel for complainants, then offered in evidence said letter-press copy, as follows:

(To the reading of which said defendants objected as incompetent, irrelevant; and the objection was overruled, and exception then & there taken, and the same was read in evidence.)

201 Examination of title to the west half of southwest quarter of section 20, T. 38 N., R. 13 E. of 3rd P. M.

1. *Receiver to James S. Seymour.*

Receipt No. 3292, not recorded, dated Jan'y 3, 1836. Acknowledges receipts of $100.00, in full payment for the west half of the southwest quarter of sect. 20, T. 38 N., R. 13 E. of 3rd P. M., containing 80 acres.

2. *United States to James S. Seymour.*

Patent, dated Oct. 1, 1839, and recorded Sept. 14, 1861, in book 218, page 298, grants the west half of the southwest quarter of sect. 20, T. 38 N., R. 13, in the district of lands subject to sale at Chicago, Illinois, containing 80 acres.

3. *James S. Seymour, of Auburn, Cayuga Co., N. Y., to Heman Scott.*

Deed, dated June 1, 1842, and recorded Oct. 14, 1843, in book 9, page 544, consid. $1,220.00. remises, releases, sells, conveys, and quit-claims, with other property, the west half of the southwest quarter of sect. 20, being 80 acres in T. 38 N., R. 13 E., of 3d P. M.

202 Deed contains covenant of warranty against persons claiming by, through, or under grantor, and none other; certif. of ackn't by John P. Hulbut, judge of Cayuga, N. Y., county court; certif. of magistracy and conformity, by clerk of said county, attested under his name and the seal of the court of common pleas of said county.

4. *James S. Seymour to Heman Scott.*

Deed, dated June 1, 1842, and recorded Oct. 7, 1861, in book 220, page 374, a re-record of the deed; certif. of ackn't and certif. of magistracy last shown, with an additional certif. of ackn't by justice of the peace, Cayuga Co., N. Y., dated Oct. 1, 1861, which states that "personally came James S. Seymour, to me known to be the same person described in and who executed the within conveyance, and acknowledged the execution thereof."

Certif. of magistracy, by clerk of said county and of the supreme court thereof, dated Oct. 3, 1861.

203 5. *John R. Bartholomew and Deborah, his wife, of Cuyahoga Co., Ohio, to Corydon Weeks.*

Warranty deed, dated Jan. 22, 1851, and recorded May 24, 1852, in book 45, page 655. Consid., $160.00.

Convey' the west half of the southwest quarter of section 20, being 80 acres, in T. 38 N., R. 13 E. of 3rd P. M., subject to all legal highways. Certif. of ackn't by justice of the peace, Cuyahoga Co., Ohio, states that "personally appeared John Bartholomew, who acknowledged that he did sign and seal the foregoing instrument, and that the same is his free act and deed. I further certify that I did examine the said Deborah Bartholomew separate and apart from her husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared she did voluntarily sign, seal, and acknowledge the same, and that she was still satisfied therewith."

Certif. of magistracy and conformity by clerk of the court of common pleas in and for said county, by deputy.

204 6. *Corydon Weeks, of Summit Co., Ohio, to A. L. Soule.*

Warranty deed, dated April 13, 1852, and recorded May 20, 1853, in book 62, page 619. Consid., $200.00.

Conveys the west half of the southwest quarter of section 20, aforesaid.

Attested.

In testimony whereof the said Corydon Weeks and Louisa L. Weeks, who hereby relinquished her right of dower in the premises, have hereunto set their hands and seals this," &c.

(Signed) CORYDON WEEKS. [SEAL.]
LOUISA L. WEEKS. [No seal.]

Ack'g'd by Corydon Weeks and Louisa L. Weeks.

Certif. of ackn't by justice of the peace, Summit Co., Ohio, does not state that said parties were known to him.

Certif. of magistracy and conformity by clerk of the court of common pleas Summit Co., Ohio.

7. *Ambrose L. Soule and Sophia M., his wife, of Cyeanga Co., Ohio, to John T. Avery.*

Warranty deed, dated May 30, 1853, and recorded Oct. 12, 1853, in book 64, page 425. Consid., $800.00.

Convey the west ½ of southwest quarter of section 20, T. 38 N., R. 13 E., of 3rd P. M., containing 80 acres.

205 Certif. of ackn't, by justice of the peace Cuyahoga Co., Ohio, states that "personally came the above-name d Ambrose L. Soule and Sophia L. Soule, who signed and sealed the foregoing instrument, and acknowledged the same to be their free act and deed; and the said Sophia M. Soule being by me privately examined, separate and apart from her said husband, acknowledged that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith.

Certif. of magistracy and conformity by clerk of the court of common pleas of said county.

8. *John T. Avery with William Person.*

Agreement recorded June 23, 1857, in book 135, page 387, as follows: Whereas I hold in fee simple the title of eighty acres of land, being the west half of southwest quarter of section 20, township 38 north, of range 13 east, of 3rd principal meridian, in Cook Co., Ills., said title being made to me by A. L. Soule, of *Granga* Co., Ohio, I hereby bind myself when said property is disposed of to pay unto William Person the one-half of the proceeds, in consideration of his having paid

206 me the one-half of the purchase money.

JOHN T. AVERY.

Cleveland, June 10, 1853.

Not under seal, not acknowledged.

Appended is—

9. *William Person to L. H. Muzzy.*

Assignment dated May 22, 1855, and recorded June 23, 1857, in book 135, page 388.

Assigns and transfers all right, title, and interest, &c., to "the within" to said Muzzy as collateral security for $675.00 paid "me" on contract for 20 acres of land in Cuyahoga Co., Ohio. "Now if I pay said Muzzy said payment & interest within sixty days he is to surrender this agreement." Not under seal; not acknowledged.

Appended is—

"I assigns this further to secure said Muzzy for my note to him of this date, payable in one year, for one hundred dollars, without interest.

"WM. PERSON."

10. *William Person and Julia, his wife, of Covington, Ky., to Lucius H. Muzzy.*

Deed dated June 18, 1857, and recorded Aug. 4, 1857, in book 144, page 91. Consid'n, $825.00.

207 Convey the one undivided half of the west half of the southwest quarter of sect. 20, T. 38 N., R. 13 E., of 3d P. M.

Deed contains covenants against acts of grantor done or suffered. Certif. of ackn't commences.

STATE OF KENTUCKY,
City of Covington, Kenton County, ss:

Be it remembered that on this 18th day of June, 1857, before me, John Mackey, a commissioner duly appointed and commissioned by the governor of the State of Illinois to take acknowledgment and proof of the execution of deeds and other instruments in writing, appeared, &c., attested under his official seal.

[L. S.] (Signed) JNO. MACKAY,
Commissioner of the State of Ill's.

Certif. of magistracy by secretary of State of Illinois certifies that John Mackay, before whom the acknowledgment was taken, is and was at the time of taking thereof a commissioner of said State (Ill's) in and for the city of Covington, State of Kentucky, duly authorized, &c.

208 11. *John T. Avery and Sarah A. Avery, husband and wife, of Cleveland, Ohio, to Lucius H. Muzzy.*

Quitclaim deed dated Nov. 23, 1857, and recorded Dec. 5, 1857, in book 133, page 52. Consid'n, $1.00.

Give, grant, remise, release, and quit claim unto the said Muzzy, his heirs and assigns, all such right and title as we, the said John T. Avery, have or ought to have in and to the south half of the west half of the southwest quarter of sect. 20, T. 38 N., R. 13 E., of 3d P. M., containing 40 acres of land, more or less, it being the south half of eighty acres deeded by A. L. Soule to said J. T. Avery in May, A. D. 1853, and recorded in book 64 of deeds, page 425, and the said Sarah A. Avery

remises, releases, and quitclaims unto the said Muzzy, his heirs and assigns, all her right and title of dower in the above described premises.

(Signed) JOHN T. AVERY. [SEAL.]
SARAH A. AVERY. [SEAL.]

Certif. of ackn't as follows:

THE STATE OF OHIO,
Cuyahoga County:

CLEVELAND, *Nov*, 23, 1867.

Personally appeared John T. Avery & Sarah A. Avery, who
209 acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed. I further certify that I did examine the said Sarah A. Avery separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she declared that she did voluntarily sign, seal, and acknowledge the same, and that she was still satisfied therewith. Before me.

[L. S.] C. ATWATER,
Notary Public.

12. *L. H. Muzzy, of Springfield, Ohio, to George W. Worthington.*

Warranty deed dated Dec. 2, 1857, and recorded Dec. 5, 1857, in book 133, page 51.

Said L. H. Muzzy, in consideration of seven hundred , gives, grants, bargains, sells, and confirms unto the said Worthington the south half of the west half of the southwest quarter of sect. 20, T. 38 N., R. 13 E., of 3d p. m., containing 40 acres of land, "it being the south half of eighty acres deeded by A. L. Soule to John T. Avery, May, 1853." To have and to hold, &c., unto the said Worthington, his heirs and assigns.

210 Grantor signs and is described in certif. of ackn't as Lucius H. Muzzy; certif. of ackn't by notary public, Cuyahoga Co., Ohio, does not state that said Muzzy was known to him.

13. *Heman Scott and Rhesa, his wife, of Marion, Ohio, to John B. King, of Chicago.*

Quitclaim deed dated June 21, 1861, and recorded June 22, 1861, in book 216, page 276.

The party of the first part, in consideration of $1.00, remise, release, sell, convey, and quitclaim unto the said party of the second part, and to his heirs and assigns, forever, all the right, title, interest, claim, and demand which the said party of the first part have in and to the following described lots, pieces or parcels of land, to wit, with other property, the west half of the southwest quarter of sect. 20, T. 38 N., R. 13 E., of 3rd p. m., also all the right, title, and interest of the said party of the first part in and to all lands, lots, and real estate of every kind, name, and nature, situated in Cook Co., Ills., as appears of record in the Cook Co. records in said State of Ills., that is to say, the day of the date of these presents.

211 14. *In the matter of the estate of John B. King, deceased.*

In the county court of Cook County.

Case No. 1 in box 1,220, and case No. 1 in box 1,473.

Petition of Emily A. King, sworn to Oct. 7, 1864, filed Oct. 7, 1864, represents that John B. King, late of Chicago, died on or about October 2, 1864, intestate, leaving personal and real estate, as far as can be ascertained by petitioner, to the amount of $20,000.00; that deceased left him surviving affiant as his widow, and Vere Bates King as child and only heir at law, aged two years last Feb'y 11th, and prays that letters of administration be granted her; letters of administration granted and issued to Emily A. King Oct. 7, 1864, and recorded in documentary record 23, page 476.

Bond in the penal sum of $30,000.00 (stamp $1.00), filed Oct. 7. 1864.

Warrant to appraisers, issued Oct. 7, 1864.

Appraisement of personal property, filed Dec. 31, 1864. Amount, $1,013.77.

Appraisement of award to widow, filed Dec. 30, 1864. Amount, $1,659.00.

Widow's selection of personal property, filed Jan'y 4, 1865. Amount, $838.27.

Inventory filed Dec. 31, 1864, does not mention the premises in question.

212 Additional inventory, filed Oct. 6, 1860, mentions with other property the west half of the southwest quarter of sect. 20, T. 38 N., R. 13 E., in Cook Co., Ills., value unknown, and states that Messrs. Waite and Towne have an interest in the same.

Proof of publication and of posting notices to creditors, filed Dec. 30, 1864.

Adjudication of claims had Feb'y 20, 1865, and at subsequent dates, and sundry claims allowed.

Reports of administratrix, filed Jan'y 24, 1866, and Feb'y 19, 1867.

15. *In the matter of the guardianship of Vere Bates King.*

In the same court.

Case No. 2, in box 1489.

Letter of guardianship granted and issued to Emily A. King, April 26, 1867, and recorded in documentary record 19, page 597, from which it appears that said minor was aged 5 years on Feb'y 14, 1867, and bond of guardianship in the penal sum of $20,000 (stamp, $1.00) filed same day.

Inventory filed June 19, 1868, mentions with other property the undivided half of the west half of the southwest quarter of sect. 20,
213 t. 38 n., r. 13 e., in Cook Co., Ills., containing 80 acres, worth about $15.00 an acre, making $600.00; and states that the title to said property is in Horace F. Waite, who holds one undivided half for the estate of John B. King, deceased, as the guardian is informed; that she is ignorant of the nature of the title held by said Waite, but believes it to be good.

Guardian's account and report, filed June 30, 1868.

214 *Judgments.*

In the circuit court of Cook County.

16. JOHN B. KING
v.
OLIVER P. FORD ET AL.

Case No. 22549, in chancery, Sept. 19, 1863, decree (inter alia) that costs be paid, one-half by petitioner and one-half by Oliver P. Ford. Fee book 3, page 425.

In the superior court of Chicago.

17. JOHN B. KING
v.
BENJ. B. KING.

Case No. 5298; garnishee dismissed at plaintiff's costs, June 5, 1866. Fee book 13, p'g' 506.

In same court.

18. JOHN B. KING
v.
THOS. B. VANERERY ET AL.

Case No. 12352; June 8, 1866, dismissed at plaintiff's costs. Fee book 25, page 173.

In same court.

19. EMILY A. KING, ADM'X,
v.
GEORGE W. DUNLOP ET AL.

Case No. 12844; June 11, 1868, sci. fa. dismissed at plaintiff's costs. Fee book 23, page 524.

In same court.

20. EMILY A. KING, ADM'X,
v.
P. B. SHIEL.

Case No. 19821; March 11, 1868, dismissed at plaintiff's costs. Fee book 26, page 33.

215 *Tax sales.*

21. Sale April 28, 1845 (State & co. taxes of 1844), of W. ½ SW. ¼ sec. 20, t. 38, r. 13, offered; 10 acres sold to W. B. Eagan for 264. "Red. by P. L. Hinckley, 6th M'ch, '47."

22. Sale July 6, 1847 (State & co. taxes of 1846), of W ½ SW. ¼ sec. 20, t. 38, r. 13, to J. Y. Scammon for 2.59. "Redeemed by G. S. Seymour for P. L. Hinkley, July 2nd, 1849."

23. Sale Sept. 13, 1850 (State & co. taxes of 1849), of W ½ SW. ¼, sec. 20, t. 38, r. 13, to G. A. Lally for 3.15.

24. Sale Sept. 11, 1851 (State & co. taxes of 1850), of W. ½ SW. , sec. 20, t. 38, r. 13, to State for 3.75. "Canceled in 1854."

25. Sale June 13, 1852 (State & co. taxes of 1851), of W. ½ SW. ¼ sect. 20, t. 38, r. 13, to B. F. Sherman for 4.88. "Redeemed Aug. 17th, 1853; by J. B. F. Russell, ag't for Wm. Person; am't 1,439."

26. Sale June 11, 1855 (State & co. taxes of 1854), of W. ½ SW. ¼ s. 20, t. 38, r. 13, to J. M. Adsit for 11.71. "Certificate surrendered and canceled August 23, 1855."

216 . We have examined our indices to the records of Cook County, Illinois, and find no conveyances of the west half of the southwest quarter of sect. 20 aforesaid executed by the parties named herein as grantors or grantees shown thereby to have been recorded in the recorder's office of Cook County, Illinois, prior to the dates of record of the deeds as by them respectively herein set forth; no judgments appearing thereby to have been rendered in the several courts of record in said county vs.—

James S. Seymour,	prior to	Oct.	14, 1843.
John R. Bartholomew,	"	" May	24, 1852.
Corydon Weeks,	"	" May	20, 1853.
Ambrose L. Soule,	"	" Oct.	12, 1853.
William Person,	"	" Aug.	4, 1857.
Lucius H. Muzzy,	"	" Dec.	5, 1857.
Heman Scott,	"	" June	22, 1861.

neither any against George W. Worthington, John T. Avery, John B. King, Emily A. King, as administratrix or guardian, or Vere Bates King, at any time, which we deem liens thereon, except those shown.

N. B.—That all dismissals and judgments under the general rule or order of the superior court made June 7, 1869, are excepted from the above statement as to judgments, and no tax sales of same noted

217 thereon as had standing on record except those shown.

Chicago, July 15, 1869.

SHORTALL & HOARD.

A true copy.

HANDY, SIMMONS & CO.

To which counsel for defendant objected, but said objection was overruled, and the same was read in evidence.

HENRY G. MILLER was thereupon sworn in behalf of complainant, and testified as follows:

I am attorney for the plaintiff; I will state that I was a member of the firm of Miller, Van Arman & Lewis during the year 1869 and 1870. The firm was afterwards changed by Mr. Van Arman's retiring and Mr. Frost coming in. In 1869 our firm was employed by Mr. Avery for the purpose of settling his title to the west half of the southwest quarter of section 20, township 38, range 13. Our employment was through a firm in Cleveland, Messrs. Canfield & Caskey there. The first thing that was done, I had an abstract made by Messrs. Shortall &

218 Hoard of the title to this property, and this abstract was brought to our office. I received some papers in relation to the title to this property from, I think, Messrs. Canfield & Caskey. There were a large number of tax receipts and, I think, there were two deeds that had never been recorded. One purported——

(Defendant's counsel objects to any testimony by the witness as to any

deed or papers until the execution of such deeds and paper has been properly proved.)

The WITNESS. One purported to be a deed from Heman Scott to Isaac Bishop. The other purported to be a deed from Isaac Bishop to Porter L. Hinkley, which were supposed to lay in the chain of title, and through which Mr. Avery claimed to have derived his title. These deeds had not been recorded in Cook County. We caused them to be recorded—filed for record. Subsequently, commission was issued to take the testimony of Mr. Scott and Porter L. Hinkley. Their testimony was taken, and the depositions were returned and filed in the case that was commenced, for the purpose of settling this title against these defend-
219 ants, and these deeds were attached, I think, as exhibits to those depositions. The case was pending at the time of the fire in October, 1871. The records of this case were destroyed in that fire—these depositions and deeds. They were then in the clerk's office, I think, of the superior court. All the papers that were delivered to Miller, Van Arman and Lewis were also destroyed. Everything in our office was destroyed. This abstract that had been made was destroyed. All the tax receipts were destroyed. Every paper that was delivered to us in connection with this case was destroyed in that fire.

(Defendant's counsel objects to the testimony of the above witness as incompetent in so far as he attempts to show the contents or character of any paper.)

JASON CANFIELD, a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct examination by Mr. MILLER:

Q. What is your business?

220 A. I am a member of the Cleveland bar, and am practicing law at that place. I am a member of the firm of Canfield & Caskey; that has been the name of our firm since 1868.

Q. Were you employed by Mr. Avery or the complainants in this case to look after—professionally employed—with reference to the title of the west half of the southwest quarter of section 20, township 38, range 13?

A. This matter was placed in our hands—in the hands of our firm—some time during the summer of 1869, by Mr. George Worthington.

Q. Now you may go on and state, without any questions, what you did, what papers were placed in your hands, what you did with them; give a history of your connection with this matter.

A. I think, in August of 1869, Mr. Worthington brought to the office this receipt with what purported to be an abstract accompanying this receipt. It was placed in our hands to investigate and find out what was the trouble with this land. We immediately took all the steps we thought was necessary to find out. We had an extensive correspondence about the country, supposing, as we did at that time, that the deed——

(Objected to.)

221 The WITNESS. Well, from our correspondence——

(Objected to.)

The WITNESS. We received from Porter L. Hinkley——

(Objected to.)

The WITNESS. We received from Porter L. Hinkley in December, 1869, two old deeds. Am I permitted to state their contents?

Q. State what they purported to be.

A. One was a deed——

(Objected to.)

The COURT. He must describe them in some way, so as to separate one from the other.

The WITNESS. One was a deed from Heman Scott to Isaac Bishop. The other was a deed of Isaac Bishop to Porter L. Hinkley. Those two deeds January 6th, 1870, we sent to be recorded—sent them to the recorder of Cook County. Mr. Miller is mistaken about having put them on record himself.

Q. Well, that is my recollection of it, any way.

A. Those deeds were returned to us in May, 1870. I was in Chicago, and on making inquiries, was informed—— (Objected to.)

222 Well, I went and saw Geo. Scoville, an attorney at this bar. I cannot state what he said.

Mr. WAITE. No, sir.

Mr. MILLER:

Q. Never mind about that.

A. I went from Mr. Scoville's office to the office of Messrs. Miller, Van Arman & Lewis, and left with them these two deeds and the abstract which was placed in my hand at the time that this receipt was—I think August, 1869—and directed them to commence suit. Afterwards these two old deeds were returned to us, and, August 30th, 1870, I sent the deed to Heman Scott to Porter L. Hinkley with a commission from this court to take his deposition, I cannot state what the instructions were?

Mr. WAITE. No, sir.

The WITNESS. The other deed, the one of Heman Scott to Isaac Bishop, I took myself about that time to Marion, and had it attached to the deposition of Heman Scott. I know nothing further with regard to this deed from Bishop toHinkley personally. The last I knew of it

223 it was sent to Porter L. Hinkley. I however paid a commissioner for taking his deposition. These deeds had the appearance of being——

(Counsel for defendant objects to the witness stating the appearance of these deeds. Objection overruled. Taken subject to objection.

The WITNESS. They appeared to be aged, looked like old papers; they were quite brown; before having these deeds recorded I procured the certificate of the clerk of the court of Geauga County, in which county the justice resided that took the acknowledgment of the deed of Bishop to Hinkley, and attached it to the deposition, the certificate of the clerk of the court of common pleas as to the official capacity of that officer at the time he took it, and that was attached to the deed at the time it was sent here for record.

Mr. MILLER:

Q. Was there anything said as to whether it was in conformity to the laws of this State?

(Objected to.)

224 A. Also while at Marion I procured a certificate of the clerk of the court of common pleas of Marion County that was attached to the deed of Scott and Bishop proving the official character of the justice who took the acknowledgment of Heman Scott.

(Counsel for defendant objects to the latter part of the preceding answer admitted subject to objection.)

Q. Let me ask you right there whether the deeds were executed in conformity to the laws of the State of Ohio.

(Objected to as incompetent; objection overruled and exception taken to the ruling of the court.)

A. I examined these certificates carefully. The certificate of the clerk of the court of common pleas of Geauga County, certified that the justice who took the acknowledgment was authorized by the laws of the State of Ohio to do it, that he was acquainted with his signature, that he was a justice at the time the acknowledgment purported to have been taken, and that the deed was acknowledged in conformity with the laws of the State of Ohio.

225 (Counsel for defendant objects to the last answer as incompetent and objection overruled.)

Q. Executed and acknowledged?

A. I don't recollect about the word executed, but I do recollect as to the rest, and the certificate of the clerk of the court of common pleas of Marion County was of a blank filled up and contained the statement that the justice who took the acknowledgment of that deed was a justice of the peace at the time that he took it, that he was acquainted with his signature, and that the deed was executed in conformity with the laws of the State of Ohio; both of the certificates were under the seals of the respective courts of the county.

Q. Were they attached to them at the time they were sent here for record?

A. I have stated that. They were attached to the deeds at the time I sent them for record and the deeds were returned to me, and had the endorsement; they were endorsed as recorded.

Q. State whether you sent any tax receipts or what purported to be tax receipts on this property to Millar, Frost & Lewis?

226 A. July 29, 1871, Mr. Avery brought into our office a number of tax receipts, and I selected from the tax receipts he brought in a certain number of tax receipts, which on that day I sent to Miller, Frost & Lewis, 94 Washington street, Chicago. Those were the tax receipts—purported to be—of this land; the west half. I have the letter copy before me, the west half of the southwest quarter of section 20, township 38, range 13, eighty acres, for the year 1856 to 1868, both inclusive, thirteen years.

Q. And all the intermediate years?

A. Yes, sir, every year; the years 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868. These taxes, as appeared by the receipts, were paid by the Rev. John T. Avery, who is one of the plaintiffs, and were the State, county, and township taxes. I examined them, all of them, at the time.

(Defendants' counsel objects to the contents of these papers being stated & objection overruled.)

Q. How did they purport to be signed, officially?

(Objected to; objection overruled.)

227 A. Purported to be signed officially, but I cannot state the name of the official; I don't recollect now.

Q. Have you got a copy of the letter in which you enclosed those receipts?

A. Yes, sir; here is the letter, impression of the letter.

Q. A letter press impression?

A. Yes, sir; the letter-press impression of that letter.

Q. Read that letter.

(Objected to as incompetent.)

A. The letter was burnt up.

Q. Did you receive any deed from Muzzy to Worthington? These deeds have been put in evidence here.

A. I did receive from one of the executors of the Worthington estate, Ralph Worthington, the deed that was attached to a deposition which I once gave in this case.

Q. You received a deed from Muzzy to Worthington, the deed which has been offered in evidence in this case?

A. Yes, sir.

Q. You received that from whom?

A. Ralph Worthington, one of the executors of the Worthington estate.

Q. (Exhibiting deed.) Is the deed now shown you the deed?

(Objected to.)

228 (Counsel hands to witness deed from Muzzy to Worthington, already offered in evidence.)

Q. Are you acquainted with the laws of Ohio?

(Objected to.)

A. Yes, sir; I am acquainted with the laws.

Q. In relation to the execution and acknowledgment of deeds?

A. Yes, sir.

Q. State whether this deed is executed and acknowledged in conformity with the laws? I mean the deed from Muzzy to Worthington.

(Objected to as incompetent; objection overruled and exception.)

A. It is.

Q. Look at the next deed, from Avery to Muzzy, and state whether that is executed and acknowledged in conformity with the laws of Ohio at the time it purports to have been acknowledged?

(Objected to, objection overruled, exception by counsel for the defendant.)

A. This deed of John T. Avery and wife to Lucius H. Muzzy is executed and acknowledged according to the laws of the State of Ohio.

Q. In force at the time it was executed?

229 A. Yes, sir; the law of 1831 is the law which is now in force in Ohio in regard to the execution and acknowledgment of deeds.

Q. You say Mr. Avery handed you an abstract that you afterwards sent to Miller, Van Arman & Lewis?

A. Yes, sir.

Q. An abstract of the title of this property?

A. Purported to be.

Q. Who made that abstract?

A. I know the certificate was the certificate of the same parties who appear on this bill.

Q. Shortall and Hoard?

A. Yes, sir.

Will you go on and state what that abstract contained, state whether you examined that abstract in the first place, and how carefully you examined it?

A. I examined it very carefully; examined it a number of times. That abstract contained——

(Defendants' counsel objects to the contents of the abstract being stated; objection overruled; exceptions by counsel for the defendant.)

Q. Before answering the question will you be kind enough to state the contents of the deed from Scott to Bishop and Bishop to

230 Hinckley? State in the first place whether you examined those deeds.

(Defendants' counsel objects to the question on the ground that it does

not appear that the witness was acquainted with the signatures of the parties to those deeds, and because the execution of those deeds have not been properly proved, the foundation for the secondary evidence not having been sufficiently laid. Taken subject to objection.)

A. I did.

Q. Did you see the certificate of the justice attached to these deeds?

A. I did. I read the deed and the certificates, all of them, of both deeds; examined them very carefully.

Q. There was a certificate of the justice to each deed?

A. Yes, sir.

Q. State whether that was in conformity with the laws of Ohio or not.

(Objected to as incompetent and irrelevant.)

Q. State the contents of those deeds as near as you can?

(Objected to as incompetent & objection overruled & exception.)

231 A. I examined very carefully the deed from Heman Scott to Isaac Bishop. That was a warranty deed with the usual covenants as to title and as to incumbrances, and it conveyed by description this very identical land; the west half of the southwest quarter of section 20, township 38, range 13. I also examined very carefully the deed of Isaac Bishop to Porter L. Hinckley; that was a warranty deed with the usual covenants of warranty as of title and against incumbrances, and that conveyed the identical land described in the deed of Heman Scott to Isaac Scott.

Q. Have you any recollection in regard to the consideration named in these deeds or either of them?

A. I don't recollect the consideration, the amount. I know, however, it was not one dollar—that is, it was not nominal; the consideration was expressed, but I cannot state the amount.

Q. Now, will you go on and state the contents of that abstract before referred to?

(Objected to as incompetent; objection overruled; exception by counsel for the defendant.)

232 A. I examined the abstract at various times; the first conveyance recited in that abstract was the recital of a certificate of James S. Seymour, of Auburn, N. Y.

The next purported to be a patent of the United States to James S. Seymour, of Auburn, N. York.

(Defendants' counsel objects to this testimony on the ground that there is no proof of the loss of the deed of Seymour or of the patent to Seymour, there being no foundation laid for even the admission of the abstract.

Plaintiffs' counsel states that he expects to prove that the deeds cannot be produced.

Taken subject to objection.)

Q. Go on.

A. The next conveyance upon that abstract purported to be a conveyance from Heman Scott to James S. Seymour; the next conveyance was John R. Bartholomew to Corydon Weeks; the next conveyance was from Corydon Weeks to Ambrose L. Soule; the next conveyance was Ambrose L. Soule to John T. Avery; the next conveyance I am not sure whether it was William Person——

Q. I don't care about going through that, because we have not
233 traced the title through Person.

A. I cannot state whether that conveyance on the abstract was William Person to Lucius H. Muzzy, or John T. Avery to Lucius H. Muzzy. The abstract shows two conveyances, one of William Person to

Lucius H. Muzzy, and the other to one-half of this property from John T. Avery to Lucius H. Muzzy. Then after these two the abstract showed a conveyance of Lucius H. Muzzy to George Worthington; another conveyance appeared upon that abstract which was put into our hands in 1869.

Q. That is in this chain?

A. In this chain there were some tax matters notices upon the abstract, but a statement upon the abstract that there were no judgments against the property. This abstract was certified to by Shortall and Hoard.

Q. Now we will go to the deed of James S. Seymour to Herman Scott. Is that deed in the possession of either of the complainants in this suit or within their control? State all you know upon that subject.

A. Not to my knowledge; I have made effort to find that deed; I have called upon Mr. Scott, in person, with reference to that deed,
234 and also have written to Auburn, N. Y., for the purpose, and could get no information in regard to it, so that I have no knowledge or intimation as to where that deed can be found, if it is in existence.

Q. You are the attorney for the complainants in this case?

A. Yes, sir.

Q. Well, they have never given it to you?

A. No, sir.

Q. Have you inquired of them for it?

(Objected as incompetent; objection overruled.)

Q. Have you asked them for them or tried to get them from them?

A. I have called upon them to produce all the papers which they had in relation to this property, and the executors and Mr. Avery have furnished me with papers which they said were all, and this deed was not among them.

Q. Take the deed of Scott to Bishop, that is already explained, and Bishop to Hinckley, and of Bartholomew to Weeks, is that deed in your possession or in possession of the parties to this suit? State all you know about efforts to get that deed.

A. Perhaps I had better mention the deed before that—the deed of Porter L. Hinckley to Bartholomew.

Q. Yes, that is it.

235 A. We have applied to Mr. Bartholomew in person to get that deed, and could not find it. We could derive no information as to where this deed could be found. We have also, by correspondence, written Mr. Porter L. Hinckley with reference to this deed, and received information—— (Objected to.) We got no information from him as to the whereabouts of this deed. We also applied to Mr. Weeks. He has given his testimony here. We had the first information we go' with regard to any whereabouts of this deed of Porter L. Hinckley to Mr. Bartholomew. I will state that we corresponded with and saw Mr. Royale Taylor, of Ravenna, Ohio, who was the agent of Ambrose L. Soule (Soule is dead), who had charge of his papers, and he examined them (objected to) at our solicitation. (Objected to.) I would state only the efforts we made to find the deed. We also corresponded with the executor of Ambrose L. Soule—Benjamin Soule, of Miner, Michigan. We could get no information of him in reference to that deed, or any of the deeds in the chain of title. We also corresponded with a son of Ambrose
236 L. Soule, living somewhere near Lake Michigan, in Michigan. I don't just now recollect the place, and we could get no information at all about it since the case was adjourned—November term. I

called upon Mrs. Weeks in person at Mount Vernon, Ohio, and also upon her son, Carlos Weeks, who is living with her, to make search for this deed. I could get no information about this deed of Hinckley to Bartholomew.

Q. Then with regard to the deed of Bartholomew to Weeks, of which there is a record, what efforts have been made to get that deed; the deed mentioned in this abstract that you refer to?

A. In our correspondence and personal application to Royale Taylor and Mrs. Lewis Weeks and Carlos Weeks, and with Corydon Weeks, we applied to them each for this deed, and could get no information with regard to it.

Q. Is that deed in the possession of the complainants, or under their control?

A. Not to my knowledge. We have called on the complainants for all the papers they had in relation to this case, and they furnished
237 us what they said were all the papers they had, and this deed was not among them, nor any other deeds or papers except what have been produced here on this trial.

Q. Then proceed to the deed of Corydon Weeks to A. L. Soulé; what efforts have you made to get that deed?

A. We made the same efforts and called upon the same parties——

Q. And have not succeeded in getting them?

A. That we did with regard to the previous deed, and could get no information in regard to it.

Q. With regard to the deed from Soulé to Avery—is that deed in evidence?

A. That deed is here.

(The counsel for the defendant Mary A. King asks first to have all the testimony of the witness which relates to the contents of the abstracts ruled out; and secondly, all the testimony of the witness which relates to the contents of any deeds; each of which motions are overruled. Exception taken by defendant's counsel.)

Cross-examined by Mr. WAITE:

Q. Are you one of the attorneys in this case?

A. Yes, sir; I have been since August, 1869.

238 Q. You have had the main management of this case from its inception?

A. So far, perhaps, as looking up these lost deeds and looking up the testimony, I have had the personal charge.

Q. You went down to see Mr. Scott, did you not, before his deposition was taken?

A. I did. I charged him with having conveyed this land twice.

Q. I did not ask you what you charged him with; you are a lawyer, and know that I simply asked to have my questions answered.

A. Certainly.

Q. Was any bargain made between you and Mr. Scott in relation to this land?

A. Not any.

Q. You have no personal knowledge of the genuineness of these tax receipts, have you, that you sent?

A. No personal knowledge whatever.

Q. You simply mean to say you had certain papers that were apparently tax receipts, but you know nothing of their genuineness?

A. That is all I wish to say.

Q. You know nothing of the genuineness of *of* these deeds you speak of?

A. No, sir.

239 Q. You have no personal knowledge of the payment of a dollar of taxes?

A. No, sir. I have not. I have perhaps some knowledge of taxes paid since, but none in relation to those tax receipts.

Q. I don't understand you to testify to any personal knowledge as to the genuineness of any of those deeds you speak of?

A. I never saw them executed.

Q. Have no personal knowledge on the subject?

A. No, sir.

Q. Is your retainer in this case the ordinary retainer of an attorney?

A. It is, sir. It came into our hands by Mr. Worthington, who has been a client of mine for twenty years.

Q. Are your fees in any manner contingent upon the result of this case?

A. O, no.

Q. Either directly or indirectly?

A. No, sir; nothing was ever said about any fees when this matter was placed in our hands, nor has been since; we have made out several bills in relation to it and they have paid them.

Q. You don't pretend to have given all the deeds that were shown by that abstract of this property?

240 A. I do; that is my recollection distinctly.

Q. Didn't that abstract show a deed of this property to John P. King?

A. Yes, sir. I am mistaken about that; not in this chain of title. There was upon that abstract what purported to be a deed of Heman Scott to John P. King.

Q. Were there not other deeds upon that abstract which you have not testified about?

A. I think not; still a person may be mistaken.

Q. Were there any tax sales shown upon that abstract?

A. I stated that the abstract did show matters in relation to taxes, but I did not give the abstract or the contents of it in relation to taxes.

Q. Can you give the date of the filing for record of the several papers shown upon that abstract from memory?

A. Not the date.

H. F. WAITE, a witness called on behalf of the plaintiff, was duly sworn, and testified as follows:

Direct examination by Mr. MILLER:

241 Q. Have you in your possession or under your control what purports to be a deed from Heman Scott and wife to John P. King?

A. I have in my possession delivered to me by my clients a deed from Heman Scott to John P. King.

Q. Will you produce it?

A. I have no directions either to produce it or not produce it.

Q. Then I shall ask the court to ask you to produce it.

A. It was brought to me by the defendant and I will do simply as the court may direct.

Q. Have you the paper now in court?

A. I cannot answer that question without examining some of the papers that I have. My impressions are that the deed in question is among those papers [indicating]. I want further to add, that inasmuch as the

bill alleged the existence of the deed, and the answer admitted it, I have not examined in relation to that deed supposing it is a fact admitted in proof. Therefore, I have not examined in relation to it, but I imagine it is among a bundle of papers handed to me by my client. The reason I think I may have it is that not deeming any testimony
242 necessary on behalf of the defendant in the state of the pleadings in this case, I brought a bundle of what I had in the office, so that in any emergency I could have them. If the court says it is proper under the circumstances, I will produce it.

Q. Will you produce the deed, or do you decline to do so, leaving us to prove its contents?

A. You may from the contents, if you desire; there is no dispute about our having that deed; we have admitted it in our answer. You have alleged it in the bill, and if the court says it is proper for me to produce it under the circumstances I will do so.

Q. Do you decline to produce it?

A. I say nothing; I am not trying your side of the case.

Which was all the evidence introduced by either party upon the trial of said cause.

And inasmuch as the matters aforesaid do not appear of record in said cause, the counsel for the complainants presents this certificate of evidence and prays that the same may be signed and sealed by
243 the court and made a part of the record in this cause, and it is done accordingly.

S. M. MOORE, *Judge.* [SEAL.]

244 Afterwards, to wit, on the 29th day of December, A. D. 1875, said defendants by their solicitors filed in said clerk's office their motion to remand said entitled cause, which said motion is in the words and figures following, to wit:

Motion to remand.

THE UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court of the United States.

RALPH WORTHINGTON ET AL.
v.
EMILY A. KING ET AL.

Now come the said defendants and move to remand this case as being improperly removed under the statutes of the United States.

WAITE AND CLARKE,
Defendants' Solic'r.

(Endorsed:) Filed Dec. 29, 1875. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 31st day of March, A. D. 1877, in the adjourned March term of said court in the record of the proceedings thereof, in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

RALPH WORTHINGTON ET AL.
v.
EMILY A. KING ET AL. } In chancery.

245 Now come the parties by their solicitors, and the complainant moves the court to extend time to take proofs herein, and thereupon the court grants leave to complainant to take further proof within thirty days, such proof not to exceed that of three witnesses, and said complainants are to pay all costs of taking the same, and if not taken in Chicago complainants are to pay solicitor's fees and expenses of taking the same.

Afterwards, to wit, on the 19th day of April, A. D. 1877, in the said adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

RALPH WORTHINGTON ET AL.
v.
EMILY A. KING ET AL. } In chancery.

Now come the parties by their solicitors, and on motion of complainants' solicitor it is ordered by the court that the order entered herein on the thirty-first day of March last be so far modified as to allow complainant to take the evidence of seven witnesses instead of three witnesses.

Afterwards, to wit, on the 4th day of May, A. D. 1877, there were filed in said clerk's office the depositions of Corydon Weeks, A.
246 Byron Robinson, Augustus G. Downs, John T. Avery, and Henry G. Miller, in said entitled cause, which said depositions are in the words and figures following, to wit:

Depositions of Corydon Weeks, A. Byron Robinson, Augustus G. Downs, John T. Avery, and Henry G. Miller.

247 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States circuit court, northern district of Illinois.

Be it remembered that on the 10th and 26th days of April, A. D. 1877, I, Lawrence Proudfoot, a commissioner duly appointed by the circuit court of the United States for the northern district of Illinois, under and by virtue of the acts of Congress in relation thereto, did cause to be and personally appear before me in pursuance of the several notices hereto attached at my office, No. 143 La Salle street, in the city of Chicago in said northern district of Illinois, Corydon Weeks, A. Byron Robinson, Augustus G. Downs, John T. Avery, and Henry G. Miller, to testify and the truth to say on the part and behalf of the complainants in a certain suit or matter in controversy now depending and undetermined in the circuit court of the United States for the northern district of Illinois, at Chicago in said district, wherein George Worthington et al. are complainants and Vere Bates King et al. are defendants.

And the said Corydon Weeks, being of lawful age, and having been by

me, on this 10th day of April, first cautioned & sworn to tell the truth, the whole truth and nothing but the truth in the matter of con-
248 troversy aforesaid, I did carefully examine the said Corydon Weeks, and he did thereupon depose, testify, and say as follows, viz:

249 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States. In chancery.

RALPH WORTHINGTON, ABBY M. HOYT, MARY B. Worthington, Clara C. Worthington, George W. Worthington, Alice M. Worthington, and John T. Avery
vs.
EMILY A. KING, VERE BATES KING, AND Emily A. King, guardian of Vere Bates King.

Messrs. Waite, Clarke, and Dorman, solicitors for defendants:

Take notice that on Tuesday next, April 10th, A. D. 1877, at 10 o'clock a. m., and continuing from day to day if necessary, we shall take the testimony of Corydon Weeks, a witness residing more than one hundred miles from the place of holding said court, to be read on the hearing of said cause on behalf of the complainants, said testimony to be taken before Lawrence Proudfoot, esq., a United States commissioner, at his office, room 27, Major Block, No. 145 La Salle st., Chicago, Illinois.

Respectfully,

MILLER & FROST.
250 *Complainants' Solicitors.*

Service of copy of above notice accepted April 5th, 1877.
WAITE, CLARK & DORMAN.

251 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States. In chancery.

RALPH WORTHINGTON, ABBY M. HOYT, MARY B. Worthington, Clara C. Worthington, George W. Worthington, Alice M. Worthington, and John T. Avery
vs.
EMILY A. KING, VERE BATES KING, AND Emily A. King, guardian of Vere Bates King.

Messrs. Waite, Clarke & Dorman, sol'rs for def't, & N. A. Lauer, guardian ad litem.

Please take notice that on Tuesday next, April 10th, 1877, at 10 o'clock a. m., & continuing from day to day if necessary, before Lawrence Proudfoot, esq., U. S. commissioner, at his office, room 27, No. 143 La Salle st., Chicago, Ills., we shall proceed to take the testimony of Corydon Weeks, a material witness on behalf of complainants, resid-

ing more than one hundred miles from Chicago, to be read in evidence on the trial of said cause.

252 Respectfully,

MILLER & FROST,
Sol'rs for Compl.

Service of copy accepted April 5th, A. D. 1877.

VERE BATES KING,
By NICHOLAS A. LAUER,
His Guardian ad litem.

253 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States. In chancery.

RALPH WORTHINGTON, ABBY M. HOYT, MARY B. Worthington, Clara C. Worthington, George W. Worthington, Alice M. Worthington, and John T. Avery,
vs.
EMILY A. KING, VERE BATES KING, AND Emily A. King, guardian of Vere Bates King.

Mess. Waite, Clarke & Dorman, sol'rs for def'ts, and N. A. Lauer, guardian ad litem:

Please take notice that on Tuesday, April 24th, A. D. 1877, commencing at 11 o'clock a. m., and continuing from day to day, if necessary, before Lawrence Proudfoot, esq., U. S. commissioner, at his office, room No. 27, 143 La Salle street, Chicago, Ills., we shall proceed to take the testimony of John T. Avery, A. G. Downs, J. P. Robinson, and D. L. Perry, material witnesses on the part of the complainants, to be read in evidence on the trial of said cause.

Respectfully,

254 MILLER & FROST,
Sol'rs for Compl't.

Service of a copy of the within & foregoing notice accepted this 16th day of April, A. D. 1877.

WAITE, CLARKE & DORMAN.
VERE BATES KING,
By NICHOLAS A. LAUER,
His Guardian ad litem.

255 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States. In chancery.

RALPH WORTHINGTON, ABBY M. HOYT, MARY B. Worthington, Clara C. Worthington, George W. Worthington, Alice M. Worthington, and John T. Avery,
vs.
EMILY A. KING, VERE BATES KING, AND Emily A. King, guardian of Vere Bates King.

Messrs. Waite, Clarke and Dorman, sol'rs for def't, and N. A. Lauer, guardian ad litem:

Please take notice that on Thursday, April 26th, A. D. 1877, com-

mencing at 11 o'clock a. m., and continuing from day to day, if necessary, before Lawrence Proudfoot, esq., U. S. commissioner, at his office, room No. 27, 143 La Salle street, Chicago, Ills., we shall proceed to take the testimony of A. B. Robinson, a material witness on the part of the complainants, to be read in evidence on the trial of said cause.

Respectfully,

MILLER & FROST,
256 *Sol'rs for Compl'ts.*

Service of a copy of the within and foregoing notice accepted this 21st day of April, A. D. 1877.

WAITE, CLAI E & DORMAN,
Sol'rs for Def'ts.

VERE BATES KING,
By NICHOLAS A. LAUER,
His Guardian ad litem.

257 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States. In chancery.

RALPH WORTHINGTON, ABBY M. HOYT, MARY B. Worthington, Clara C. Worthington, George W. Worthington, Alice M. Worthington, and John T. Avery,
vs.
EMILY A. KING, VERE BATES KING, AND Emily A. King, guardian of Vere Bates King.

Messrs. Waite, Clarke & Dorman, sol'rs for def'ts, and N. A. Lauer, guardian ad litem:

Please take notice that on Thursday, April 26th, A. D. 1877, commencing at 11 o'clock a. m., and continuing from day to day, if necessary, before Lawrence Proudfoot, esq., U. S. commissioner, at his office, room 27, No. 143 La Salle street, Chicago, Ills., we shall proceed to take the testimony of Henry G. Miller, a material witness on the part of the complainants, to be read in evidence on the trial of said cause.

Respectfully,

MILLER & FROST,
258 *Sol'rs for Compl'ts.*

Service of a copy of the within and foregoing notice accepted this 24 h day of April, A. D. 1877.

WAITE & CLARKE.
VERE BATES KING,
By NICHOLAS A. LAUER,
His Guardian ad litem.

259 1st Q. Please give your name, age, residence, and occupation?

A. Corydon Weeks; 60 years old the last day of March; am a farmer; residence, Allegan, Michigan.

2d Q. State whether you were ever the owner of the west half (W. ½) southwest quarter (S. W. ¼) of section twenty (20), being eighty (80) acres in township 38 north, range 13 east of the 3rd P. M., Cook County, Illinois?

(Objected to as incompetent and leading).

A. Yes; I suppose I did.

3d Q. Of whom did you purchase it?

A. From John R. Bartholomew, I think; Bartholomew, at any rate.

4th Q. About what time?

A. I think about '50 or '51, about that time.

5th Q. State whether he ever executed a deed of this property to you?

(Objected to as leading and incompetent).

260 A. Yes. He did execute such a deed to me.

6th Q. State what became of this property after you purchased it of Bartholomew?

A. I deeded it to one Ambrose L. Soule.

7th Q. About what time?

A. About one--well, less than one year after I bought it of Mr. Bartholomew. I think I didn't have it a year.

8th Q. What was the consideration which you gave for the land when you bought it of Bartholomew?

A. I gave him forty acres of land in Van Buren County, State of Michigan, but back from that I think he let me have a note against Hinckly, against whom he had a note.

9th Q. Porter L. Hinkley?

(Objected to as leading).

A. Yes.

10th Q. What was the consideration which you received when you conveyed the property to Soule?

A. Well, I couldn't say really what it was worth.

11th Q. What did you get for it? What did you receive for it?

A. I didn't receive any money for it.

12th Q. What was it?

A. I received a horse, a very fine horse, and a lot of tea—chests of tea. I received the horse and chests of tea.

13th Q. What became of Soule?

261 A. He left Chagrin Falls, State of Ohio, and went to a place called Lyon, on the Grand River in Iowa County, Michigan.

14th q. Is he living?

A. He is dead; so I am told by mail?

15th q. Have you these deeds, the one which was executed by Bartholomew to you and also the one which was executed by you to Soule?

(Objected to as leading.)

A. I have not.

16th q. Do you know where they are?

A. I know where I last saw them.

17th q. What became of the one which you gave to Soule, or which you executed to him?

A. That I couldn't tell.

18th q. Did you retain that or deliver it up?

A. Delivered it up, of course.

19th q. Have you ever seen it since that time?

(Objected to as leading.)

A. No, sir.

20th q. Now, when did you last see the other deed which Bartholomew executed to you?

A. Well, I should think about 9 years ago—8 or 9 or ten.

21st q. Where was that?

A. In the State of Ohio, Summit County, town of Stowe.

22d q. In what particular place did you last see it?

A. In the bureau drawer.

262 23d q. In whose bureau drawer?

A. Mine.

24th q. Do you know what became of it?

A. No, I do not.

25th q. You have it not now?

A. I haven't got it now, no, nor I haven't seen it since then; when I left Ohio I left the bureau with those papers in it.

26th q. Has your deposition been once before taken in this cause?

A. Yes, sir.

27th q. How is this property described in your deed to Soule?

(Objected to as incompetent?

A. You mean the deed from me to Soule, I suppose.

28th q. Yes.

A. Well, it is described the same as from Bartholomew to me; the same description as from Bartholomew to me, or Hinckley to Bartholomew; I had both deeds.

29th q. Did you ever own any other lands in Cook County, Illinois, than this?

A. No, sir.

30th q. State whether the deed which you gave to Soule was acknowledged or not?

(Objected to as leading.)

A. Yes.

31st q. Before whom?

263 A. Well, that is a question that I can't come right straight at; the only man that ever executed any deeds to my knowledge; acknowledged any deeds, was M. D. Coll, of Summit County, Ohio.

32d q. What officer was he?

A. Justice of the peace.

33d q. Have you ever seen this deed since you gave it to Soule?

A. No, sir.

34th q. Are you familiar with the form of deeds for conveying land?

(Objected to as leading and incompetent.)

A. I used to be.

35th q. When?

A. Well, up to 12 years ago, 11 or 12; say 11 years ago; from 36 up to that time I was deeding and selling all the while more or less, taking deeds.

36th q. What do you say in respect to this deed, the form and contents?

(Objected to as leading and asking for opinion and not giving facts, and being incompetent.)

A. This was a deed all the way through by warranty, till it went out of my hands; the whole chain was warranty.

37th q. How was it in other respects in respect to the granting clause, &c.?

264 (Objected to as leading and incompetent, and asking for opinion instead of facts.)

A. I don't know as I really understand that.

38th q. I mean what clauses or clause was contained in the deed, in respect to naming the party from whom the title proceeded, and the party to whom, in whom it was vested by the deed?

(Objected to as incompetent and leading and asking for the opinion of the witness.)

A. Well, it was from me to Soule, if I understand it, are of course from me to Soule.

39th q. Do you mean that by the words of the deed the title was conveyed from you to Mr. Soule?

(Objected to as leading, incompetent, and asking for the opinion of the witness.)

A. Yes, sir.

(The testimony of the above witness is objected to as being in-
265 terested and incompetent against the defendants, and as having been taken over without any authority of the court, he having once already testified, and all the above questions which are leading and which ask for the opinion of the witness are objected to on that account.)

Cross-examination by Mr. WAITE:

1st X Q. When was the first year you came to Illinois?

A. Do you mean the time the deposition was taken here? That is the first time I was ever in Illinois.

2d X Q. That is, when your deposition was taken previously in this cause?

A. Yes, sir.

3d X Q. You never saw the land?

A. No, sir.

4th X Q. You have really no recollection of the description of the land?

266 A. I recollect the description of the land because it is the only land, of course, that I ever owned in this State.

5th X Q. You testified before that you could not recollect the description of the land, did you not?

A. Well, that I don't really recollect. I don't know whether I did or not, now, that was so long age. One thing is a fact, it is the only land I ever owned in this State.

6th X Q. I didn't ask you that; I asked you if you didn't testify on a previous occasion that you did not recollect the description of the land?

A. I might have done it.

7th X Q. You haven't seen the papers since then?

A. I might have said so before; can't say as to that.

8th X Q. You haven't seen the papers about which you testify since that former testimony?

A. No. All the recollection I have I found out a little more about it by writing in regard to it, than I did before.

9th X Q. You never saw the land?

A. No, sir; never saw it.

10th X Q. Do you know which direction it is from Chicago?

A. I don't know; I know what Mr. Bartholomew told me and I know what Mr. Hinckley told me.

267 11th X Q. You don't know what direction it is from Chicago?

A. No; the distance they told me——

12th X Q. I didn't ask you the distance.

A. No; I don't recollect.

13th X Q. You don't know which way it is from Chicago?

A. No, sir.

14th X Q. Do you know what county it is in?

A. Yes, sir; Cook County.

Upon reading over this deposition to the witness, he desires to correct his answer to the thirty-sixth direct interrogatory by answering

the same as follows: "This was a warranty deed that I delivered to Soule" (in place of the answer above given).

CORYDON WEEKS.

268 And the said A. Byron Robinson, being of lawful age and having been, by me, on this 26th day of April, 1877, first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, did thereupon testify, depose, and say as follows, viz:

269 A. BYRON ROBINSON, a witness called on this 26th day of April 1877, on behalf of the complainant, having been first duly sworn, was examined in chief by Mr. MILLER, and testified as follows:

Q. Where do you reside, Mr. Robinson?
A. I reside in Muir, Ionia County, Michigan.
Q. Did you know Ambrose L. Soule?
A. I did, sir.
Q. Is he now living?
A. He is not.
Q. When did he die?
A. He died on the 24th of June, 1857.
Q. Where was he living at the time of this death?
A. In Muir, Ionia County, Michigan.
Q. Were you a relative of his?
A. I was a son-in-law of his.
Q. Who was the representative of his estate?
A. I was acting executor of the estate after his death.
Q. Do you know whether he ever owned any land in Cook County, Illinois?

(Objected to as leading, as he is not competent to establish the ownership of real estate.)

270 A. I know that he owned 80 acres of land in Cook County.
Q. From whom did he get his title to it?

(Same objection as last.)

A. From Corydon Wicks.
Q. State all you know upon the subject of his getting this land from Corydon Wicks.

(Same objection as last.)

A. I recollect distinctly in 1851 or '2—'50 or '51 or '52—I couldn't tell precisely—he made a purchase of some land in Cook County, near South Chicago, of one Corydon Wicks, living, I think, in the county of Summit, at that time, township of Stow; I think he lived there.

(The last answer objected to as being incompetent evidence.)

Q. What State?
A. Ohio; I think it was the county of Summit, but I would not be positive; I have seen the deed among his papers from Corydon Wicks to Mr. Soule; I recollect the transaction wery well.

(Same objection as the last answer.)

Q. Did you have anything to do with the preparing of the deed, or anything of that kind?

271 A. It is rather my impression I drew the deed, but I will not be positive. I was acting as secretary for Father Soule during those years.

(Same objection as to last answer.)

Q. Have you looked for this deed?

(Same objection as last, and because the witness can't give his impression, that not being competent evidence.)

A. I have, sir.

Q. Where?

A. Among all the papers that I had in my possession, and that are now in the possession of the acting representative of his estate—his youngest son.

Q. Could you find them?

A. I could not.

Q. Do you know where it is?

A. I do not.

Q. Did Mr. Soule convey this property to any one in his lifetime?

(Objected to as not being the best evidence and leading.)

A. He conveyed this property to one John T. Avery; at least I have seen on his books a transfer of the property that he
272 owned—that he received from Corydon Wicks, to one John T. Avery.

Q. Will you look at the deed that was handed to the last witness, Mr. Avery, and is now annexed to the deposition in this cause, and state whose deed that is?

A. (Looking at deed referred to.) That is A. Le Soule's deed, sir; his signature is to it.

Q. Do you know his signature?

A. I do, sir.

Q. Is that signature (indicating) his wife's signature to it?

A. I should think it was, although I would not swear positively as to that; I would to the other.

Q. Will you state what the description of the land was when he deeded to Mr. Soule?

(Objected to as leading.)

A. I could not do it?

Q. Did Mr. Soule ever own any other land in Cook County?

(Objected to as leading and incompetent, as not being the best evidence to establish the fact.)

A. Not to my knowledge.

273 (Answer objected to as being the opinion of the witness.)

A. I think he never did.

Q. If he had would you have known it?

A. Yes, sir.

No cross-examination desired.

All of the above testimony of the witness in relation to any deed from Corydon Wicks, or anything contained in the deed from Corydon Wicks, or anything about the deed from Corydon Wicks, being objected to because it does not appear that the witness has any knowledge of the contents of such a deed or any knowledge of the handwriting of Corydon Wicks, and because no proof has been introduced by him or any one else to prove the execution any such deed.

A. BYRON ROBINSON.

274 THURSDAY, *April 26th*, 1877.

On this 26th day of April, came AUGUSTUS G. DOWNS, a witness called on behalf of the complainants, who, having been first duly sworn, was examined in chief by Mr. MILLER, and testified as follows:

Q. Where do you reside?

A. In Chicago.

Q. Do you know John T. Avery, of Cleveland?
A. I do sir.
Q. How long have you known him?
A. Since 1845.
Q. Did you ever pay any taxes for him on the southwest quarter (S. W. ¼) of section 20, township 38 north, range 13 east of the 3rd p. m.?
A. Yes, sir.
Q. Where did you pay them?
A. Paid them at the county treasurer's office.
Q. Here in Chicago?
A. Yes, sir.
Q. How long did you pay those taxes?
A. From 9 to 12 years; I couldn't say positively; 10 or 11 or 12 years.
Q. When was the last year that you paid them?
A. I think 1868 was the last year I paid them.
275 Q. And from 9 to 12 years prior to that time?
A. Previous to that.
Q. Did you pay them continously each year?
(Objected to as leading.)
A. No doubt I did.
Q. Did you take receipts at each payment.
(Objected to as leading.)
A. I did.
Q. What did you do with those receipts?
(Objected to as leading.)
A. Sent them to Mr. Avery at Cleveland, Ohio.
Q. Were those receipts genuine receipts, made by the proper officer?
(Objected to as leading.)
A. They were; they came from the county treasurer's office where I paid my own taxes; they were legitimate receipts; no doubt about that.
Q. Did you attend to those matters personally?
A. I did.

Mr. Miller desired to have it stated that after the direct examination was concluded Mr. Waite appeared and made the above objections to each interrogatory.

Mr. Waite states that he was detained by the court's charging
276 a jury in a case in which he was actually on the trial, and sent word to have them wait fifteen minutes for him and he would be here, and he was here in the time mentioned, and the testimony went on in his absence, and was taken, as Mr. Proudfoot says, subject to his (Waite's) right to make any objections when he arrived.

The direct examination was therefore resumed by Mr. Miller.

Q. You say you paid the taxes for Mr. Avery for from 9 to 12 years; will you state for what years you paid them?
(Objected to as leading, and as implying that he had paid the taxes for a term of years, and as being in that respect incompetent and leading.)
A. I notice the last time I paid taxes was 1868—from 1868, the last year I paid the taxes, and I paid taxes before that, I should say from 9 to 12 years; I wouldn't say positively whether from 9 to 12 years or not unless I had some of my letters to confirm me.

Q. What did you receive; did you receive any voucher when
277 you paid the taxes; and if so, what?

A. I received the county treasurer's receipt for the money which I paid.

Q. In each instance?

(Objected to as leading.)

A. In every instance.

Q. What did you do with those receipts?

A. I sent those receipts to Mr. Avery, of Cleveland, Ohio.

Cross-examination by Mr. WAITE:

Q. Can you tell me the amount you paid for any one year?

A. I don't think I could; my cash-book was burned up during the fire.

Q. Can you tell me the officer to whom you paid any amount?

A. Well, I don't know as I could refer back to the officer I paid the taxes to; I paid the taxes when I paid my own taxes in the county treasurer's office, and I got legitimate receipts.

Q. Did you pay any money in the county clerk's office on account of this land?

A. I don't think I did, sir.

Q. You don't remember?

A. I don't remember.

Q. You have no data to go by in relation to the payment of taxes on this land?

278 A. Yes, sir; some letters to go by—some letters to go by.

Q. You haven't those letters?

A. No, sir.

Q. You have nothing at all to refresh your memory by?

A. Nothing that belongs to me personally.

Q. Not belonging to you personally?

A. No, sir.

Q. You didn't go over those receipts after 1868, did you?

A. No, sir; I sent the receipts away.

Q. Never saw whatever receipts and papers you received for those years since you sent them away?

A. No, sir.

Redirect examination by Mr. MILLER:

Q. You say you have nothing in your possession to refresh your memory by? Have you anything to refresh your memory by?

A. I have seen letters that I wrote which gave my phraseology and about my language—letters of my own that I wrote in regard to the payment of the taxes.

279 Q. To whom?

A. To Mr. Avery; I paid those before the time I discovered that there was some one paying the taxes previous to my paying them—previous to myself.

R'cross-examination by Mr. WAITE:

Q. You found then that some one else had paid them besides yourself?

A. I did find that some one had paid them before the time was up—before it was really or absolutely time to pay. I found that duplicate payments were made of the amount; I found it marked paid on the books; I saw it myself; previous to the time of my attempt to pay the taxes I found that they were already marked paid on the books; I saw the partie's name who had paid it; that is why I came to know it was King; I knew King personally; found Mr. King had paid the taxes; found his name put opposite to it; I didn't see him pay it personally, but

I think Mr. King paid them; don't know whether Mr. King was
280 living at that time, but it was Mrs. King—the King name at any rate.

Q. Then, some of these years somebody else paid them?

A. Well, that year somebody else did; it is the first I ever knew of it.

By Mr. MILLER:

When was it you discovered somebody else paid the taxes?

A. I think it was in 1869.

Q. For what year?

A. The taxes would have been for the year, that is, in the spring; I think it would have been for the year——

Q. 1869?

A. Don't know but what it would have been for the year 1869; might have been for the year 1868.

Q. So that was the first time anybody else stepped in and paid the taxes?

A. That is the first time ever I knew it; I never knew of any one having any interest in the taxes besides Mr. Avery.

(Answer objected to as incompetent.)

The witness here states: Hearing my deposition read over reminds me of a circumstance which reminds me that when I saw the name King on the tax books I found afterwards it was Mr. King's son, the name meant to be represented.

281 By Mr. FROST:

State whether or not you ever paid any taxes on the land after you found they had already been paid by King?

A. I never paid any more taxes after that.

Q. State whether you ever found any body had stepped in and paid the taxes at any other time besides for the year 1868 or 1869.

A. It was only the one year that I knew there was any one had any interest in it.

Q. That year you think was what?

A. That year was for the taxes of 1868.

AUGUSTUS G. DOWNS.

282 On this 26th day of April, 1877, came JOHN T. AVERY, a witness called on behalf of the complainant, and, having been first duly sworn, was examined in chief by Mr. Miller, and testified as follows:

Preceeding the direct examination, Mr. Waite, of counsel for the defendant, entered the following objection:

1. The defendant objects to said Avery's testifying, because he is one of the complainants in said case, and the suit is brought against minors, and by the statute he is incompetent and interested.

2. Said Avery is objected to as being incompetent by reason of interest.

3. As being interested in the event of the suit, and therefore for that reason he is incompetent.

Direct examination by Mr. Miller:

1. Q. Where do you reside, Mr. Avery?

A. In Cleveland, Ohio.

2. Q. Are you one of the complainants in this suit?

A. Yes, sir.

3. Q. Were you ever the owner of the west ½ southwest ¼ section 20, township 38 north, range 13 E., 3d P. M.?

283 (Objected to as leading, and that it is not competent, and that the witness is not competent to testify in relation to it, and not being the best evidence, by reason of interest.)

A. Yes, sir.

4. Q. From whom did you get your title?

(Same obj ct on.)

A. Mr. Soule.

5. Q. Is the deed now shown to you attached to the depositions on file in this cause, marked C. M. Stone, commissioner, February 3d, 1873, the deed you received from Ambrose L. Soule of this land?

(Objected to as leading, and that the witness, by reason of interest, is incompetent to testify in answer to the question, and for the reason stated, to the previous question.)

284 A. It is to my satisfaction.

6. Q. I repeat the question. State distinctly whether this is or is not the deed.

(Same objection.)

A. It is.

7. Q. How much did you give Mr. Soule for this land?

(Same objection.)

A. The price was $800.00.

8. Q. How much did you give him?

(Same objection.)

A. I might state I gave him a fortune, because——

9. Q. Will you be good enough to state what you gave for this land—what you gave Mr. Soule for this land?

(Same objection.)

A. $800.00.

10. Q. What did you pay him?

(Same objection.)

A. That is the reason I didn't answer the other question. I gave him a lot of land in Cleveland.

(Answer objected to.)

11. Q. Did you have any agent in Chicago for the payment of taxes on this land?

(Same objection.)

A. At what time?

12. Q. From the year 1856 to the year 1868?

(Same objection.)

A. Mr. A. G. Downs.

13. Q. I didn't ask you who your agent was, but whether dur-

285 ing that period you had any agent in Chicago for the payment of taxes on this land?

(Same objection.)

A. Yes, sir,

14. Q. Who was the agent?

(Same objection.)

A. Mr. A. G. Downs.

15. Q. The witness who has just testified?

(Same objection.)

A. Yes, sir.

16. Q. Did you receive any receipts from him?

(Same objection.)

A. Yes, sir.

17. Q. What were they; what was the character of them?
(Same objection.)
A. I don't know what you mean by the question.
18. Q. I mean what do they purport to be?
(Objected to for the same reason as the last, and it not appearing that the witness knew anything about whether they were genuine or copies; and also it not appearing that the witness knew anything about their being originals.)
286 A. (No answer given.)
19. Q. I mean what do those papers you received from your agent, Mr. Downs, purport to be; that is, what they appear to be on their face?
(Same objection as last.)
A. They were treasurer's receipts, signed by the treasurer of the county.
20. Q. Of Cook County?
A. Yes, sir.
(The last two answers objected to, the proper foundation not being laid showing that the witness had any knowledge of the handwriting of the county treasurer.)
The WITNESS. I did have knowledge.
By Mr. MILLER:
21. Receipts of what?
(Same objection as last.)
A. For taxes.
22. Q. You say they were treasurer's receipts; receipts of what?
(Same objection)
A. Of money for taxes on the land in dispute.
(Same objection to this answer as to the last.)
287 23. Q. What did you do with these receipts that you received of Mr. Downs?
(Same objection.)
A. Put them into my desk and kept them there until the time of this interruption in the payment.
24. Q. Interruption in the payment of what?
(Same objection.)
A. Interruption in the payment of taxes in the treasurer's office, referred to by Mr. Downs.
25. Q. What did you then do with them?
(Same objection.)
A. I delivered them to Mrs. Canfield and Caskie, a law firm in Cleveland.
26. Q. What is Mr. Canfield's first name?
(Same objection.)
A. I couldn't swear to that—Jason Canfield; that is the name.
27. Q. Is Mr. Canfield now living?
(Same objection.)
A. No, sir.
28. Q. When did he die?
(Same objection.)
A. I think two years ago; can't be positive; don't remember exactly.
29. Q. Where did he die?
(Same objection.)
A. At Cleveland Heights—South Cleveland it is called.
Q. State of Ohio?
(Same objection.)

288 A. Yes, sir.

30. Q. State whether this land was occupied or vacant from 1856 to 1868.

(Same objection.)

A. How do you mean occupied? What do you mean by occupied?

31. Q. Whether any one was improving it, or whether any one was living on it, or anybody had possession of it from 1856 to 1868.

(Same objection.)

A. Not to my knowledge; it was not occupied to my knowledge.

(Last answer objected to as being dictated by Mr. Bently.)

32. Q. Will you please state whether any one was in possession of this land from 1856 to 1868?

(Objected to.)

A. What do you mean by possession? I said on that point, not to my knowledge. I don't know whether I could give any different answer.

33. Q. That is a sufficient answer. Is Heman Scott now living?

(Same objection.)

A. He is not.

34. Q. When did he die?

(Same objection.)

A. March 21st, 1874. I have a record of it that will show it; I

289 handed it to——

35. Q. I don't want that; I want to know when he died.

A. I was not there; I took the record; he died March 21st, 1874.

36. Q. Where?

(Same objection.)

A. At Marion, Ohio.

37. Q. How did you ascertain that fact of his death at that time?

(Same objection.)

A. Do you want me to tell all the ways I ascertained it?

38. Q. No.

A. I had the testimony of his wife and the testimony of the pastor who preached the funeral service; the testimony of the sexton who dug the grave and buried him; the testimony of the executor of the estate, and the testimony of the judge of the county and the seal of the county, and testimony that he performed his duty faithfully and settled the estate; and also I took the inscription on his tombstone with my own hand.

39. Q. You mean by testimony the statement of these parties?

(Same objection.)

A. Yes, sir; and I have in my possession a copy from the Marion County Sanitary Association.

290 40. Q. What did his wife say to you on that subject—upon the subject of his death?

(Same objection.)

A. She said he was dead.

41. Q. When did she say he was dead?

(Same objection.)

A. He died on the 21st of March, 1874.

42. Q. And you took the inscription from his tombstone?

A. I did.

43. Q. Will you read that, so the commissioner can take it down?

(Same objection.)

A. Heman Scott, born at Watertown, Connecticut, January 5th, 1798; died at Marion, Ohio, March 21st, 1874; aged 76 years, 2 months, and 16 days.

(Mr. Horace F. Waite, appearing for Vere Bates King, a minor, and a defendant in this case, objects to each and every of the above questions, and to each and every of the above answers, because the said Avery is interested in the event of this suit, and because he cannot testify against the defendant Vere Bates King, who is a minor, and because by the law he is an incompetent witness in a case brought against a minor as a witness; and at the time the above questions were propounded and each of the above answers made, the above objec-
291 tions were made, and to save rewriting of the same they are put at the end instead of after each question and answer.)

JOHN T. AVERY.

292 APRIL 26, 1877.

HENRY G. MILLER, a witness called on behalf of the complainant, having been first duly sworn, testified as follows:

I am one of the solicitors for the complainant. In 1869 or 1870 the firm of which I was then a member, Miller, Van Arman and Lewis, were employed by Mr. Avery, one of the complainants, to settle his title to the west ½ of the southwest ¼ section 20, township 38 north, range 13. Our employment was through a firm in Cleveland, Messrs. Canfield and Caskie. Either our firm procured an abstract to be made of the title to this property or else such an abstract was handed to us by Mr. Avery, then recently made; it was made by Shartall and Haard. He also gave us other papers embracing quite a number of tax receipts for the payment of taxes upon this property, and among these papers were two deeds, one purporting to be deed from Heman Scott to Isaac Bishop, and the other purporting to be a deed from Isaac Bishop to Porter L. Hinckley. The difficulty with his title was these deeds had not been recorded.

293 (Mr. Waite objected to this as being the opinion of the witness.)

Mr. Miller proceeded: They were either filed for record by us or had been recently filed for record, so as to appear in this abstract. In the meantime it appeared from the record that a deed had been made from Heman Scott to John B. King. It was therefore necessary to prove the execution of the deed—of these deeds from Heman Scott to Bishop and from Bishop to Hinckley. The first deed was attached to the commission sent to take the testimony of Heman Scott. His deposition was taken and this deed was annexed to it and returned into court, the superior court of Cook County, where the suit had been commenced. The second deed was attached to the commission to take the testimony of Porter L. Hinckley. The deposition of Hinckley was taken and the deed attached to his deposition, which was returned into court. These two deeds lay in the claim of complainant's title, and each of them, I am sure, described the land as it is described in the bill of complaint. While these depositions with these deeds annexed to them were in the clerk's office in Chicago they were destroyed by the fire of October,
294 1871. In the same fire the tax receipts, abstract, and all the papers delivered to us by Mr. Avery, or his Cleveland counsel, were also destroyed. Every paper in our office was burnt up. I was present when this case was tried in the superior court before Judge Moore. Jason Canfield was then examined and testified as a witness. The testimony he then gave was taken down and is contained in the papers embracing the depositions in this cause. I was present and heard his testimony. On reflection, I think the above papers were handed to us by Mr. Canfield in person, rather than by the complainant.

(The defendant objects to all of the above testimony which attempts

to show the contents or character of any written paper, it not appearing that this witness had any knowledge of the handwriting of Heman Scott or of Isaac Bishop, or of the parties who purported to execute or make said instruments or written papers, and all the above testimony which undertakes to give the contents or character of any written pa-
295 pers are objected to because the execution of such papers have not been proved; and all of the above testimony which undertakes to give the opinion of the witness is objected to as incompetent and irrelevant.)

By Mr. WAITE:

I will ask you, Mr. Miller, if you have any knowledge or had any personal knowledge of the signatures to the deed from Heman Scott or Isaac Bishop?

A. I have not.

Q. You state that Canfield was examined as a witness on the hearing of said case?

A. Yes, sir.

Q. He was examined orally?

A. Yes, sir.

Q. And what you refer to are the notes of his evidence?

A. Yes, sir; as they were written out and put into the certificate of evidence.

Q. And the objections that appear therein were all of them made as they appear?

A. Certainly.

HENRY G. MILLER.

296 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Lawrence Proudfoot, a commissioner duly appointed by the circuit court of the United States for the northern district of Illinois, under and by virtue of the acts of Congress in relation thereto, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, the witnesses are material and necessary in the cause in the caption of the said depositions named.

I further certify that due notification of the time and place of taking the said depositions was made out and served on the proper parties in interest, as will more fully appear by the copies thereof which I have attached to these depositions, to be present at the taking of the same, and to put cross-interrogatories, if he or they might think fit.

I further certify that on said 10th and 26th days of April, A. D. 1877, I was attended by Messrs. Miller & Frost, solicitors for complainant, and by Mr. Horace F. Waite, solicitor for defendant, and by the said witnesses, who are of sound mind and lawful age, and the said witnesses were respectively by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the
297 truth, and the depositions were taken down in short-hand in the presence of the witnesses and from their statements respectively, and were afterwards written out in long-hand and carefully read over by said witnesses respectively, who subscribed and swore to the same before me.

In testimony whereof I have hereunto set my hand and seal this 5th day of May, A. D. 1877.

[SEAL.] LAWRENCE PROUDFOOT,
U. S. Commissioner.

Comm'rs and short-hand reporter's fees, $30.00. Paid by complainants.

LAWRENCE PROUDFOOT.

(Endorsed:) Filed May 4, '77. Wm. H. Bradley, cl'k.

298 Afterwards, to wit, on the 7th day of May, A. D. 1877, said defendants, by their solicitors, filed in said clerk's office their motions to suppress certain depositions in said entitled cause, which said motions are respectively in the words and figures following, to wit:

Motions to suppress depositions.

THE UNITED STATES OF AMERICA,
Northern District of Illinois:

GEORGE WORTHINGTON ET AL.
v.
VERE BATES KING ET AL.

And now come the said defendants, severally and not jointly, and move to suppress the following parts of the deposition of Heman Scott, because said Scott is interested in the event of this suit, and as such cannot testify against the defendant, Vere Bates King, who is a minor, to each of the several matters and things contained in the answers to the following interrogatories:

1st. Answer to interrogatory one and each part of the same.

2nd. Answer to interrogatory two and each part of the same, and further objects to said answer as being incompetent evidence.

3rd. Answer to interrogatory three.

4. Answer to interrogatory four.

5. Answer to interrogatory five.

6. Answer to interrogatory six.

7. Answer to interrogatory seven.

8. Answer to interrogatory eight.

299 9. Answer to interrogatory nine.

10. Answer to interrogatory ten.

11. Answer to interrogatory eleven.

12. Answer to interrogatory twelve.

13. Answer to interrogatory thirteen.

14. Answer to interrogatory fourteen.

15. Answer to interrogatory fifteen.

16. Answer to interrogatory sixteen.

17. Answer to cross interrogatory one.

18. Answer to cross-interrogatory two.

19. Answer to cross-interrogatory three.

20. Answer to cross-interrogatory four.

21. Answer to cross-interrogatory five.

For the above reasons, the defendant asks that said several answers be suppressed. And the defendants, not waiving the above objections, ask to have said several answers suppressed as incompetent and irrelevant, and because no sufficient foundation is laid for secondary evidence, and because the execution of the instrument of which he purports to speak is not proved. And to each of said answers and every sentence thereof—because of its secondary evidence—no proper foundation was and is laid for the introduction of the same, and because the

contents of instrument is sought to be proved without proving its execution.

H. F. WAITE,
For the Defendant.

(Endorsed: Filed May 7, 1877. Wm. H. Bradley, cl'k.

300 UNITED STATES OF AMERICA,
Northern District of Illinois:

GEORGE WORTHINGTON ET AL.
vs.
VERE BATES KING ET AL.

Circuit court of the United States within and for the said northern district of Illinois. In chancery.

And now come the said defendants, severally and not jointly, and move to suppress each question propounded to H. G. Miller and his answer thereto, because—

1st. Said questions are leading.

2. And because said answer is incompetent and irrelevant.

3. Because it is hearsay.

4. To the answer that undertakes what Jason Canfield testified to on a former hearing of this cause.

5. To each part of the testimony of said Miller which gives or undertakes to give the testimony of Jason Canfield.

6. To each part of the answer of said Miller which speaks of the contents of written papers, their execution not having been proved, the proper foundation not having been laid.

7. To each and every sentence of what is given as the testimony of Jason Canfield testified to on a former trial.

301 For these and other causes the defendants move to suppress the same and every part of the same, and they repeat here each and every of the objections made when he testified to the testimony of said Jason Canfield, and insist upon the same.

By HORACE F. WAITE,
Their Sol'r.

(Endorsed:) Filed May 7, 1877. Wm. H. Bradley, cl'k.

THE UNITED STATES OF AMERICA,
Northern District of Illinois:

GEORGE WORTHINGTON ET AL.
vs.
VERE BATES KING ET AL.

And now come each of the defendants and move to suppress the following parts of the records, the pretended testimony of Henry Handy, the same not being a deposition, but simply what he testified to in open court as a witness on a former hearing.

2. The same is not certified to according to law.

3. To the several matters and things testified to by them, the same not being competent evidence.

4. The defendants move to suppress that part of the record called

"Examination of title," c., the same not being competent evidence.

302 5. To all that part of the record which pretends to give what Jason Canfield swore to, the same not being properly certified to, it not being a deposition; and not waiving the same, they repeat each and every objection made to the said testimony.

H. F. WAITE,
Sol'c'r for Defendant.

(Endorsed:) Filed May 7, 1877. Wm. H. Bradley, cl'k.

THE UNITED STATES OF AMERICA,
Northern District of Illinois:

GEORGE WORTHINGTON ET AL.
vs.
VERE BATES KING ET AL.

Circuit court of the United States within and for said district. In chancery.

And now comes the defendant, severally and not jointly, and moves the following parts of the depositions of Corydon Weeks, being the deposition last taken—because said Weeks is interested in the event of the suit—is incompetent as a witness, on account of interest, and as such cannot testify against the defendant, Vere Bates King, a minor, and the other defendant, or as a witness in said suit, and to each of the several matters and things contained in answer to each interroga-

303 tory in chief and each cross interrogatory, and to each answer to interrogatory No. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, and cross-interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14. Said objection is severally made to each sentence of the above-enumerated answers, and they ask to have the exception deemed numbered the same as the interrogatory and cross-interrogatory, and for the above reason they ask that the several answers be suppressed; and the defendants each not having the above objections, ask to have said several answers suppressed as incompetent and irrelevant, and because no sufficient foundation is laid for secondary evidence, and because the execution of which he purports to speak is not proved; and to each of said answers and every sentence thereof, because it's secondary evidence, no proper foundation was and is laid, and because the contents of instruments is sought to be raised without proving the loss or execution of the same.

H. F. WAITE,
Solic. for Defendant.

(Endorsed:) Filed May 7, 1877. Wm. H. Bradley, cl'k.

304 Afterwards, to wit, on the 8th day of May, A. D. 1877, in the adjourned May term of said court, in the record and proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

RALPH WORTHINGTON ET AL.
vs.
EMILY A. KING ET AL. } In chancery.

Now come the parties, by their solicitors, and on motion of defendants' solicitor time to take proofs herein is extended thirty days.

Afterwards, to wit, on the 6th day of June, A. D. 1877, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

RALPH WORTHINGTON ET AL.
vs.
EMILY A. KING ET AL. } In chancery.

On motion of Mr. Waite, solicitor, time to take proofs herein is extended fifteen days from the eighth day of June instant.

Afterwards, to wit, on the 30th day of March, A. D. 1878, said defendants, by their solicitor, filed in said clerk's office their motion to enter order of the supreme court of the State of Illinois, which said
305 motion is in the words and figures following, to wit:

Motion to enter order of the supreme court of the State of Illinois, &c.

UNITED STATES OF AMERICA,
Northern District of Illinois:

JOHN T. AVERY ET AL.
vs.
VERE BATES KING ET AL.

Circuit court of the United States within and for the northern district of Illinois. In chancery.

And now comes the defendant, Vere Bates King, by Emily A. King, his guardian and next friend, and not in anywise waiving the objections to removal of the case from the superior court of Cook County, and not in anywise waiving the motion heretofore made to remand said case from this court to said superior court, still maintains that it is improperly removed, and it has no jurisdiction to hear the case, and represents unto your honor that the complainants took and filed in this case the depositions of Heman Scott, Corydon Weeks, Porter L. Hinckley, John Bartholemew; to these depositions your defendant Vere Bates King filed exceptions to several parts of each of said depositions on account of each of said witnesses being incompetent to testify against your defendant on account of interest, which said several exceptions were in writing and are now on file in this court; that said exceptions
306 came on duly to be heard before the judge of the superior court of Cook County, where this cause was pending, and the exceptions were each of them overruled, the said superior court of Cook County deciding that neither of said witnesses were incompetent on the ground of interest, and a decree was afterwards rendered in this case in favor of the complainant; from which decree he, said Vere Bates King, took an appeal to the supreme court of the State of Illinois, and said appeal

was duly heard and said decree below reversed and the case remanded for further proceedings consistent with the views of the court therein expressed.

That in and by such decision the supreme court decided that the exceptions of the said Vere Bates King ought to and should be sustained to each of the testimony of Heman Scott, Corydon Weeks, Porter L. Hinckley, and John Bartholemew, and the said court further held that each of said witnesses Heman Scott, Corydon Weeks, Porter L. Hinckley, and John Bartholemew were incompetent witnesses to testify in said case on account of interest; and he is advised and believes and so charges that such decision was and is res adjudicata in this case, and is binding not only on the superior court of Cook County, but on this court, to which it has been removed since such decision. And he

307 further represents unto your honor that after the rendering of such decision by the supreme court, said cause was duly remanded and docketed, and, after being so docketed on the petition of the complainants, and without the consent and against the protest of the said Vere Bates King, was removed into this honorable court, where it now is pending. And the said Vere Bates King further represents unto your honor that he is still a minor under the age of twenty-one years; that the nature and character of this litigation is shown by the bill and pleadings in this case, to which he refers and makes the same part of this petition and motion, so far as is necessary for the understanding and rightful decision hereof is concerned. He further represents and claims and insists that it has been decided that each of said witnesses Heman Scott, Corydon Weeks, Porter L. Hinckley, and John Bartholemew are interested witnesses, and that the several exceptions filed to each of said witnesses' deposition and testimony have been decided, and that the decision that each of them are interested and cannot testify in this case, and their testimony cannot be read against said Vere Bates King, is res adjudicata, and this court is bound by the same and cannot and ought not, by the rules of law, to go behind the same, and that the order

308 should be, and he asks that the order may be, entered sustaining said several exceptions agreeably to the decision of the supreme court so rendered in said case. He further says that since said decision in the supreme court so rendered the evidence of neither of said persons has been retaken, and the depositions now on file sent up from the State court are the same ones of said witnesses which the supreme court so decided to be incompetent by reason of interest. The said Vere Bates King asks that said exceptions severally filed to said several depositions be ordered sustained and the order entered accordingly, agreeably to the decision of the supreme court. In support of this motion, he makes the opinion of the supreme court reported in volume 73, page 161 to 165, inclusive, as found in the edition of the Reports of the State of Illinois, published by authority of the laws of the State of Illinois, published in 1877, and also the judgment and order of the supreme court reversing and remanding said cause, a copy of which is attached to the record returned to this court from the State court, a part of this his motion as if here repeated fully and at large, and he prays for such other and further relief as may be equitable and just and in accordance to law and said decision in the premises.

309 The same objection is taken and the same thing is asked as to what appears in the record as being testified to by H. W. Handay, with the still further objection that it is not a deposition.

2d. It is not signed.

3rd. Nor sworn to. That it is not taken or certified to according to law.

4. That it purports to be an unverified statement of what he testified to on or at examination on the former hearing of the case, and is incompetent to be read on the rehearing of the case. That it is not competent to read what a witness orally testified to on a former trial.

5. That the several objections heretofore filed, or the parts of the same, on account of incompetency, should be sustained, and he asks that they may be sustained.

And he further makes the like objections to what appears in the record and purports to be a copy of an abstract as being incompetent and irrelevant.

And the same objections are taken, and the same motion made, and the same order is asked to be entered as to what appears in the record to be testified to by one Jason Canfield, and the same objections are made, and the same order is asked, as is made and asked above as to the testimony or deposition of Heman Scott, and also the like objections and exceptions as those taken above to H. H. Handy, and that the
310 same be sustained; and he further says that the decision made by the supreme court as to the testimony of Jason Canfield is res adjudicata, and he assigns the still further objection that what appears as Jason Canfield's evidence is not signed, certified to, or taken according to law. That it is not a deposition; that it has no place in the record; that it is not competent to be read or used on the rehearing of this case in this court.

As a part and parcel of this motion and objections, he herewith files and makes part of the same, duly certified according to law, the record and opinion in said case in the supreme court, and he will ever pray.

By WAITE, CLARKE AND DORMER,
His Att'ys.

At a supreme court begun and held at Ottawa, on Tuesday, the eighth day of September, in the year of our Lord one thousand eight hundred and seventy-four, within and for the northern grand division of the State of Illinois;

Present, Pinkney H. Walker, chief justice; Sidney Breese, justice; John M. Scott, justice; W. K. McAllister, justice; Benjamin R. Sheldon, justice; John Scholfield, justice; Alfred M. Craig, justice.

311 EMILY A. KING AND VERE BATES KING, and Emily A. King, guardian of Vere Bates King,
vs.
JOHN T. AVERY, RALPH WORTHINGTON, ABBY M. Hoyt, Mary B. Worthington, Clara C. Worthington, George W. Worthington, and Alice M. Worthington. } No. 626.

Appeal from superior court of Cook County. Filed Oct. 11, 1875.

Opinion by Schofield, J.

The object of the bill in the present case was to have declared void and that it cease to be a cloud upon complainants' title a certain quit claim deed, executed by one Heman Scott to John B. King, now deceased, the father of the defendant Vere Bates King, and the husband

of the defendant Emily A. King. The complainants claim under Heman Scott, by virtue of a prior conveyance by him to one Bishop, through a series of mesne conveyances, and the charge is that the quit claim deed to King was made without any valuable consideration and that King took it with notice of the prior conveyance to Bishop.

The burden was upon complainants to prove title as alleged, and, the defendant Vere Bates King being a minor, it is essential the record should show that the proofs fully authorized the decree.

A portion of the conveyances in the complainants' chain of title were recorded, but three of them were not.

312 The evidence shows the loss of all the original conveyances but two, and the destruction by burning of the records of those that were recorded.

The court, over the objection of the defendants' counsel, received in evidence a letter-press copy of an abstract of title to the property taken from an abstract made before the destruction of the record, and the question is thus raised whether this evidence was properly received. It is not pretended by the counsel that it would have been admissible but for the statute in force July 1st, 1872, entitled "An act to remedy the evils consequent upon the destruction of any public records by fire or otherwise," by the twenty-third section of which it is provided, "In all cases under the provisions of this act, and in all proceedings or actions now or hereafter instituted as to any estate, interest, or right in or any lien or incumbrance upon any lots, pieces, or parcels of land where the original evidence has been destroyed by fire or otherwise, the court shall receive all such evidence as may have a bearing on the case to prove the execution or contents of the records and deeds so destroyed, although not admissible as evidence under existing rules governing the admission of evidence; provided that the testimony of the parties themselves shall be received subject to all the qualifications in respect to such testimony which are now provided by law."

313 This by its general and comprehensive terms it is argued, in view of the fact that by the next section an abstract is made evidence in such cases, is sufficient to authorise the letter-press copy to be received as evidence, which it is claimed is more than a mere copy, being an exact fac simile of the face of the original.

The next section, the twenty-fourth, is as follows: "Whenever it shall be made to appear in any court in which any suit or proceeding is now or hereafter may be pending that the originals of any deed or deeds or other instruments of writing or records in courts relating to any lands, the title or any interest therein being in controversy in such suit or proceeding, is lost or destroyed, or not within the power of the party or parties to produce the same, and the records of such deeds or other instruments in writing, or other records relating to or affecting such lands, is destroyed by fire or otherwise, it shall be lawful for any such party to offer in evidence any abstract of title made in the ordinary course of business prior to such loss or destruction showing the title of such land," &c.

It would, therefore, seem clear that, by the familiar and well settled rules of construction, the twenty-third section was not intended to embrace copies of abstracts of title as instruments of evidence. Each section, we must suppose, was designed to, and we think does, convey a definite and distinct meaning from that conveyed by the other, and the latter enlarges the rule of evidence declared by the former, and

314 extends to instruments not within its contemplation.

The twenty-fourth section being the only authority for the ad-

missibility of abstracts of title in evidence, and its language embracing abstracts only, we are unable to discover any reason for holding that a copy of an abstract is also admissible. Had such been the intention of the legislature, it would certainly have been so said in so many words. A letter-press copy is not an original. It in no wise differs from any other accurate copy than in the mode in which it is made, and it can be used in the place of an original in no case where a proved copy made in another manner would not be equally admissible. (Foote vs. Bartley, 44th N. Y., 169.)

Our conclusion, therefore, is, the court erred in admitting the evidence.

The testimony of Heman Scott, Corydon Weeks, Robert L. Hinckley, and John Bartholemew, each of whom was a grantor by deed with full covenants of warranty in the complainants' chain of title, and who severally testified to their ownership and conveyance of the property in controversy, was also received by the court over the defendants' objection, and this is also claimed to be erroneous.

The defendant Vere Bates King, as before observed, is a minor, and defends as the heir at law of John B. King, deceased. If, therefore, these witnesses have in presumption of law such an interest in the result of the suit as would have disqualified them from testifying before the passage of our statute permitting parties to suits and persons interested therein to testify, they fall within one of the exceptions in that statute, and must be held incompetent.

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This question we do not consider an open one, and, as will be seen by the closing paragraph in section twenty-three of the act above quoted, the rule is not to be changed in the present case by reason of the peculiar character of the evidence by which complainants are under the necessity of making out their title.

In Hamilton vs. Doolittle (37 Ill., 474) the plaintiffs claimed title as heirs at law of one Irwin B. Doolittle, deceased, who was the grantee of Peter Manord by deed with covenant of warranty. The deed purported to have been acknowledged before a notary public, but, there being no proper seal attached to his certificate, other proof of its execution became necessary. Menard himself was then introduced as a witness and proved its execution.

There, as here, the defendant claimed under a subsequent quitclaim deed made by the same grantor. The court, in passing on the competency of Menord as a witness, among other things, said, "We are aware of no case which has gone the length of permitting the grantor by deed containing covenants for title to give evidence in a case in which the validity of the title is involved. Such a person has, it is believed, always been held to have a disqualifying interest in the event of the suit. It is insisted in this case that the witness is called against his interest; that it was his interest to invalidate the deed, and thereby avoid his covenants. This is not the true attitude of the grantor. It is obviously his interest to maintain the title which he covenanted to make good. Nor does it follow that to defeat a recovery under the deed would absolve him from his liability or his covenants. A failure to recover would fix the failure of the title, which he could not dispute, and it would afford a material link in the chain of evidence to establish his liability. Nor could he, in an action of covenant on the deed, establish the deed to have been void by showing that the land could not be received under this deed; and when it is shown that no title passed by the execution and delivery of the deed, then the liability is established under his covenants. It does not follow that because the deed was not

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sufficiently proved to bind third parties, that it, therefore, was not binding between the parties to the instrument as between them, and as a covenant it might be proved, or any other written instrument, to
317 entitle it to be read in evidence. In an action of covenant it would require a less degree of proof than as a deed sufficient to pass title to the land."

We are unable to discover anything in this respect in the present case to distinguish it in principle from that, and it must hence be governed by the same rule. (See also Leslie vs. White's Heirs, 44th Ill., 465.)

With regard to the objection of Canfield's evidence, we only think it is necessary to say it was not competent to prove the Ohio statutes by parol evidence, but the introduction of the statutes themselves obviated all injury that might otherwise have resulted to the defendants on that account. His opinion of the sufficiency of the deeds and certificates appended with the statutes of Ohio was incompetent as evidence, but his recollection of the substance of the deeds and certificates was properly admissible as secondary evidence of their contents. The rejection of the evidence which we hold to have been improperly received leaves the case without sufficient proof to sustain the decree. The decree will, therefore, be reversed and the cause remanded for further proceedings consistent with the views here expressed.

Decree reversed and cause remanded.

318 I, Cairo D. Trimble, clerk of the supreme court in and for the northern grand division of the State of Illinois, do hereby certify that the foregoing is a true copy of the final opinion of the said supreme court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court at Ottawa, this 28 day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.]

C. D. TRIMBLE,
Clerk of the Supreme Court,
By A. H. TAYLOR,
Deputy.

At a supreme court begun and held at Ottawa on Tuesday, the eighth day of September, in the year of our Lord one thousand eight hundred and seventy-four, within and for the northern grand division for the State of Illinois:

Present, Pinkney H. Walker, chief justice.
" Sidney Breese, associate justice.
" John M. Scott, " "
" Wm. K. McAllister, " "
" Benjamin R. Sheldon, " "
" Jno. Scholfield, " "
" Alfred M. Craig, " "

In term time, October 11th, A. D. 1875.

319 *Appeal from the superior court of Cook County.*

EMILY A. KING AND VERE BATES KING, AND Emily A. King, guardian of Vere Bates King,
vs.
JOHN T. AVERY, RALPH WORTHINGTON, ABBY M. Hoyt, Mary P. Worthington, Clara C. Worthington, George W. Worthington, and Alice C. Worthington.

On this day came again the said parties, and the court having dili-

gently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of opinion that in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error. Therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the decree of the superior court of Cook County in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the superior court of Cook County for such other and further proceedings as to law and justice shall appertain.

And it is further considered by the court that the said appel-
320 lants recover of and from the said appellees their costs by them in this behalf expended, and that they have execution therefor.

I, Cairo D. Trimble, clerk of the supreme court of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said supreme court at Ottawa, this twelfth day of November, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] C. D. TRIMBLE,
Clerk of the Supreme Court.

(Endorsed:) Filed Nov. 13, 1875. A. F. Stevenson, clerk. Filed March 30th, 1878. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 2d day of April, A. D. 1878, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

RALPH WORTHINGTON ET AL.
vs.
EMILY A. KING ET AL. } In chancery.

Now come the parties, by their solicitors, and now comes on to be heard the motion of defendants to suppress the depositions of Heman Scott, Corydon Weeks, Porter L. Hinkley, and John Bartholomew, and after hearing the same the court overrules said motion, and this cause now coming on to be heard upon the pleadings and proofs herein, and the court, after hearing the same, not being now sufficiently advised in the premises, takes the same under advisement.

Afterwards, to wit, on the 8th day of April, A. D. 1878, there was filed in the said court the affidavit of John Wentworth and Daniel McBain, which said affidavit is in the words and figures following, to wit:

Affidavit of John Wentworth and Daniel McBain.

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court of the United States within and for the northern district of Illinois. In chancery.

JOHN P. AVERY ET AL.
v.
VERE BATES KING ET AL.

John Wentworth, being duly sworn, says that he is acquainted

321 with the value of the west half of the southwest one-fourth of section twenty, T. 38 N., R. 13 E. of 3 p. m. in Cook County, Illinois; that it is worth over $5,000, and is worth, in affiant's opinion, $100 an acre. He further says he is acquainted with the value of lands in that neighborhood, it not being far from my farm.

JOHN WENTWORTH.

STATE OF ILLINOIS,
Cook County, ss:

Subscribed and sworn to before me this fifth day of April, A. D. 1878. Witness my hand and notarial seal.

[SEAL.] MOSES J. WENTWORTH,
Notary Public.

Also Daniel McBain being duly sworn says he is acquainted with the value of the land above described; that he is a land agent, and has the means of knowing the value of land; that said land above described is worth over eight thousand dollars; that in the fall of seventy-three it was worth much more.

DAN'L McBAIN.

Subscribed and sworn to before me this fifth day of April, A. D. 1878. Witness my hand and notarial seal.

[SEAL.] DAVID B. JONES,
Notary Public.

(Endorsed:) Filed April 8, 1878. Wm. H. Bradley, cl'k.

323 Afterwards, to wit, on the 13th day of April, A. D. 1878, in the said adjourned March term of said court in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

RALPH WORTHINGTON, JOHN T. AVERY, ABBY M. Hoyt, Mary B. Worthington, Clara C. Worthington, George Worthington, and Alice M. Worthington } In chancery.
vs.
EMILY A. KING, VERE BATES KING, AND Emily A. King, guardian of Vere Bates King.

And the said cause coming on for hearing upon the pleadings filed and evidence taken therein, and the counsel for the respective parties having been heard and the court being fully advised in the premises, doth find the issues in said cause in favor of the complainants, that is to say: That on or about the first day of June, A. D. 1843, one Heman Scott, of Marion County, Ohio, was the owner in fee of the premises described in said bill of complaint, to wit: The west half of the southwest quarter of section (29) twenty, in township thirty-eight (38) north, of range thirteen (13) east of the third (3d) principal meridan, it being situate in the county of Cook and State of Illinois,
324 and that said Scott duly sold and conveyed said premises to Isaac Bishop, of Tully, New York, on or about the first day of June, A. D. 1843.

That the title thus acquired by said Bishop to said premises descended as stated in the bill of complaint to the complainants in this suit; that is to say, that said Bishop sold and conveyed said premises

to Porter L. Hinckley, on or about the thirteenth day of October, A. D. 1845, and that during the year A. D. 1845 said Porter L. Hinckley sold and conveyed said premises to John R. Bartholomew, and that said John R. Bartholomew, on or about the twenty-second day of January, A. D. 1851, sold and conveyed said premises to Corydon Weeks, and that said Corydon Weeks afterwards and on or about the twenty-fourth day of May, A. D. 1852, sold and conveyed said premises to Ambrose L. Soulé, and that the parties aforesaid, at the time of the conveyances to them above mentioned, respectively acquired a title to said premises in good faith and for a valuable consideration paid by them therefor, and that said Avery by deed, bearing date November twenty-third, 1857, conveyed the south half of said premises to Lucius H. Muzzy, who afterwards, and on or about the second day of December, A. D. 1857, sold and conveyed the said south half of said lands to George W. Worthington.

That the said George W. Worthington afterwards and since the
325 commencement of this suit departed this life, leaving the complainants, other than the said John T. Avery, his only heirs at law in whom his said title to said south half became vested by descent.

That the complainant John T. Avery, in good faith and for a valuable consideration, purchased said premises of Ambrose L. Soulé, who was the owner thereof, on or about the thirtieth day of May, A. D. 1853. That on the day and year last aforesaid, the said Ambrose L. Soulé, in pursuance of said purchase, conveyed said premises to John T. Avery, who thereupon became the owner thereof and vested with the title thereto in fee simple. The court further finds that on or about the twenty-first day of June, A. D. 1861, said Heman Scott executed and delivered to one John B. King, then of the city of Chicago, a deed of quit-claim, purporting to convey and quit-claim unto the said King all his right, title, and interest in said property, which said last mentioned deed was duly acknowledged and filed for record on the twenty-second day of June, 1861. That the said deeds from Scott to Bishop, and Bishop to Hinckley, and from Hinckley to Bartholomew had not been filed for record in the recorder's office of Cook County on the said twenty-second day of June, 1861, and that the said deed from Scott to King consequently placed the apparent title to said premises, as shown by the records, in the said John B. King, but the court finds that
326 the said King paid no valuable consideration for said deed and received the same with full notice of the rights of the complainants in the premises, and that said Scott had previously sold and conveyed said premises as hereinbefore stated.

The court further finds that said John B. King departed this life, as stated in said bill of complaint, leaving him surviving his wife, Emily A. King, and Vere Bates King, his only child and heir-at-law. The court therefore orders, adjudges, and decrees that the said deed from Heman Scott to John B. King conveyed no title to the said premises as against the said complainants, and that the same should be held for nought and the complainants' title to said premises wholly unaffected thereby.

And it is ordered, adjudged, and decreed by the court, that the complainants do pay their own costs and that the defendants do pay the costs by them respectively incurred herein to be taxed, and that execution issue therefor.

And thereupon the defendants, by their solicitors, filed the affidavits of John Wentworth and Daniel McBain, showing the value of the premises in controversy herein to exceed the sum of five thousand dol-

lars in value. The court ordered said affidavits to be made part of the record in this cause.

327 And thereupon the defendants, by their solicitors, pray an appeal herein to the Supreme Court of the United States, which is allowed by the court upon giving bond herein in the penal sum of one thousand dollars, with security to be approved by the court.

And on the same day, to wit, the 13th day of April, A. D. 1878, said defendants, by their solicitors, filed in said clerk's office their certificate of evidence in said entitled cause, which said certificate of evidence is in the words and figures following, to wit:

Certificate of evidence.

Circuit court of the United States, northern district of Illinois. In chancery.

RALPH WORTHINGTON, JOHN T. AVERY, ABBY M. HOYT, MARY B. WORTHINGTON, GEORGE WORTHINGTON, ALICE M. WORTHINGTON,
v.
EMILY A. KING, VERE BATES KING, AND Emily A. King, guardian of Vere Bates King.

Certificate of evidence.

Prior to the hearing of said cause, defendants to suppress the depositions of Heman Scott, Corydon Weeks, Porter L. Hinckley, and John Bartholomew, on the ground that said witnesses were incompe-

328 tent to testify in said cause by reason of their interest therein, came on to be heard, and in support of said motion, defendants' counsel produced and read to the court the opinion of the supreme court of the State of Illinois, found in vol. 73 of Illinois reports, commencing on page 161 of said volume, and which is set out on page 310 of this transcript.

The court overruled said motion, to which defendants excepted.

Plaintiffs then read in evidence the deposition of Heman Scott, to the reading of which the defendants objected on the ground that the same was incompetent; which objection was overruled by the court, and said deposition was read, and is set out on pages 92 of this transcript.

Complainants then offered in evidence the deposition of John R. Bartholomew, to which defendants objected on the ground that the same was incompetent. The court overruled said objection, and the same was read in evidence, and is set out on pages 98 & 112 of this transcript.

The complainant then offered in evidence the deposition of Porter L. Hinckley, to which defendant objected on the ground that the same was incompetent. The court overruled said objection, and said deposition was read in evidence, and is set out on page 134 of this transcript.

329 Complainants then offered in evidence the deposition of Corydon Weeks. The same was objected to by defendants as incompetent. The court overruled said objection, and said deposition was read in evidence, and is set out on page 166 of this transcript.

Complainants then offered in evidence the deposition of Carlos Weeks,

which was then read in evidence, and is set out on page 147 of this transcript.

Complainant then offered in evidence the deposition of Louisa Weeks, and the same was read in evidence, and is set out on page 154 of this transcript.

Complainants then offered in evidence the second deposition of Corydon Weeks, to which defendant objected on the ground that the same was incompetent. The court overruled said objection, and the same was read in evidence, and is set out on page 259 of this transcript.

Complainants then read in evidence the deposition of A. Byron Robinson, which is set out on page 269 of this transcript.

Complainants then read in evidence the deposition of Augustus G. Downs, which is set out on page 274 of this transcript.

Complainants then offered in evidence the deposition of John
330 T. Avery, one of the complainants, which was objected to by the defendants on the ground that the same was incompetent.

The court overruled said objection, and the same was read in evidence, and is set out on page 282 of this transcript.

Complainants then read in evidence the deposition of Henry G. Miller, which is set out on page 282 of this transcript.

Complainants then offered in evidence portions of the testimony of Jason Canfield given on the former trial of this case in the State court. The defendants objected to the same on the ground that said evidence was incompetent.

The court overruled said objection, and the same being the marked portions was read in evidence, and is set out on page 219 of this transcript.

Complainants then offered in evidence the following deed purporting to be made by Ambrose L. Soulé and wife to John T. Avery.

To which defendants objected on the ground that the execution of said deed was not proved or acknowledged according to law. But the court overruled said objection, and the same was read in evidence, as follows:

331 EXHIBIT A.

Warranty deed.

Know all men by these presents, that we, Ambrose S. Soulé and Sophia M. Soulé, of the township of Russell, Granger County, Ohio, for and in consideration of the sum of eight hundred ($800) dollars to us in hand paid by John T. Avery, have bargained and sold, and do hereby grant, bargain, sell, and convey unto the said John T. Avery, and his heirs and assigns forever, the following described premises, situated in the State of Illinois, Cook County, being the west ½ of southwest quarter of section 20, township 38 north, of range 13 east, of 3rd principal meridian, containing 80 acres.

[C. M. Stone, commissioner, Feb'y 3d, 1873.]

To have and to hold the aforesaid premises with the appurtenances unto the said John T. Avery and his heirs and assigns forever. And we, the said Ambrose S. and Sophia M. Soulé, for ourselves and our heirs, do hereby covenant with the said John T. Avery, and his heirs and assigns, that we are lawfully seized of said premises, and have
332 good right to sell and convey the same, and that said premises are free and clear of all incumbrances, and that said Ambrose S. and Sophia M. Soule and our heirs will forever warrant and defend the

same unto the said John T. Avery, and his heirs and assigns, against the lawful claims and demands of all persons.

And the said Sophia M. Soule hereby releases all right of dower in said premises unto the said John T. Avery.

In witness whereof, we have hereunto set our hands and seals, this thirtieth day of May, A. D. one thousand eight hundred and fifty-three.

A. S. SOULE. [L. S.]
S. M. SOULE. [L. S.]

Signed, sealed, and delivered in presence of—
L. McFARLAND,
AMOS UPHAM.

THE STATE OF OHIO,
Cuyahoga County, ss :

Before me, Amos Upham, j. peace, in and for the said county, personally came the above named Ambrose S. Soule and Sophia M. Soule, who signed and sealed the foregoing instrument and acknowledged the same to be their free act and deed.

And the said Sophia M. Soule, being by me privately examined
333 separate and apart from her said husband, acknowledged that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith.

Before—

AMOS UPHAM,
J. Peace.

Exhibit A., C. M. Stone, commissioner.

THE STATE OF OHIO,
Cuyahoga County, ss :

I, James D. Cleveland, clerk of the court of common pleas, in and for said county. do hereby certify that Amos Upham, esq., before whom the foregoing acknowledgment was taken, and who has thereunto subscribed his name officially, in his own proper handwriting, was at the date of the said acknowledgment and now is an acting justice of the peace, within and for said Cuyahoga County, authorized by the laws of the State of Ohio to take acknowledgments as aforesaid, and duly commissioned and sworn, and to all whose official acts full faith and credit are due and ought to be given throughout the United States and elsewhere, and that said deed is executed and acknowledged according to the laws of the State of Ohio.

334 In testimony whereof I hereunto subscribe my name and affix the seal of said court, at Cleveland, this 1st day of October in the year of our Lord one thousand eight hundred and fifty-three.

[SEAL OF CLERK OF COURT.] JAS. D. CLEVELAND, *Clerk.*

(Enclosed:) 80 acres. W. ½ S. W. ¼ sec. 20, town. 38, range 13, 80 acres. No. 45294.

STATE OF ILLINOIS,
County of Cook, ss :

Filed for record Oct. 12, 1853, and recorded in book 64 of deeds, p. 425.

L. D. HOARD, *Clerk.*

335 Complainants then offered in evidence deed by John T. Avery and Sarah, his wife, to H. Muzzey. Defendants objected to said deed on the ground that the execution of said deed was not proved or acknowledged according to law. The court overruled said objection and said deed was read in evidence and is set out on page of this transcript.

Complainants then offered in evidence deed from L. H. Muzzey to George Worthington. Defendants objected to same on the ground that the execution of said deed was not proved or acknowledged according to law. The court overruled the same and said deed was read in evidence and is set out on page 87 of this transcript.

Complainants then read in evidence deed from Heman Scott to John B. King, dated re recorded in the office of the recorder of Cook County in book 39, page 299.

336 The defendants furthermore to maintain the issue on their part introduced the following:

The mandate. Judgment of the supreme court set out on page 310 of this transcript.

The opinion of the supreme court of Illinois, published by the State of Illinois in vol. 73 of Illinois reports, page 161, and inasmuch as the same is in print it is stipulated that it need not be inserted, but the book itself may be read.

The deposition of Samuel Marrs, which is as follows:

337 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court for said district. In chancery.

JOHN T. AVERY ET AL.
vs.
VERE BATES KING ET AL.

Deposition of Samuel Marrs taken in above cause, and taken in accordance and under the foregoing notice.

SAMUEL MARRS, being duly sworn on oath in the above entitled cause to testify the truth, the whole truth, and nothing but the truth to the following interrogatories, makes answer and says:

Int. 1. What is your name, and were you acquainted with John B. King during his lifetime? Do you know the west half of the southwest quarter of section twenty, town thirty-eight north, range thirteen east of third principal meridian; if so, did you rent the same at any time of John B. King in his lifetime; if so, state what you did with the same, if you so rented it, during what years did you rent it?

338 Answer. Samuel Marrs. I was acquainted with John B. King during his lifetime. I am acquainted with the land above described in the question. I rented same of John B. King in his lifetime; I think I rented in 1862, somewhere between 1862 & 1865; I think 2 or 3 years I rented it. I rented it again to other parties who cut the grass upon it.

Int. After the death of John B. King did you rent it of any one representing his estate; if so, of whom, and what years did you so rent the same?

Ans. I rented it after the death of John B. King of R. K. Swift, who represented the estate; I rented of Swift in 1865; I rented same then of Mrs. Emily A. King a number of times.

Int. State whether or not the years you so rented said land you were in the possession of the same or not by yourself or your tenants?

Ans. The parties that I rented it to were in possession, and cut the hay. I don't know whether you call that possession or not; no one interfered with them.

Int. Do you know anything of Alexander Roberts' renting it of John B. King in his lifetime; if so, what year did he rent it?

Ans. All I know is what Roberts told me, that he rented it.

339 Cross-examination:

Int. Was the lease R. K. Swift made to you in writing?

Ans. Yes, sir. We had no regular lease, but a written receipt of the amount paid.

Int. Will you hand it to commissioner and let it be attached to deposition?

Ans. Yes, sir. It is attached and marked Exhibit A.

Int. Did you have a written lease from John B. King?

Ans. Yes. I always had a writing setting forth that I had it from him and paid him so and so. It was not a regular lease.

Int. Was it not substantially like the writing you got from Swift?

Ans. No; it was not like that.

Int. Where is it?

Ans. I don't know; it is gone long ago.

Int. When did you last see it?

Ans. Writing to convey the privilege of cutting the grass, did you mean?

Int. Yes.

Ans. I don't know when the last I saw it was. It was many years ago.

Int. Did you ever have more than one?

Ans. Yes; I think I had three.

Int. Did you take these writings when you paid him for this privilege?

340 Ans. Yes, sir; but sometimes I gave him my note, and took a writing.

Int. Is the paper now shown you one of the papers you received of Mrs. E. A. King?

Ans. I don't know whether that is a receipt she gave me for the money; I received this from her.

Int. Will you hand it to commissioner to be attached to your deposition as an exhibit?

Ans. Yes.

(Attached and marked No. 2.)

Int. That is not dated; what year was it?

Ans. I could not tell, sir.

Int. Did you get the privilege from Mrs. King to cut grass upon this land for any year before 1870?

Ans. I could not say.

Int. How much did you usually pay for this privilege?

Ans. Prices vary so I could not say. Grass sometime' was low.

Int. All that was ever done was to cut the grass off?

Ans. That was all we ever did.

Redirect:

Int. You rented it for Mrs. King to other persons, did you not, after her husband's death; if so, did you so rent it prior to 1871?

341 Ans. My impression is strong that I did; but I could not say.

Int. I see among your papers a lease, signed by Emily A. King, guardian, which Mr. Miller does not call for you to produce; will you produce the same, and make it a part of your deposition; and will you state whether you occupied said land under said lease?

Ans. I occupied the land under it, and produce it.

(Attached and marked Exhibit C.)

Recross:

Int. Did you occupy it any more than to cut the grass?

Ans. The grass was cut and the hay made, and it was stacked on it.

Re-redirect:

Int. During the years you leased the land in question, where did you stack the hay cut on same?

Ans. We stacked it on the land described.

Int. How long did it remain so stacked on the land?

Ans. I couldn't say. The mode of making hay is stacking it upon the land for a time—sometimes a short time—sometimes a long one.

Int. About how long?

342 Ans. We generally let it remain till winter or towards winter before we hauled it to town.

Int. During any of these years you leased the premises, was the hay stacked there till winter; if so, can you give the year?

Ans. I don't think I could give the year, and I don't think I could say the hay was stacked there until winter.

Int. How long could you say it was stacked there?

Ans. My recollection don't enable me to state that it was stacked there any particular length of time.

Int. Give your best recollection on the subject.

Ans. I don't think I could; my recollection is it was the mode to stack the hay; sometimes it stayed longer, and sometimes it was moved away soon.

SAMUEL MARRS.

STATE OF ILLINOIS,
Cook County, ss:

The above deposition was duly subscribed and sworn to before me by Samuel Marrs, this 19th day of June, 1877.

[SEAL.] RUSHTON M. DORMAN,
Notary Public.

Further notarial certificate waived and leave given to file same.

MILLER & FROST,
Sol'rs for Comp'ts,

343 *Ex. A of Marrs' deposition—R. M. Dorman.*

Samuel Marrs to R. K. Swift, trustee, Dr.

1865. March 20. To the grass on the following described lands, to be cut and taken therefrom during the present season, and at any time before January 1, 1866. to wit, E. ½ of SE. ¼ sec. 30, 38, 13, & W. ½ of SW. ¼ sec. 20, 38, 13..... $35

Rec'd pay't.

R. K. SWIFT,
Trustee, &c.

[2 cent U. S. int. rev. stamp cancelled.]

Exhibit B of Marrs' deposition.

Received of S. Marrs $30 as rent for the 80 acres and 50 acres, called the Herman Scott land.

MRS. E. A. KING.

Exhibit C.

This is to certify that I have this day leased to Sam'l Marrs the west half of SW. qr. of sec. 20; also, the north fifty acres of the east half of SE. qr. sec. 30, town. 38 north, of range 13 east, for the season of 1871. Given under my hand this 6th day of Jan., 1871.

EMILY A. KING,
Guardian.

[50 cent U. S. int. rev. stamp cancelled.]

(Endorsed:) JAN. 6, 1871.

Received on the within lease fifteen dollars.

EMILY A. KING.

344 FEB. 14TH, 1871.

Received on the within lease twenty-five dollars, being in full for the use of the within described land for the year 1871.

EMILY A. KING.

(Endorsed:) Filed Oct. 11, 1877. W. H. Bradley, cl'k.

345 The foregoing was all the evidence in the case.

The court, upon being advised in the premises, found a decree for the complainants.

Upon the finding of the decree the defendants filed the affidavits of the Hon. John Wentworth and David McBain, of value of the premises in controversy tending to show that the value of said premises exceeds the sum of five thousand dollars, which said affidavits are set out on page 321 of this transcript.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed April 13, 1878. Wm. H. Bradley, cl'k.

And afterwards, to wit, on the 31st day of May, A. D. 1878, said defendants, by their solicitors, filed in said clerk's office their bond in appeal in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States within and for the northern district of Illinois.

RALPH WORTHINGTON, JOHN T. AVERY, Abby M. Hoyt, Mary B. Worthington, George Worthington, Alice M. Worthington,
346
vs.
EMILY A. KING, VERE BATES KING, Emily A. King, guardian of Vere Bates King. } In chancery.

Decree entered in said case in favor of plaintiffs against the defendants, April 13th, A. D. 1878, ordering a certain deed therein described to be set aside, and for costs of suit against the defendant Vere Bates King.

Know all men by these presents that we, Vere Bates King, by Emily

A. King, his guardian, and Emily A. King and said Emily A. King, guardian for said Vere Bates King, principals, and James H. Rees, surety, are held and firmly bound unto Ralph Worthington, John T. Avery, Abby M. Hoyt, Mary B. Worthington, George Worthington, and Alice M. Worthington, in the sum of one thousand dollars, lawful money of the United States, to be paid to the above-named obligees, their executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this fifteenth day of May, A. D. 1878, the said Vere Bates King being a minor, his guardian at law, Emily A. King, executes this bond for and in his behalf.

347 Whereas the above-named Emily A. King and said Emily A. King, guardian of Vere Bates King aforesaid, have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States within and for the northern district of Illinois.

Now, therefore, the condition of this obligation is such that if the above bounden Vere Bates King and Emily A. King shall prosecute their said appeal with effect and answer all costs, if they shall fail to make good their said appeal, then this obligation shall be void, otherwise to remain in full force and virtue.

VERE BATES KING,
By EMILY A. KING, [SEAL.]
His guardian at law.
EMILY A. KING, [SEAL.]
Guardian.
EMILY A. KING. [SEAL.]
JAMES H. REES. [SEAL.]

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

RALPH WORTHINGTON ET AL.
EMILY A. KING ET AL.

Emily A. King, being duly sworn, says that the said Vere Bates King, one of the defendants in the above entitled suit, and being the suit mentioned in the above appeal bond, is a minor and under the age of twenty-one years, and that she is his lawful guardian, duly
348 appointed by the county court of Cook County, where said Vere Bates King resides, and she, as such, signs and executes said above-described bond for him.

EMILY A. KING.

Subscribed and sworn to before me this twenty-second day of May, A. D. 1878. In witness whereof I have hereunto set my hand and notarial seal.

[SEAL.]

DAVID B. JONES,
Notary Public.

Approved.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed May 31st, 1878. Wm. H. Bradley, cl'k.

349 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Ralph Worthington et al. are the complainants and Emily A. King et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 16th day of October, A. D. 1878, and of our Independence the one hundred and third.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 295. Emily A. King, Vere B. King, & Emily A. King, guardian of Vere B. King, appellants, vs. Randolph Worthington, John T. Avery, Abby M. Hoyt, et al. N. Illinois C. C., U. S. Filed 18th October, 1878.

REC. 295—9

OFFICE SUPREME COURT U. S.
FILED
DEC 31 1880
JAMES H. McKENNEY, CLERK

No. 295.

SUPREME COURT OF THE UNITED STATES.

NORTHERN DISTRICT OF ILLINOIS.

EMILY A. KING et al.

v.

RANDOLPH WORTHINGTON et al.

Appeal from the Circuit Court of the United States.

HORACE F. WAITE,
Attorney for Appellants.

CHICAGO.
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No. 295.

SUPREME COURT OF THE UNITED STATES.

NORTHERN DISTRICT OF ILLINOIS.

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v.
RANDOLPH WORTHINGTON ET AL.

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Such proceedings were had, that in the Superior Court a decree was rendered in favor of the appellees. From this decree, the appellant took an appeal to the Supreme Court of the State of Illinois, and the decree was set aside (Record 17.) The opinion of the Supreme Court will be found on (Record 311), and in 73 of Illinois Reports, p. 165. The cause was remanded and re-docketed in the Superior Court, and subsequently a petition was filed to remove, and the case was removed to the United States Circuit Court.

The following errors are assigned:

I.

This cause was not removable under the act of Congress. The petition was not filed at the term at which said cause could be first tried, and before the trial thereof, and the petition is insufficient for its removal.

II.

The Court erred in deciding Heman Scott, Corydon Weeks, John R. Bartholomew and Robert Hinckley were competent to testify in this case; also, in deciding that the decision of the Supreme Court of the State of Illinois, holding them incompetent

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This suit was commenced July 15, 1870. The record was destroyed by the great fire of Oct., 1871. A substituted or restored bill was filed July 15, 1872 (Record, 2). A final hearing was had in said cause, and a final decree rendered July 1, 1874 (R. 46). It was *tried and heara* in the Supreme Court Oct. 11, 1875, and remanded for further proceedings (R. 54).

The appellees re-docketed the case (R. 56) Nov. 23, 1875. On the 4th day of Dec., 1875, the appellees filed their petition to remove (R. 57). The ground of removal, as set forth in the petition, is that it was docketed in the Supe rior Court Nov. 23, 1875, and "that the present term of said Court (that is the December term) is the first term at which said cause could have been tried since" the date of docketing said cause in said Superior Court, and since the passage of the act of Congress under which the petition is filed. To this petition the appellants file an answer, denying the right of removal (R. 69).

Notwithstanding such objections, the order was made by the Superior Court for its removal, Dec. 14, 1875 (R. 73). The record was filed in the Circuit Court Dec. 20, 1875 (R. 2). On the 29th day of Dec., 1875 (R. 244), the appellants filed a motion to remand the case, as being improperly removed under the statutes. No formal disposition of this motion appears in the Record to have been made. In point of fact it was overruled. As late as March 30, 1878 (R. 306), and only about 13 days prior to the final hearing (R. 306 and 323), we find appellants still claimed the Circuit Court had not acquired jurisdiction.

The first error was committed by the Superior Court in deciding, over appellants' objections, that it was removable. The subsequent hearing of said case is equivalent to a formal overruling of the motion to remand. This suit being against a minor—Vere Bates King—the appellees can take no default against him, but must sustain at

every stage, by proper petition and proof, their right of removal.

That the cause is not properly removable is evident from these considerations:

The removal was sought to be made under the act of March 3, 1875. The 3d section provides that it can be removed "before or at the term at which said cause could be first tried, and before the trial thereof." This has been construed to be the first term at which the suit could be tried after the act of 1875 went into operation, which was March 3, 1875. At that date, the cause was pending in the Supreme Court (Record 52), the appeal having been taken July 31, 1874. The decision was rendered in said Supreme Court, October 11, 1875. So that this being a pending case, could only be in time if made at the first term of the Court after the passage of the law, which was not done.

The petition only says, "it is the first time at which said cause could have been tried since the date of docketing said cause in the Superior Court, and since the passage of the act." It will be seen by reference to Illinois Statutes (Hurd), p. 331—see 54, the terms of the Superior Court commence on the first Monday of every month—hence every month is a term. If the case had not been in the Supreme Court, there were many terms after the passage of the Act of March 3d, 1875, at which said cause could be first tried."

Now in "Removal Cases," 100 Otto, R. 473, it is held, in cases pending at the date of the passage of act,—"the application is in time if made at the first term of the court thereafter." This it is not pretended was done, but the right of removal is placed on the ground that it is the first term of the Court that it could be heard after it was docketed—after it was reversed. This is not the law—nor is it the construction given to it in the Removal Cases. At the date of the passage of the law, the

appellees had a decree, the cause was pending in the Supreme Court on appeal by appellants. At a subsequent term of the Supreme Court, the cause was heard by the Supreme Court, the appellees did what they could to sustain their decree—were beaten, made this application to remove the case, to get rid of a decision of the Supreme Court made at a term and at a hearing after the passage of the act of March 3d, 1875. To sanction such a removal is to give to the act of March 3d, 1875, a construction not warranted by the law itself, or any construction of it given by the Supreme Court, that we can find.

The views of Judge Blodgett, who tried this case in the Circuit Court, on a like case, may be found in *Pellilon* v. *Noble*, 7 Bissell, 450. He places it on the ground that when it is remanded for further proceedings, it stands like a new cause, and he adds, as the defendant was not bound to docket it, that he is entitled to remove it when docketed by the other side. Now the appellees here were, by Judge Blodgett's ruling, bound to docket it, and could have docketed it immediately after the decision on Oct. 11, 1875, at which term, *i. e.*, the October Term of the Superior Court, it could have been tried. If the appellees, whose duty it was to docket the cause, could delay from the 11th of October till the 23d of November—they could delay months. It will be noted that the petition to remove was not filed till December 4, in the December term, and it only claims that it could not have been tried after the mandate was filed and the case is docketed. It no where shows or claims it could not have been heard at the November or October Terms of said Court, and it could not show it, because the cause could have been tried at either the October or November term, if at once docketed.

The appellees are bound in their petition to show an absolute right of removal, or they must fail. The right of removal is a statutory right. "To support the juris-

diction the petitioners must bring themselves strictly within the provisions of the statute." *Gurnee* v. *County of Brunswick*, 1 Hugh, p. 270; *Gold Washing* v. *Water Company*, 96 Otto, 202; *Insurance Co.* v. *Peck*, 95 Otto. 183; *Amory* v. *Amory*, Id. 186.

The fact that the appellees were not ready to docket it, can make no difference. Nor can it make any difference that the Court was not ready. 33 Ohio St. p. 282; *Insurance Co.* v. *Sartel*, also, 1 Hugh, p. 270. It is the first term at which it could be tried. This, Judge Drummond says, is the term at which the issues were first made up—the party applying for removal not being guilty of negligence. *Scott* v. *Railroad Co.* 6 Bissell, 529. The issues were all made up prior to the case going to the Supreme Court. See, also, 1 Hugh Circuit, 270, and *Insurance Co.* v. *Sartel*, 33 Ohio St. 282; *New York Warehouse Company* v. *Loomis*, 122 Mass. R. 431.

As soon as the issue is made up, the cause is ready for trial. The parties and the court may not be ready, but the cause is, at the first term at which there is an issue for trial. An application for removal must be made before or at this term," says Judge Waite, in *Gurney* v. *Brunswick*, 1 Hugh, C. R. 277; *Allee* v. *Potter*, 4 Dillon, 561, goes still further, and holds, when the application was made at the second term, it is too late to remove a case, even when the issues were not made up, [because they could have been made up and tried at the return term,] as it was not the term at which it could *first be tried*. And Judge Benedict, in *Warner* v. *R. R. Co.*, 13 Benedict, 233, says, "when no legal obstacle to a trial exists at a particular term, it may be said that the trial could be had at that term, although in point of fact, the state of the business of the term may satisfy the court that the particular cause will not be called for trial:" It is the first term at which it could be noticed for trial, is the ruling in *Warner R. R. Co.* 13 New York (6 Hun.), 197.

The mandate could have been filed at any time on or after the 11th of October, and the cause was by the Illinois practice in order for trial when docketed, and it was the delay and negligence of the appellees, that it was not at once redocketed. The petition does not say it was not the first term at which it could be tried, or at which it could be docketed, but only the first time after their negligence and delay in docketing it. We do not think the docketing of the case has anything to do with it. The statute certainly contains no such provision. The only other case which at all tends to sustain the Circuit Court's decision is *Hoadly* v. *San Francisco*, 3d Sawyer R. 555. That case had been reversed, and stood upon a petition for re-hearing at the date of the passage of the act of March 3d, 1875, and no hearing was had in the Supreme Court after the passage of the law.

This case does not place the right of removal upon the re-docketing the case, but upon the fact "that there was no term at which the cause could have been tried after the passage of the act." Here two terms did elapse after the passage of act at which it could have been tried after the reversal—and besides it was tried in the Supreme Court. The application was not made till the 3d term of Superior Court, after the decision in the Supreme Court. We hence claim that not only was the petition not in proper form, but it came too late.

In *Pellilon* v. *Noble*, Judge Blodgett assigns as the reason of his so holding, "that the case stands like a new suit." Elsewhere in this brief, we think we have shown that this is a mistake, that whatever has been decided by the Supreme Court is *res adjudicata*, and all that the lower court can do is to go on with it where the Supreme Court left off.

On appeal, one of the questions before the Supreme Court was that in the Court below, on the final hearing, the appellants objected to the testimony, which had pre-

viously been taken, of Herman Scott, Corydon Weeks, Robert Hinckly andJohn R. Bartholomew, on the ground they were incompetent as witnesses on the account of interest. These objections were overruled, but in the Supreme Court were sustained (Record, 315). Upon redocketing the case in the Superior Court, appellees filed, as above stated, a petition to remove it to the United States Court, where the cause was heard and a decree rendered in favor of the appellees, from which the appellants took this appeal. The Circuit Court, prior to and at the hearing of said cause, decided to overrule and reverse the opinion of the Supreme Court of the State of Illinois, and held this very testimony of Scott, Weeks, Hinckly and Bartholomew—which the Supreme Court had decided to be incompetent—was competent, and allowed the same identical testimony to be read, and on it based this decree. This was adjudicated upon, and finally decided to be incompetent, by the Supreme Court prior to the removal—and which could not be re-adjudicated upon in the State Courts. But the appellees by the removal sought to reverse, and by the decision in the Circuit Court did overrule and reverse the judgment of the Supreme Court of the State of Illinois.

That for a fuller understanding of the merits of the cause, we would state that the bill alleges that John T. Avery purchased of Ambrose L. Soule, who was then the owner in fee simple, the West ½ of the Southeast ¼ of Section 20, T. 38, N. R. 13, E. of 3d P. M., on May 30, 1853, for the sum of $800; and conveyances were made so that the North half of whatever title, if any, said Avery acquired, passed to complainant Worthington. That prior to June 1, 1843, the title of the property was in one Herman Scott; that he conveyed to one Isaac Bishop. Said Bishop conveyed about October 13, 1845, to Porter L. Hinckley. That said Hinckley conveyed the same about Jan. 22, 1851, to John R. Bartholomew, who

conveyed the same to Coryden Weeks, which last deed was filed for record, May 24, 1852. He conveyed the same to Ambrose L. Soule, which last deed was filed for record, May 20, 1853. That the deeds of Scott to Bishop, Bishop to Hinckley was neither filed for record prior to June 22, 1861. On which last day, said Herman Scott deeded said land to John B. King, by deed filed for record June 22, 1861. That said John B. King was not a *bona fide* purchaser: that he departed this life intestate, leaving a widow, Emily A. King, and one only child, a minor defendant, Vere Bates King.

The bill prays that the deed from Scott to King may be declared to be null and void. The defendant, Emily A. King, the widow of John B. King, files an answer for herself, and as guardian of Vere Bates King, denying all the allegations of the bill. The infant defendant, Vere Bates King, by his guardian *ad litem* files the usual answer. The Court decreed in favor of appellees. To sustain this decree the appellees must have established by competent evidence the alleged deeds from Scott to Bishop, Bishop to Hinckley, Hinckley to Bartholomew, Bartholomew to Weeks, Weeks to Soule, and Soule to Avery—not one of which deeds is in existence, and consequently said deeds and their contents, and including their proper execution, must depend entirely upon parol evidence, and if the appellees fail by competent parol evidence to establish these facts as to any one of these deeds, the decree cannot be supported.

First in order is the pretended deed from Herman Scott to Isaac Bishop, claimed to be made in June, 1843, which is not in existence, is not recorded, and the only evidence to establish its existence, its contents or its execution, is the testimony of Herman Scott. If he is incompetent to testify against the infant Vere Bates King, it must end the case. *King* v. *Worthington*, 73 Ill. R. 165. His depo-

sition was taken Feb. 5, 1873. He was decided by the Supreme Court to be incompetent to testify in this case.

Corydon Weeks, Porter L. Hinckley and John R. Bartholomew, as witnesses, are in the same condition—and without the testimony of either one of which the decree cannot be sustained.

John R. Bartholomew's deposition was taken Jan'y 25, 1873 (Rec. 122); Porter R. Hinckley's deposition was taken Feb'y 10, 1873; Corydon Weeks' was taken Nov. 16, 1873; Porter L. Hinckley's was taken Feb'y 10, 1873. To each of the depositions of Scott, Weeks, Hinckley and Bartholomew, proper exceptions were duly filed, before the hearing in the Superior Court (see Record), which was on July 7, 1874, and the exceptions overruled by the Superior Court; but, as before stated, on appeal, by the Supreme Court, the exceptions were sustained (73 Ill. R. 162, *King* v. *Worthington*), and they held to be incompetent, on the ground of interest. Without re-taking their testimony, by removal to this Court a new ruling is had, and these depositions admitted. This was error.

The case having gone to the Supreme Court, and the incompetency of the testimony of witnesses Scott, Porter, Hinckley and Bartholomew having been adjudicated on, is *res adjudicata*, and cannot be questioned in the further progress of the suit.

Reed v. *West*, 70 Ill. R. 479.
Eugene Tuttle v. *Garrett*, 74 Ill. R. 444.
Ogden v. *Larabee*, 70 Ill. R. 512.
Price v. *Price, Adm.*, 33 Ala. R. 609.
Kingsbury v. *Buckner*, 70 Ill. R. 514.

Even if the Supreme Court erroneously decided such adjudication is binding and cannot be questioned, except by petition for re-hearing in the Supreme Court making such decision: *Reid* v. *West*, 70 Ill. R. 479. In this cited case it was urged on a second appeal, that when the same case had previously been passed upon, the Supreme

Court had not properly decided the question, but the Supreme Court say: "the former judgment must be held to be conclusive of the rights of the parties. This Court has no power to review its former judgment, except upon a petition for a re-hearing presented in accordance with the rules of the Supreme Court for that purpose. *Ogden* v. *Larabee*, 70 Ill. 510. To the same effect is *Smith* v. *Brittenham*, 94 Ill. R. 626; *Corning* v. *Troy Iron and Nail Factory*, 15 Howard R. 466.

This doctrine of the incompetency of the witnesses and their depositions, on account of the same being *res adjudicated*, is clearly established by an unbroken current of Illinois Reports, and is clearly the rule of the Federal Court.

Duncan v. *Gegan*, 101 U. S. R. 812; *Supervisors* v. *Kennicott*, 94 U. S. R. 498.

If this case had not been removed, on any second hearing in the State court by the ruling of the Illinois Supreme Court, by the authorities cited above, it would no longer be an open question as to the right of the appellees to use this testimony, but be *res adjudicata*, and the same could not be examined on a second appeal. See the above cases, and especially *Reid* v. *West*, 70 Ill. 479. See, also, same rule in cases cited in *Supervisors* v. *Kennicott*, 94 U. S. R. 499. Says C. J. Waite: "Whatever has been decided here on one appeal cannot be examined on a subsequent appeal of the same suit."

One of the questions decided on the first appeal was the competency of this testimony, and the case therefore falls fully within not only the principle but the language of the Court in *Supervisors* v. *Kennicott*, as well as within the principle of the cases there cited. Neither does the fact of the removal make any difference. By the authorities cited above, the State Court would have no power if it had not been removed to re-pass on the competency of this testimony. The case having been re-

moved, the Circuit Court takes it where the other court left off, in the condition it was when the State Court was deprived of its jurisdiction. This is clearly the doctrine of, as well as the language of, *Duncan* v. *Gegan*, 101 U. S. R. 812.

In the last cited case, after a decision in the Supreme Court and the remanding of the case, the defeated party removes the case, as the appellee has done, to the federal court, and sought to re-adjudicate a question settled by the State Supreme Court. The Circuit Court decided, as we here contend, and says: "The Circuit Court, when a transfer is effected, takes it in the condition it was when the State Court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the State Court would have had if the suit had not been removed. It takes the case where the State Court leaves off." And it adds, further: "The judgment of the Supreme Court of the State, on appeal, in the original, concludes him as to his rights thus litigated and disposed of." In *Wadhams* v. *Gay*, 83 Ill. R. 255, the Court, Breese, Justice, uses this emphatic language:

"In the opinion remitted to the Superior Court, certain principles were announced by which the case was governed, the merits having been thoroughly examined and passed upon." "That fixed the rights of the parties then and forever." In *Sibbald* v. *United States*, 12 Peters, 492, the following language is used: "Whatever was before the Court and is disposed of, is considered as finally settled." This fully justifies the language of Chief Justice Waite, in *Supervisors* v. *Kennicott*, that "whatever has been decided upon an appeal, cannot be re-examined on a second appeal." Says Judge Grier, in *Roberts* v. *Cooper*, 20 Howard, 481: "None of the questions which were before the Court on the first writ of error can be reheard or examined upon the second." See, also, to the

same effect, *Corning* v. *Troy Iron and Nail Factory*, 15 Howard, 467; the words of Judge Grier are: "Whatever was formerly before the Court, and was disposed of by its decree, is considered as finally disposed of." See, also, *Sizer* v. *Many*, 16 Howard R. 103;. *Roberts* v. *Cooper*, 20 Howard R. 481; *Oldshaw* v. *Knoles*, 6 Brad. R. 330.

This last case was a decision as to rule of evidence. But it is said that is a rule of evidence, and each Court is governed by its own rulings; this under the guise of a removal of the case is only a way the appellee has taken to review the decision of the Supreme Court. The appellees selected their own tribunal; they could have brought the suit either in the federal Court, or after hearing brought it in the State court, have at once removed it to this Court, but instead of doing either they speculated on the result in the State Court, were beaten on the competency of these depositions, and it, by all rules of law and justice, is *res adjudicata*, and the change of tribunal can make no difference, for the reason that it takes it in the condition it was where the State Court left off. Any other rule would tend to bring contempt upon our duplicate system of jurisprudence and the right of removal.

In the case of *Hazard* v. *Chicago B. R. R.*, 4 Bissel R. 454, in a case where the plaintiff had sued the railroad in the State Court, obtained a judgment for personal injury, which the railroad had appealed from, and the judgment below reversed. After reversal the plaintiff had discontinued the suit and sued over again in the Federal Court. Judge Drummond held, that the law laid down in the Supreme Court of the State ought to govern in this case, although tried here, "and if the facts are substantially the same in every material respect as they were in the State Court, the defendant would have a right to ask this Court to instruct the jury that the law is as laid down by the Supreme Court."

Now the facts in the case before us are the same—because they are the same witnesses, *the same identical depositions, not even re-taken.* We quote still further from Judge Drummond: "That this Court will have to lay down the law as laid down by the (State) Supreme Court, if the facts were the same as they were then, otherwise the effect would be this—that after a party has chosen his own forum, and the opinion of the Court was against him upon the law, he might dismiss his suit, and go into another forum and insist upon a different rule of law." And he accordingly holds that "the law laid down by the highest tribunal of the State must govern here."

See, also, *Akerly* v. *Vilas*, 3d Bissell R. 332; *Boggs* v. *Willard*, 3 Bissell R. 256; *Thompson* v. *Railroad Company*, 6 Wallace, 134; *West* v. *City of Aurora*, 6 Wallace, 139. In *Ackerly* v. *Vilas*, the judge says—when a cause had been removed after certain proceedings were had on it: "All the rights secured by either party under the practice and the laws of the State where the suit was commenced, are impressed upon the case, and as full effect must be given to them by the Federal as would have been given by the State Court if tried there." And the Court adds, further: "All rights acquired by and all defenses allowable under the State laws are to be recognized and preserved in the Federal Courts, and that this is not inflicting any hardship upon the party" who selected his own tribunal. *West* v. *City of Aurora*, 6 Wallace, 139.

In support of III.d and also 2d errors assigned we would say

All of the record prior to page 245, is what was before and passed on by the Supreme Court. Henry H. Handy R. 190. An abstractor is called to lay the foundation for the introduction of a letter-press copy of an abstract which extends to 217. This is decided by the Supreme Court to be incomptent evidence. 72 Ill. 163.

The statement of what Canfield, Handy and Miller swore to, being oral evidence, is not properly in the record. Miller was re-taken, R. 292, who testifies to what Canfield had testified to, Canfield having died, so that Canfield's testimony would be deemed re-taken after the removal of the case.

The testimony of Corydon Wicks was re-taken, page 259. Without going into detail, we submit his testimony is too vague and uncertain to establish the deed about which he testifies. The only description he undertakes to give of any property is in answer to the second question, which was properly objected to as leading, and even then his answer is "I suppose I did." On cross- examination, it appears he never saw the land; does not know which direction it was from Chicago, and it is patent he does not know the description except as it is put into his mouth. Robinson R. 269, saw a deed from Coryden Wicks to Soule, but does not know its description; thinks it is the same land conveyed by Soule to Avery. August G. Downs, 274, undertakes to testify to the payment of taxes from 9 to 12 years.

The bill alleges that it was vacant and unoccupied land But it was proved by the testimony of Samuel Marrs (R. 338) that during these years that Downs claims to have paid the taxes for Avery, he had rented the land of King to cut hay, and was in possession of the same. The hay was made, cut and stacked on it (R. 341 and 342). For two reasons the appellees cannot claim anything from the payment of taxes. The cutting and stacking of the hay was a possession by King, and therefore it was not vacant and unoccupied land.

2nd. Even if we concede it to be vacant and unoccupied land, and that appellees paid taxes for seven successive years, it will not furnish grounds of affirmative relief to set aside the deed to King.

There is no allegation in the bill on which decree can

be founded; that the payment of taxes for seven successive years on vacant land confers a title, on which they can ask to have a deed set aside. The allegations and proof must correspond. John Avery, one of the complainants, testifies that he purchased the land of Soule; in addition he testifies to the death of Canfield Scott, and about the payment of taxes. Miller—page 293—testifies as to the loss of deeds and tax receipts, but says he knows nothing of their genuineness. He also proves what Canfield testified to on the former hearing. The Supreme Court says Canfield was competent to prove his recollection of the substance of the deeds, which, we take it, means that the execution and genuineness of any deed having been established by competent evidence, a third party may testify to the contents of a paper thus proved.

The rule is, the execution of a lost deed must be as strictly and first proved, as if the deed were produced in Court. *Marriner* v. *Saunders*, 5 Gilm. 113; *Owen* v. *Thomas*, 33 Ill. R. 326; *Metcalf* v. *Van Benthuoyson*, 3d Comstock, 430. There must be clear proof on this point. the testimony, which the Supreme Court has decided in-Id. Without competent, there is no proof of the execution or contents of any one of the papers testified to by Canfield. On thecontrary, he says he has no knowledge on the subject. His testimony just as it now stands, was before the Supreme Court, and they at the conclusion of their opinion say: "The rejection of the evidence which we hold to have been improperly received, leaves the case without sufficient proof to sustain the decree." We have shown by the above references that no material change has been made in the proof since the case went to the Supreme Court, and holding, as we do, that the decision of the Supreme Court upon the testimony of Herman Scott, Corydon Wicks, Porter L. Hinckley, and John Bartholomew, is *res adjudicata*, the decree must be reversed.

The statement of what Canfield, Handy and Miller swore to, being oral evidence, is not properly in the record. Miller was re-taken, R. 292, who testifies to what Canfield had testified to, Canfield having died, so that Canfield's testimony would be deemed re-taken after the removal of the case.

The testimony of Corydon Wicks was re-taken, page 259. Without going into detail, we submit his testimony is too vague and uncertain to establish the deed about which he testifies. The only description he undertakes to give of any property is in answer to the second question, which was properly objected to as leading, and even then his answer is "I suppose I did." On cross- examination, it appears he never saw the land; does not know which direction it was from Chicago, and it is patent he does not know the description except as it is put into his mouth. Robinson R. 269, saw a deed from Coryden Wicks to Soule, but does not know its description; thinks it is the same land conveyed by Soule to Avery. August G. Downs, 274, undertakes to testify to the payment of taxes from 9 to 12 years.

The bill alleges that it was vacant and unoccupied land But it was proved by the testimony of Samuel Marrs (R. 338) that during these years that Downs claims to have paid the taxes for Avery, he had rented the land of King to cut hay, and was in possession of the same. The hay was made, cut and stacked on it (R. 341 and 342). For two reasons the appellees cannot claim anything from the payment of taxes. The cutting and stacking of the hay was a possession by King, and therefore it was not vacant and unoccupied land.

2nd. Even if we concede it to be vacant and unoccupied land, and that appellees paid taxes for seven successive years, it will not furnish grounds of affirmative relief to set aside the deed to King.

There is no allegation in the bill on which decree can

be founded; that the payment of taxes for seven successive years on vacant land confers a title, on which they can ask to have a deed set aside. The allegations and proof must correspond. John Avery, one of the complainants, testifies that he purchased the land of Soule; in addition he testifies to the death of Canfield Scott, and about the payment of taxes. Miller—page 293—testifies as to the loss of deeds and tax receipts, but says he knows nothing of their genuineness. He also proves what Canfield testified to on the former hearing. The Supreme Court says Canfield was competent to prove his recollection of the substance of the deeds, which, we take it, means that the execution and genuineness of any deed having been established by competent evidence, a third party may testify to the contents of a paper thus proved.

The rule is, the execution of a lost deed must be as strictly and first proved, as if the deed were produced in Court. *Marriner* v. *Saunders*, 5 Gilm. 113; *Owen* v. *Thomas*, 33 Ill. R. 326; *Metcalf* v. *Van Benthuoyson*, 3d Comstock, 430. There must be clear proof on this point. the testimony, which the Supreme Court has decided in-Id. Without competent, there is no proof of the execution or contents of any one of the papers testified to by Canfield. On thecontrary, he says he has no knowledge on the subject. His testimony just as it now stands, was before the Supreme Court, and they at the conclusion of their opinion say: "The rejection of the evidence which we hold to have been improperly received, leaves the case without sufficient proof to sustain the decree." We have shown by the above references that no material change has been made in the proof since the case went to the Supreme Court, and holding, as we do, that the decision of the Supreme Court upon the testimony of Herman Scott, Corydon Wicks, Porter L. Hinckley, and John Bartholomew, is *res adjudicata*, the decree must be reversed.

We do not think, even if their testimony is received over the opinion of the Supreme Court, the complainants have made a case. They are too vague and uncertain to deprive a minor of his property. When a written instrument is to be proved by parol, "vague and uncertain recollections are not sufficient." *Taylor* v. *Riggs*, 1 Peters, 591. And if ever there was vague and uncertain testimony it will be found here.

After the execution of a lost paper is clearly and first proved, "the proof of its contents must be so clear as to leave no reasonable doubt of the substance of the material parts of the paper." *Bennett* v. *Waller*, 23 Ill. R. 181; *Marriner* v. *Saunders*, 5 Gilm. R. 122; *Metcalf* v. *Van Benthuysen*, 3d Comstock R. 430. Without going into detail, even if all this rejected testimony is admitted, there is no such clear proof of the execution or of the description of the property conveyed by these alleged lost deeds, as is a ground by law to set aside a valid deed. It will be noted that Vere Bates King is a minor, and every right and every objection which he had or could make is preserved to him. We therefore ask that the decree be reversed.

HORACE F. WAITE,

Attorney for Appellant.

OFFICE SUPREME COURT U.S.
FILED
FEB 12 1881
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1880.

No. 295.

EMILY A. KING, ET AL.,
Appellants,
vs.
RUDOLPH WORTHINGTON, ET AL.
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT

on behalf of Appellees.

HENRY G. MILLER,
For Appellees.

BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET

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on behalf of Appellees.

A bill was filed in the State court, by George W. Worthington and John T. Avery, citizens of Ohio, against Emily A. King, wife of John B. King, deceased, and Vere Bates King, his only child, and Emily A. King, guardian of Vere Bates King, citizens of Illinois, to remove a cloud upon their title to the West ½ of the South West ¼ of Section 20, T. 38, R. 13, E. of the 3d P. M., in Cook County, Illinois; occasioned by the giving of a quit-claim deed by Heman Scott to John B. King, in June, 1861, of this property, nearly 20 years after he had sold and conveyed this land to Isaac Bishop, from whom the complainants traced their title through mesne conveyances.

The bill alleges that John T. Avery, on the 13th of May, 1853, purchased this land from Ambrose L. Soule, for $800, and received a conveyance therefor from Soule and his wife, which was recorded in the recorder's office of Cook County, on the 12th of October, 1853, in book 64 of deeds, at page 425, and on the 23d of Nov., 1857, sold and conveyed the south half of it to Lucius H. Muzzey, and Lucius H. Muzzey sold and conveyed this south half to George W. Worthington, on the 2d day of Dec., 1857, for $700. That the deed to Muzzey was filed for record, and recorded in the recorder's office of Cook County, on the 2d day of December, 1857, in book 133 of deeds, on page 52, and on the same day, the deed from Muzzey was filed in the same office, and recorded in book 133 of deeds, at page 51. That on the first day of June, 1843, one Heman Scott, who was then the owner of this land in fee, sold it to Isaac Bishop, of Tully, New York for the sum of $200, and in pursuance of such sale executed a conveyance to Bishop, by deed bearing date, and duly acknowledged on that day.

That on the 13th day of October, 1845, Bishop sold this land to Porter L. Hinckley, and conveyed it to him by a deed duly executed and acknowledged on said last mentioned day.

That during the year 1845, Hinckley sold and conveyed the land, by deed duly executed and acknowledged, to John R. Bartholomew; and Bartholomew, on or about the 22d of January, 1851, sold and conveyed the land to Corydon Weeks, by deed duly executed and acknowledged, and bearing date on the last mentioned day, which was filed for record on the 24th day of May, 1852, and recorded in the recorder's office of Cook County, in book 45 of deeds, at page 655, and that Corydon Weeks afterwards, and on the 13th day of April, 1852, and for a valuable consideration paid to him therefor, sold and conveyed

this land to Ambrose L. Soule, by deed bearing date on that day, and filed for record in the recorder's office of Cook County, on the 20th of May, 1853, and recorded in book 62 of deeds, at page 619.

That at the time of the execution of these several deeds, the grantors therein were respectively the owners in fee simple of these premises. That since the purchase of the premises by complainants, they have paid all taxes and assessments that have been levied or assessed upon said lands. That shortly before the filing of the bill, complainants learned that, by the omission and mistake of the parties thereto, the deed from Scott to Bishop, and the deed from Bishop to Hinckley, were neither of them filed for record or recorded in the recorder's office of Cook county; and that there appeared upon said records a quit-claim deed to these premises from Heman Scott to John B. King, dated June 21st, 1861, and recorded in book 216 of Deeds, at page 216, thereby placing the apparent title of record to said premises in said King. That said Scott had, in fact, no title or interest in said premises at the time he executed said quit-claim deed to said King, and said King never became a *bona fide* purchaser of said lands, or paid, or agreed to pay anything therefor.

That said King died on the 2d of October, 1864, leaving his wife, Emily A. King, and his only child, Vere Bates King, a minor under the age of 18 years, and that the said Emily A. King has been duly appointed as guardian of the person and estate of said minor, and was then acting under such appointment. That this deed to King had created a cloud upon the title of complainants to the land, in consequence of which they were unable to sell or dispose of it. Prayer that the deed of Scott to King may be decreed to be null and void; that the said Emily A. King, Vere Bates King, and Emily A. King as guar-

dian of Vere Bates King, be made defendants, and for process to them to answer, &c.

The answer of Emily A. King, and Emily A. King as guardian, was filed, censisting of a general denial of the allegations in the bill, excepting the allegation of the conveyance from Scott to John B. King, and the depositions of Scott and Hinckley, and Bartholomew, were taken, and the deeds which had not been recorded were produced to these several witnesses, and verified by them and attached to their respective depositions. The other deeds had been recorded, and their execution could have been easily proved.

In October, 1871, and before the case was brought to a hearing, the great fire in Chicago occurred, in which the records in this suit, embracing the depositions which had been returned to court, the records of the recorder's office, and the abstract of this property which had been made prior to the fire, and which, if preserved, would have been competent evidence in this case under a statute passed by the legislature of this State after the fire, together with all the receipts for the payment of taxes held by the complainant, were burned up.

After the fire the case was restored and a substantial copy of the bill filed and Emily A. King, in her own right, and as guardian of Vere Bates King, filed her second answer, which commences at page 8 of the printed abstract.

The depositions of Heman Scott, John R. Bartholemew, Alexander C. Caskey, Porter L. Hinckley, Louisa L. Weeks, Carlos H. Weeks, Corydon Weeks, were taken, and by these witnesses the execution of the several deeds, mentioned in the bill, as well those which had been filed for record as those which had not been filed, were fully proved.

The following is the testimony of the witness Heman Scott, regarding his conveyance to John B. King:

"Int. 9. Since your conveyance of the land to Isaac "Bishop, state whether or not you have been in possession "of the land, or exercised any control over it?

"A. Not that I know of.

"Int. 10. State whether to your knowledge you have "paid any taxes on this land?

"A. Not any that I know of.

"Int. 11. Have you made a conveyance of this land "subsequently to your conveyance to Isaac Bishop?

"A. Not to my knowledge.

"Int. 12. State whether you have made a quit claim "deed to John B. King of Chicago, Ill., and if so, state the "particulars in reference to that conveyance, when it was "made, and the conversation that took place at the time?

"A. I should think some four or five years ago one "Mr. Charles Ham, he called himself, who acted as the "agent for Mr. King in the transaction of this business. "He informed me that there was several pieces of land "near Chicago standing in my name, with the taxes un- "paid on it, and wished to know what I would take— "wanted to buy them. I told him I didn't think of taking "any further trouble with it, as I supposed it was covered "up with taxes, and didn't know that I owned it. He then "made this proposition to me: 'If you will give me a quit "claim I will look up these claims and I will compromise "with them the best I can; pay them a part and divide the "profits with you.' Whereupon I gave him a quit claim "of those lots mentioned, which he had picked out.

"Int. 13. State whether or not this Charles Ham was "a stranger to you?

"A. He was a stranger to me; never saw him before "or since, to my knowledge.

"Int. 14. State whether or not, at the time this quit

"claim deed was made, Charles Ham, or any one beside, "paid you anything for or on account of the land con- "veyed?

"A. Not anything."

In addition to this testimony, the plaintiffs gave in evidence at the hearing a letter press copy of the abstract which had been destroyed by the fire, commencing on page 68 of the printed record, which showed a patent from the United States to James S. Seymour, conveyance by James S. Seymour to Heman Scott, and conveyance by John R. Bartholomew to Corydon Weeks, by Corydon Weeks to A. L. Soule', by A. L. Soule' to John T. Avery, by John T. Avery of the South half to Lucius H. Muzzey, and by L. H. Muzzey to George W. Worthington, and a quit claim deed from Heman Scott to John B. King, dated June 21, 1861.

And also gave in evidence the loss of the original papers, deeds, tax receipts, &c., by fire.

This testimony was further fortified by the testimony of Jason Canfield, commencing at page 75 of the printed record, who testifies to having seen the deeds prior to their destruction by fire; that they were apparently executed and acknowledged in conformity to the laws of Ohio, and had the certificates necessary to prove their execution attached, and that he in person delivered these papers to the solicitors for the complainants, for the purpose of having this suit commenced. The allegations in the bill were abundantly established in a variety of ways.

A decree was entered by the Superior Court of Cook County, in which the suit was brought in favor of the complainants. This decree is set forth in pages 14, 15 and 16 of the printed record.

The defendants took the case by appeal to the Supreme Court of this State. The Supreme Court reversed the

decree, because incompetent testimony had been received in the court below, and sent the case down for a re-trial.

The statute of this State provides that "no person shall "be disqualified as a witness in any civil action, suit or "proceeding except as hereinafter stated, by reason of his "or her interest in the event thereof as a party or other-"wise."

The exception is: "No party to any civil action, suit "or proceeding, or person directly interested in the event "thereof, shall be allowed to testify therein of his own "motion, or in his own behalf, by virtue of the foregoing "section, when any adverse party sues or defends, as "* * heir * of any deceased person or as guardian "* of any such heir." And the Supreme Court held (see opinion, commencing on page 106 of the printed Record), that because Vere Bates King was a minor, and defends as the heir at law of John B. King, the witnesses, Herman Scott, Corydon Weeks, Porter L. Hinckley, and John R. Bartholomew, were incompetent witnesses, for the reason that it appeared from the record that the deeds executed by them, respectively, contained covenants of warranty.

They also held that the statute of this State, in force July 1st, 1872, entitled: "An act to remedy the evils con-"sequent upon the destruction of any public records, by "fire, or otherwise," and which made abstracts issued in the regular course of business, before the fire, competent evidence of the records which had been destroyed by the fire, did not embrace letter-press copies of such abstracts, and the court remanded the case to "the Superior Court "of Cook County for such other and further proceedings "as to law and justice shall appertain."

The decree in the court below was entered on the 7th of July, 1874, and was heard at the September term of the

Supreme Court. The opinion of that court was filed on the 11th of October, 1875. The mandate was filed in the court below on the 13th day of November, 1875, and the cause re-docketed in that court on the 23d day of November, 1875. On the 4th of December, 1875, complainants filed their petition in the Superior Court for the removal of the cause into the Circuit Court of the United States, for the Northern District of Illinois, alleging in their petition, that said cause "is pending for trial in the "Superior Court of Cook County, Illinois, and that said "cause was docketed in this court on the 23d day of No-"vember, A. D. 1875, and that the present term of said "court is the first term at which said cause could have "been tried since the date of docketing said cause in said "Superior Court, as aforesaid, and since the passage of "the act of Congress under which the petition is filed."

Objection to the removal was filed by Emily A. King, and by Emily A. King, as guardian of Vere Bates King, on the ground that said cause had been tried and determined by the Supreme Court of this State. (See pages 22 and 23 of the printed Record).

The Superior Court entered an order, directing the removal of the case into the Federal Court, on the 14th of December, 1875. Further testimony was taken by the complainants, after this removal; particularly the testimony of Augustus G. Downs, commencing on page 93 of the abstract, showing the payment of taxes by complainants, for nine or ten continuous years, prior to the year 1868. Some of the witnesses were re-examined. The case proceeded to a hearing, and a decree was entered in favor of the complainants. The decree is found on pages 111 and 112 of printed Record. The case is now brought by the defendants to this court for a review.

ARGUMENT.

The first error assigned is, that the cause was not removable from the State court, under the act of Congress, for the reason that the petition was not filed at the term at which the cause could have been first tried in the State court.

It appears that the solicitors for the appellant filed with the clerk of the Circuit Court, a motion to remand the cause, on the 29th of December, 1875, as having been improperly removed, under the statute of the United States —page 83 of printed Record—but they did not have confidence enough in their motion to afterwards call the attention of the court to it, but litigated the questions at issue to a final decree, precisely as though the case had been commenced in that court. It appears from the record, that the parties to the controversy were citizens of different States. The complainants on the one side being citizens of Ohio, and those on the other, citizens of Illinois.

As we could have dismissed the suit without prejudice in the State court, and brought a new suit in the United State court, if the case was not subject to removal under the act of Congress, and the defendants to the suit proceeded to a hearing in the United States court, without asking that court to rule upon the question whether it could have been removed or not, we think they are entirely too late to raise the question now, and therefore it is not properly raised by this record. But even if it had been raised, the case was manifestly subject to removal, under the act of Congress of March 3d, 1875. The act in terms applies to cases pending in State courts at the time of its passage, and provides that the petition for removal shall be filed in the State court "before or at the term at which "said cause could be first tried, and before the trial "thereof."

The case was argued in the Supreme Court at the September term, 1874, and was under advisement in that court when the act was passed. It was decided October 11th, 1875. The decree of the court below was reversed and set aside, and the cause remanded "to the Superior "Court of Cook County for such other and further pro- "ceedings as to law and justice shall appertain." When re-docketed in the Superior Court, it was in the condition of a new cause, and was then pending for trial, and was, for the first time, subject to removal under this act. The statute of this State provides—Secs. 84 and 85, Chap. 110, Rev. Stat. of Illinois: "When a cause or proceeding is "remanded by the Supreme Court, or Appellate Court, "upon a transcript of the order of the court remanding the "same, being filed in the court from which the cause of "proceeding was removed, or in which the cause originated, "as the case may require, and not less than ten (10) days' "notice thereof being given to the adverse party, or his "attorney, the cause or proceeding shall be reinstated "therein.

"Sec. 85. If neither party shall file such transcript "within two years from the time of making the final "order of the Supreme Court, or [Appellate] Court, as "the case may be, reversing any judgment or proceeding, "the cause shall be considered as abandoned, and no further "action shall be had therein."

The case was redocketed on the 23d day of November, 1875, (page 18 printed abstract) and on the 4th of December, the last day of the November term, (the December term did not commence until the 6th of December, the Monday following), a petition was filed for the removal of the case into the Circuit Court of the United States for the Northern District of Illinois, and it is stated in the petition that that term of the court "was the first term at "which said cause could have been tried since the date of

" docketing said cause in the Superior Court, as aforesaid, " and since the passage of the act of Congress under " which the petition is filed." How a case could have been more clearly within the act of Congress than this was at the time of its removal, we cannot see. The complainants in the case had two years during which the cause could have been redocketed in the court below; the redocketing would have been as effective for any and every purpose if made during the later portion as if made during the earlier portion of this period. But even if the law exacted great diligence in this regard, such diligence was exercised in this case. The 10 days' notice could not have been given, and the case redocketed for trial at the October term. It was redocketed at the next succeeding term, to wit, the November term, and at the same term the petition was filed for a removal of the case.

On the same day the bond required by the statute was filed in the case. On the 11th of December the defendants in the case filed their objection to this removal (page 22 printed record), but they do not intimate that the complainants had not used proper diligence in procuring the cause to be redocketed and in filing the petition for its removal, but the objection is that the case had been already tried by the State court, and for this reason was not within the ~~province~~ purview of this act of Congress.

II.

The second assignment of error is the decision of the court below that Heman Scott, Corydon Weeks, John R. Bartholomew and Porter L. Hinckley were competent witnesses in the case. The Supreme Court decided that they could not testify as witnesses under the statutes of Illinois while the case was in a court of that State, because they were within the exception named in the statute

removing the disability of witnesses by reason of interest in the event of the suit. That statute could only affect the qualification of witnesses when testifying in the State court. It has no force or effect whatever in a Federal court.

There the rule governing the introduction of testimony is prescribed by a law of Congress. This law contains no such exception, and under that law they are competent witnesses.

If after the case had been remanded to the State court, that portion of the State law containing the exception had been repealed, they would after the repeal have been competent witnesses on a re-trial of the case, notwithstanding the decision of the Supreme Court; for that decision was simply an interpretation of the prior statute. If the Supreme Court had decided the case upon its merits, if for example it had decided upon the evidence introduced in the case that John B. King was a *bona fide* purchaser of the property, and was not affected by the deed from Scott to Bishop, then this decision would have been controlling upon a re-hearing of the case in the court below, or in any other court to which the case should be removed; or if any other facts had been decided by the Supreme Court, and that court had directed a decree to be entered in conformity to the principles anounced in the opinion filed; this would have been controlling in the court below, or in any other court; but they simply reversed the case, because incompetent testimony had been received, and remanded it to the court below for further proceedings in conformity to law, leaving it subject to such rules regulating the admission of testimony as should be in force at the time of a re-trial.

The Supreme Court did not decide any fact in the case, or apply any principle of law to the facts contained in the

record. They did not look into the merits of the case, but simply found as we have already said that improper evidence had been received, and on that ground alone reversed the decree of the court below.

This decision can have no force or effect whatever where such objection to the evidence does not exist, but where a different rule with reference to the introduction of testimony obtains. No objection is made to the way in which the depositions of these witnesses were taken, or because their testimony was not re-taken in the Federal court; but the objection is confined to their incompetency as witnesses, and is based upon the fact that the Supreme Court of the State decided that they were not competent witnesses under the State statute.

We do not see how appellants can invoke the doctrine of *res adjudicata*, and therefore do not consider it necessary to attempt a review of the cases in which that familiar doctrine has been applied. No right of any of the parties to the property in controversy was affected by that decision, and consequently no rights were secured to either party by it.

The decision simply related to the evidence of their rights.

III.

The objection that the decree is against the evidence does not deserve serious consideration. Heman Scott testifies—page 30 of record—that he conveyed this land to Isaac Bishop in 1844, and that about two years before his deposition was taken he testified in the case, and then had the deed he made to Bishop before him, and recognized it as his deed. It will be remembered that his first deposition was burned up in the fire, and it appears from the testimony of Henry G. Miller that this deed was attached

as an exhibit to that deposition. John R. Bartholomew says that he received from Porter Hinckley a deed of this 80 acres and paid Hinckley $350 for it, and gave the deed to Corydon Weeks (to whom he sold and conveyed the land) to be put on record.

In his re-examination he says he purchased the land of Hinckley about 20 years before giving his testimony, and sold and conveyed it to Corydon Weeks about six months after he bought it ot Hinckley.

Porter L. Hinckley says—44 of record—that he purchased this land of Isaac Bishop, Oct. 13, 1845, when Bishop conveyed it to him, at the same time delivering to him the deed from Scott to Bishop; that he kept these deeds in his possession from Oct. 13, 1845, to Dec. 26, 1869, when he sent them to Messrs. Canfield and Caskey, complainants' solicitors, and that they were never recorded. He says that he gave his deposition before in the case in December, 1870, when this deed was before him, and it is in evidence that this deed was attached to his deposition as an exhibit, and burned up in the fire.

Corydon Weeks was examined as a witness Nov. 19, 1873, and again on the 26th of April, 1877. He says he purchased this property of John R. Bartholomew in 1850 or 1851, and gave him 40 acres of land in Michigan for it. That he received a conveyance from Bartholomew of the land, and sold and conveyed it to Ambrose L. Soule.

The loss of these deeds, to wit, the deed from Bartholomew to Weeks and from Weeks to Soule, was clearly established by the testimony of C. H. Weeks, L. L. Weeks, and Corydon Weeks. The deeds from Soule to Avery and from Avery to Muzzey and from Muzzey to Worthington were put in evidence.

Jason Canfield testified, page 75 of the record, that he received the deed from Scott to Bishop, and from Bishop to

Hinckley in 1869, and sent them to the Recorders office in Cook County to be recorded January 6th 1870. That in August 1870, the deed from Scott to Bishop was placed before Scott while he was giving his evidence, and attached to his deposition, and the deed from Bishop to Hinckley was sent to be attached to the deposition of Hinckley. That he also had in his possession tax receipts for the payment of taxes by complainants from the years 1856 to 1868 inclusive. It is in evidence that these receipts were burned up in the fire while in the office of complainants solicitors. Witness says he also carefully examined the deeds from Scott to Bishop, and from Bishop to Hinckley, and that they respectively conveyed the land described in the bill of complainant. He says they were executed and acknowledged in conformity to the laws of Ohio. Complainants also proved by A. G. Downs, payment of taxes for the years above mentioned. They also proved the contents of an abstract showing the title to this property which was made prior to the fire and which was burned up in the fire, which showed a continuous claim of title from the Government to the complainants.

The title of appellees to this property is in this way fully established, and there is no evidence in the record showing or tending to show that appellants have a shadow of a legal or equitable claim to it.

HENRY G. MILLER,

For Appellees.

14-5-2

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~302.~~ 8

D. G. DRIESBACH, PLAINTIFF IN ERROR,

vs.

THE SECOND NATIONAL BANK OF WILKES BARRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 19, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 302.

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vs.

THE SECOND NATIONAL BANK OF WILKES BARRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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4 UNITED STATES,
Western District of Pennsylvania, sct.:

The President of the United State to the marshal of the western district of Pennsylvania, greeting:

We command you, that you summon D. G. Driesbach, a citizen of the State of Pennsylvania, and a resident of the western district thereof, late of your district, if he may be found therein, so that he be and appear before the judges of the circuit court of the United States, in and for the western district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Williamsport, on the first Monday of March next, to answer to the Second National Bank of Wilkes Barre, a banking association established in the western district of Pennsylvania under the laws of the United States providing for national banking associations, in a plea of trespass on the case upon promises, and have you then and there this writ.

Witness the honorable Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, at Williamsport, this twenty-first day of February, A. D. 1878, and in the one hundred and second year of the Independence of the said United States.

[SEAL.] B. S. BENTLEY, JR., *Clerk.*

5 FEB'Y 23d, 1878—I hereby accept service of the within writ.
E. N. WILLARD,
Att'y for Def't.

(Indorsed:) No. 124. June term, 1878. The Second National Bank of Wilkes Barre, Pa., vs. D. G. Driesbach. Summons in trespass on the case upon promises. Armstrong & Linn.

6 And thereupon, afterwards, to wit, on the fourth day of March, A. D. 1878, the plaintiff, by her attorneys comes into court here and files her declaration together with copy of instruments on which the plaintiff's claim is founded, also affidavit thereto, which said declaration, copy of instruments on which plaintiff's claim is founded being read, are as follows, to wit:

7 In the circuit court of the United States for the western district of Pennsylvania, at Williamsport. No. . June T., 1878.

THE SECOND NATIONAL BANK OF WILKES Barre, a banking association established in the western district of Pennsylvania, under the laws of the United States providing for national banking associations,
vs.
D. G. DRIESBACH, A CITIZEN OF THE STATE OF Pennsylvania, and a resident of the western district thereof.

UNITED STATES,
West. Dist. Pennsylvania, ss:

D. G. Driesbach, a citizen of the State of Pennsylvania and a resident of the western district thereof, defendant, was summoned to answer the Second National Bank of Wilkes Barre, a banking association established in the western district of Pennsylvania, under the laws of the

United States providing for national banking associations, plaintiff, of a plea of trespass on the case upon promises, whereupon the said plaintiff, by Armstrong & Linn, her attorneys, complains for that whereas the said defendant on the eleventh day of August, A. D. one thougand eight hundred and seventy-seven, at Wilkes Barre, Pa., to wit, at the district aforesaid, made his certain promissory note in writing, bearing
8 date the day and year aforesaid, and then delivered the same to one J. B. Stark, and thereby promised to pay to the order of the said J. B. Stark eight thousand dollars, at the Second National Bank of Wilkes Barre, without defalcation, value received, in ninety days after the date thereof, which period had elapsed before the commencement of this suit; and the said J. B. Stark then endorsed the same to the said D. G. Driesbach, defendant, and the said D. G. Driesbach, defendant, then endorsed the same to the Second National Bank of Wilkes Barre, the said plaintiff, whereof the defendant then had notice and then in consideration of the premises promised to pay the amount of the said note to the plaintiff according to the tenor and effect thereof, but neither the defendant nor any other person or persons did or would pay the amount of the said note, although the same was duly presented at the Second National Bank of Wilkes Barre aforesaid for payment on the day when it became due, of which the defendant then had due notice.

And also for that whereas the said defendant on the sixth day of September, A. D. one thousand eight hundred and seventy seven, at Wilkes Barre, to wit, at the district aforesaid, made his certain other
9 promissory note in writing bearing date the day and year last aforesaid, and then delivered the same to the said J. B. Stark, and thereby promised to pay to the said J. B. Stark five thousand dollars, at the Second National Bank of Wilkes Barre, without defalcation, value received, in ninety days after the date thereof, which period had elapsed before the commencement of this suit, and the said J. B. Stark then endorsed the same *then endorsed the same* to the said D. G. Driesbach, defendant, and the said D. G. Driesbach, defendant, then endorsed the same to Second National Bank of Wilkes Barre, the said plaintiff, whereof the defendant then had notice, and then in consideration of the premises promised to pay the amount of the said note to the plaintiff according to the tenor and effect thereof, but neither the defendant nor any other person or persons did or would pay the amount of the said note although the same was duly presented at the Second National Bank of Wilkes Barre aforesaid for payment on the day when it became due, of which the defendant then had due notice.

Nevertheless the said defendant, not regarding his said several promises and undertakings in this behalf, has not as yet paid the said sums of money, although often requested so to do, or any part thereof, but to pay the same the said defendant has hitherto wholly neglected
10 and refused and still doth neglect and refuse to the damage of the plaintiff twenty-six thousand dollars.

And therefore she brings suit, &c.

ARMSTRONG & LINN,
Att'ys for Pl'ff.

Copy of claim.

The pl'ff's claim is founded upon two promissory notes, of which the following are copies.

$8,000.] WILKES BARRE, PA., *August 11th*, 1877.

Ninety days after date I promise to pay to the order of J. B. Stark

eight thousand dollars. at the Second Nati:nal Bank of Wilkes Barre, without defalcation. Value received.

D. G. DRIESBACH.

For value received I hereby waive protest on within note. Nov. 12th, 1877.

J. B. STARK.

(On the back of which is endorsed:) J. B. Stark, D. G. Driesbach.

$5,000.] WILKES BARRE, PA., *Sept. 6th*, 1877.

Ninety days after date I promise to pay to the order of J. B. Stark five thousand dollars, at the Second National Bank of Wilkes Barre, without defalcation. Value received.

D. G. DRIESBACH.

For value received I hereby waive protest on within note. Dec. 8th, 1877.

J. B. STARK.

(On the back of which is endorsed;) J. B. Stark, D. G. Driesbach.

11 RECAPITULATION.

Note dated Aug. 11th, 1877	$8,000
Int. Nov. 12th, 1877, to	
Am't due	
Note dated Sept. 6th, 1877	$5,000
Int. Dec. 8th, 1977 to	
Am' due	

UNITED STATES,
West. Dist. Pennsylvania, ss :

John H. Mitchell, att'y for pl'ff, being duly sworn, saith that he verily believes the amount above stated with interest to be due to the plaintiff from the defendant.

JOHN H. MITCHELL.

Sworn and subscribed to before me this 4th day of March, A. D. 1878.
B. S. BENTLEY, JR., *Clerk.*

(Endorsed:) No. 124. June T., 1878. Second National Bank, Wilkes Barre, vs. D. G. Driesbach. Narr., copy, claim, stad't, am't due, and affidavit. Filed Mch. 4th, 1879. A. & L.

12 And thereupon afterwards, to wit, on the fourth day of March, A. D. 1878, the defendant by his attorney, J. O. Parker, esquire, comes into court here and files his affidavit of defence, which being read, is as follow, to wit:

13 In the circuit court of the United States for the western district of Pennsylvania. No. 124. June term, 1878.

THE SECOND NATIONAL BANK OF WILKES Barre, Pa.,
vs.
D. G. DRIESBACH.

Daniel G. Driesbach, the above named defendant, being duly sworn

according to law, says that he has a full, complete, and entire defense to the whole of the plaintiff's claim in the above stated action except as to the sum of three thousand nine hundred and thirty-two dollars and ninety-six cents. The nature and character of which is as follows, viz:

The action is founded on two certain promissory notes made by this deponent payable to the order of J. B. Stark, at the said Second National Bank, one of them bearing date August 7th, 1877, at ninety days for the payment of the sum of eight thousand dollars, and the other bearing date Sept. 4th, 1877, at ninety days for the payment of the sum of five thousand dollars ($5,000).

And this deponent further says that said two notes are made up as follows: On April 21st, 1871, he had his note discounted for the sum of five thousand dollars, and the same was renewed every ninety days from that time till December 4th, 1877, and regularly discounted and renewed by said bank during all that time. That on August 17th,
14 1871, said Second National Bank discounted for deponent another note for five thousand ($5,000), which was renewed every ninety days from that time till August 7th, 1877; that on July 25th, 1873, said bank discounted another note for deponent for three thousand dollars ($3,000), which was renewed from time to time by said bank till August 7th, 1877, at which time said last two notes were incorporated into the eight thousand dollars, upon which this suit is founded; and said last named note became due Nov. 11th, 1877, and the said bank refused to renew the same, and on December 4th, 1877, the said note first described, amounting to five thousand dollars, became due, and said bank refused to renew the same. That said notes upon which this action is founded are the last renewals of the three notes dated April 21st, 1871, August 17th, 1871, and January 25th, 1873.

And this deponent says that during all of said time said bank has charged and he has paid to said bank interest on said notes, amounting to from over eight to over ten per centum per annum, never having paid less than eight per centum thereon. That the legal rate of interest in the State of Pennsylvania is six per centum per annum, and that all of said interest so paid by him is usurious and was received by said
15 bank in violation of section 5197 and 5198 of the Revised Statutes of the United States, and deponent further says that the usurious interest thus paid by him on account of said notes and others, of which those in suit are renewals, amount with interest from the respective dates of payment to the sum of eight thousand four hundred and sixty-seven dollars and four cents, which he claims as so much in payment of said notes.

And deponent further says that he has an offset, amounting to the further sum of at least seven hundred dollars, being the amount of usurious interest paid by said deponent to said bank on other paper discounted for him by said bank, with six years last past, so that he is now indebeted to said bank in the sum of three thousand nine hundred and thirty-two dollars and ninety-six cents, and no more, and for this amount judgment is hereby tendered.

And deponent says further that all of the plaintiff's claim is paid except the sum of $3,932.96 as aforesaid.

D. G. DRIESBACH.

Sworn and subscribed to before me this 27th day of February, 1878.

E. W. SIMRELL,
U. S. Commissioner.

16 (Endorsed:) No. 124. June term, 1878. The Second National

Bank of Wilkes-Barre vs. D. G. Driesbach. Affidavit of defence. Filed M'ch 4th, 1878. E. N. Willard, att'y for def't.

And, afterward, to wit, on the sixth day of May, A. D. 1878, the defendant by his attorney, J. O. Parker, esquire, files his plea as follows, to wit:

17 U. S. C. C., W. D. of Pa. No. 124. June term, 1878.

SECOND NATIONAL BANK OF WILKES-BARRE
vs.
D. G. DRIESBACH.

Defendant pleads non-assumpsit payment, payment with leave to introduce special matter in evidence and set off.

May 6th, 1878.

J. O. PARKER,
Att'y for Def't.

(Endorsed:) No. 124. June T., 1878. Bank vs. Driesbach. Plea. Filed May 6th, 1878.

And afterwards, to wit, on the twenty-fifth day of June, A. D. 1878, a jury being called came, to wit:

1 R. M. Frick.	7 Lewis Mortin.
2 M. L. Wortman.	8 Ralph Peters.
3 F. M. Hartshorne.	9 J. M. Foster.
4 Wm. Ewing.	10 Thomas Kernan.
5 James Cravens.	11 R. M. Foresman.
6 E. B. England.	12 J. G. L. Shindle.

18 Who are respectively sworn or affirmed to try the issues joined, &c.

And, afterwards, to wit, on the twenty-sixth day of June, A. D. 1878, the jurors aforesaid on their oaths and affirmations aforesaid, respectively, do say that on the issues joined they find for the plaintiff in the sum of thirteen thousand four hundred and sixty-six dollars and seventy-four cents ($13,466.74), with costs.

Whereupon it is considered and adjudged by our said circuit court of the United States that the said plaintiff, the said Second National Bank of Wilkes-Barre, do recover against the said defendant, the said D. G. Driesbach, her debt of thirteen thousand four hundred and sixty-six dollars and seventy-four cents. And also the sum of one hundred and four dollars and sixty cents, for her costs and charges in this behalf expended, which said debt, costs and charges in the whole amount to thirteen thousand five hundred and seventy-one dollars and thirty-four cents ($13,571.34).

And the said defendant in mercy, &c.

19 *Citation sur writ of error.*

THE SECOND NATIONAL BANK, OF WILKES Barre, a banking association, &c.,
vs.
D. G. DRIESBACH, A CITIZEN, &C.

UNITED STATES OF AMERICA, *ss:*

To the Second National Bank of Wilkes Barre, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Pennsylvania, wherein you, The Second National Bank of Wilkes Barre, are defendant, and D. G. Driesbach is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable W. W. Ketchum, judge of the circuit court of the United States for the west. dist. of Pa., this 1st day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

W. W. KETCHUM, *Judge.*

20 This citation was served upon us personally this day.
July 2d, 1878.

ARMSTRONG & LINN,
Att'ys for Pl'ff.

(Endorsed:) Second National Bank of Wilkes Barre vs. D. G. Driesbach. Citation.

21 *Bond.—Sur writ of error.*

Writ of error to the circuit court of the United States, west. dist. of Pennsylvania. No. 124. June term, 1878.

THE SECOND NATIONAL BANK OF WILKES Barre, a banking association, established in the western district of Pennsylvania, under laws of the United States providing for national banking associations,
vs.
D. G. DRIESBACH, A CITIZEN OF THE STATE of Pennsylvania, residing in the western district thereof.

Know all men by these presents, that we, D. G. Driesbach, J. B. Stark, and Isaac Tripp, all of Luzerne County, State of Pennsylvania, in said district, are held and firmly bound unto the Second National Bank of Wilkes Barre, in the State of Pennsylvania, in the sum of twenty thousand dollars, to be paid to the said Second National Bank of Wilkes Barre, her successors or assigns, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and one and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this twenty-ninth day of June, A. D. 1878.

Whereas the above named, D. G. Driesbach, hath prosecuted a
22 writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the circuit court of the United States for the western district of Pennsylvania:

Now, therefore, the condition of this obligation is such, that if the above named, D. G. Driesbach, shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good

his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

D. G. DRIESBACH. [SEAL.]
J. B. STARK. [SEAL.]
ISAAC TRIPP. [SEAL.]

Witness:
E. B. STARK.

Now, July 1st, 1878, the foregoing bond is approved and ordered to be filed.

W. W. KETCHUM, *Judge.*

(Endorsed:) Second National Bank of Wilkes Barre vs. D. G. Driesbach. Bond.

23 And afterwards, to wit, on the 30th day of September, A. D. 1878, the defendant, by his attorneys, file the following bill of exceptions, to wit:

Be it remembered that in June sessions (No. 124), A. D. 1878, came Second National Bank of Wilkes Barre, Pa., into the circuit court of the United States for the western district of Pennsylvania, and impleaded D. G. Driesbach, of Pennsylvania, in a certain plea of trespass on the case, &c., in which the said plaintiff declared as follows:

Narr.

In the circuit court of the United States, of June sessions, 1878. No. 124.

WESTERN DIST. OF PENNSYLVANIA, *ss:*

D. G. Driesbach, a citizen of the State of Pennsylvania, and a resident of the western district thereof, defendant, was summoned to answer The Second National Bank of Wilkes Barre, a banking association, established in the western district of Pennsylvania, under the laws of the United States, providing for national banking associations, plaintiff, of a plea of trespass on the case upon promises, whereupon the said plaintiff, by Armstrong & Linn, her attorneys, complains:

For that whereas the said defendant, on the eleventh day of August, A. D. one thousand eight hundred and seventy-seven, at Wilkes
24 Barre, Pa., to wit, at the district aforesaid, made his certain promissory note in writing, bearing date the day and year aforesaid, and then delivered the same to one J. B. Stark, and thereby promised to pay to the order of the said J. B. Stark, eight thousand dollars at the Second National Bank of Wilkes Barre, without defalcation, value received, in ninety days after the date thereof, which period had elapsed before the commencement of this suit, and the said J. B. Stark, then endorsed the same to the said D. G. Driesbach, defendant, and the said D. G. Driesbach, defendant, endorsed the same to the Second National Bank, of Wilkes Barre, the said plaintiff, whereof the defendant then had notice, and then in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof, but neither the defendant nor any other person or persons did or would pay the amount of the said note, although the same was duly presented at the Second National Bank of Wilkes Barre aforesaid, for payment on the day when it became due, of which the defendant then had due notice.

And also for that whereas the said defendant, on the sixth day of September, A. D. one thousand eight hundred at seventy-seven, at Wilkes Barre, to wit, at the district aforesaid, made his certain other promissory note in writing, bearing date the day and year last aforesaid, and then delivered the same to the said J. B. Stark, and thereby promised to pay to the order of the said J. B. Stark, five
25 thousand dollars at the Second National Bank of Wilkes Barre, without defalcation, value received, in ninety days after date thereof, which period had elapsed before the commencement of this suit, and the said J. B. Stark then endorsed the same *then endorsed the same* to the said D. G. Driesbach, defendant, and the said D. G. Driesbach, defendant, then endorsed the same to Second National Bank of Wilkes Barre, the said plaintiff, whereof the defendant then had *had* notice, and then in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof, but neither the defendant nor any other person or persons did or would pay the amount of the said note, although the same was duly presented at the Second National Bank of Wilkes Barre aforesaid, for payment on the day when it became due, of which the defendant then had due notice.

Nevertheless the said defendant not regarding his several promises and undertakings in this behalf, has not as yet paid the said sums of money, although often requested so to do, or any part thereof, but to pay the same, the said defendant has hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the plaintiff twenty-six thousand dollars.

And therefore she brings suit, &c.

ARMSTRONG & LINN,
Att'ys for Pl'ffs.

26 (Endorsed:) No. 124. June sessions, 1878. Second Nat. Bank of Wilkes Barre, Pa., vs. D. G. Driesbach. Narr.

And the said defendant pleads as follows:

U. S. C. C., W. D. of Pa. No. 124. June term, 1878.

SECOND NATIONAL BANK OF WILKES BARRE
vs.
D. G. DRIESBACH.

Defendant pleads non assumpsit payment, *payment*, with leave to introduce special matter in evidence and set off.

May 6th, 1878.

J. O. PARKER,
Att'y for Def't.

(Endorsed:) No. 124. June T., 1878. Bank vs. Driesbach. Plea.

27 And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the city of Williamsport aforesaid, before the honorable Wm. McKennan, one of the justices of the said court, on Tuesday, the twenty-fifth day of June, A. D. 1878, the 'foresaid issue between the said parties came to be tried by a jury of the said district for that purpose duly empanelled, as follows:

1. R. M. Frick.
2. M. L. Wortman.
3. F. M. Hartshorne.
4. Wm. Ewing.
5. James Cravens.
6. E. B. England.
7. Lewis Martin.
8. Ralph Peters.
9. J. M. Foster.
10. Thomas Kernan.
11. R. M. Foresman.
12. J. G. L. Shindle.

At which day came as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid empannelled to try the said issues being also called, came, and were then and there in due manner chosen, sworn, or affirmed to try the said issue; and upon the trial the following proof and testimony was introduced.

28 Plaintiffs' counsel offer in evidence the note bearing date "Wilkes Barre, August 11, 1877. Ninety days after date, I promise to pay to the order of J. B. Stark $8,000, &c., &c."; signed D. G. Driesbach; endorsed J. B. Stark, and D. G. Driesbach. Also: "For value received, I hereby waive protest on within note; Nov. 12th, 1877; J. B. Stark."

Plaintiffs' counsel offer in evidence note dated "Wilkes Barre, Sept. 6th, 1877. Ninety days after date, I promise to pay to the order of J. B. Stark $5,000," &c., &c.; signed D. G. Driesbach; endorsed J. B. Stark, D. G. Driesbach. Also: "For value received, I hereby waive protest on the within note; December 8th, 1877"; signed J. B. Stark.

Plaintiffs rest.

D. G. DRIESBACH sworn for defendant.

Counsel for defendants offer to prove by the witness on the stand, defendant Driesbach in this action, that on or prior to the 21st of April, 1871, he made an arrangement with the Second National Bank of
29 Wilkes Barre, the plaintiffs, to give him a line of discounts of from twelve to fifteen thousand dollars; that in pursuance of that arrangement the plaintiffs discounted, on or about the 21st of April, 1871, the note of the defendant in the sum of $5,000; that on subsequent dates, in the same or following years, the said plaintiffs discounted two other notes of the defendant, each in the sum of $5,000, at ninety days; that these three several notes, as they fell due, were renewed by the said bank, by discounting other notes of the defendant, Driesbach, and that each line of renewals was maintained continuously from the first note discounted by said bank—with a payment upon one of the $5,000 notes of the sum of $2,000; and that finally one of the $5,000 notes and the $3,000 note became incorporated in the $8,000 note sued upon, of August 11th, 1877; and the remaining note sued upon of $5,000, dated Sept. 6th, 1877, is the last of the line of renewals of one of the $5,000 notes originally given; that during this entire period the said bank, plaintiffs, charged a usurious rate of interest, varying from eight to ten and one-half per cent., and that the total amount of interest charged the defendant by said bank and paid by the defendant as discount upon the said notes amounted to the sum of $6,901.41.

By the COURT. How much of that was in excess of six per cent.?

30 Mr. PARKER. About $2,900 it would be.

Offer continued: For the purpose of showing that the said plaintiffs knowingly took, received, reserved, and charged a rate of interest greater than is allowed by the act of Congress, and that the entire amount of interest charged upon the said notes and the several

renewals thereof is forfeited by said bank; and in connection therewith the defendants propose to show that the legal rate of discount allowed by the laws of the State of Pennsylvania, where the bank, plaintiffs, is located is six per cent.

Plaintiffs' counsel object, for the reason that since the year 1869 the following State banks of issue have been organized in the State of Pennsylvania, under and by virtue and authority of the laws of the State, namely:

Manayunk Bank;	by the act of	14th June,	1871;	P. L., pp.	1359.
Southwark "	"	"	"	"	1360.
Petroleum "	"	20th Nov.,	"	"	1381.
Franklin "	"	Apl.,	1870;	"	737.
United States B'k'g Co.;	"	2d June,	1871;	"	987.
Lycoming Sav'gs B'k;	"	14th March,	1872;	"	1017.
Somerset Co. Bank;	"	29th "	"	"	1041.
Butchers & Drovers' "	"	27th April,	1870;	"	1538.
Watsontown Bank	"	27th M'ch,	1872;	"	1044.
Harrisburg Sav'gs Bank;	"	24th April,	1867;	"	1311.
German Sav'gs " Pittsburg;	"	8th "	1870;	"	1050.

31 That the said banks were authorized by the laws creating them respectively to charge upon discounts and loans a rate of interest as follows, to wit: The first nine of said banks at such rates of discount as might be agreed upon by the parties, and the other two, any rate of discount not exceeding ten per cent.; that some of the said banks were organized before the original loans were made by the plaintiffs to D. G. Driesbach, the maker of the note in suit, and some have been since organized with the right to receive and charge upon discounts made by them respectively a rate of interest equal to or exceeding the rate of discount which the said Driesbach agreed to pay upon the original notes and the renewals thereof; that the several State banks above named are all located and have their places of business within the State of Pennsylvania; and in this connection offer the several acts of assembly incorporating the foregoing State banks specified; also the act of May, 1861, relating to banking companies (Pamphlet Laws, 503); also, the act entitled, "An act regulating banks," approved the 16th of April, 1850 (Pamphlet Laws, 477), &c., &c., of all of which acts of assembly and the banks organized thereunder, the court will take judicial cognizance.

Objections overruled; evidence received; plaintiffs' counsel except, and bill sealed.

32 Q. Where do you reside?

A. Beach Haven.

Q. Luzerne County?

A. Yes, sir.

Q. Please look at the two notes that have been put in evidence and on which these suits have been brought; those are your notes, signed by you?

A. Yes, sir.

Q. When did you first obtain discounts at tde Second National Bank of Wilkes Barre?

A. I do not know as I can remember exactly. 1871 was when I commenced doing a regular banking business there; in April, 1871.

Q. Please state what arrangement you made with the Second National Bank in regard to a line of discount in 1871, and about when it was.

Well, Avary, who was cashier at that time, and J. B. Stark and

Samuel Hoyt, who were directors, had frequently invited me to come there and do my business. That was the year before. Along in the spring of 1871, Mr. Avary and Stark met me and invited me again. They had plenty of money; more money than they could use, they said; and Stark said Avary would come to the Valley House at 2 o'clock to see me, which he did, and made me an offer to give me a line of discounts. J. B. Stark was voluntarily my endorser; offered me a
33 line of discounts of $50,000; I told them I did not want $50,000; that I would probably want $12,000 or $15,000, which I wanted as a permanent loan, to be renewed. I took $5,000, I think, on the 20th of April, 1871, and I think I got another $5,000 that I renewed in July.

Q. When did you obtain the first discount in pursuance of that arrangement?

A. I think on the 20th of April, 1871. It is entered in my book on the 21st.

Q. Is that the note? (Paper shown witness.)

A. I should say it was.

Q. What discount was charged you on that note?

A. They charged $104.44 on this note for ninety days.

Q. Was that note renewed?

A. Yes, sir.

Q. When?

A. On the 25th. It is in my book discounted the 25th of July. But I generally had my notes there oftentimes three or four days before they were due, and sometimes I did not go, and I enclosed my note and sent to Stark to endorse; then sent to the bank and it was not put in my book for thirty, sixty, or ninety days. My book was not settled up often, and these entries in the books are a little irregular in dates.

Q. Have you the note given in renewal?

34 A. Yes, sir.

Q. What is the date?

A. July 22d, for $5,000, at 90 days.

Q. What was the discount charged by the bank on that note?

A. $104.44.

Q. Was that note renewed?

A. Yes, sir; by note of Oct. 23d, 1871, in the amount of $5,000 at 90 days.

Q. How much discount was charged?

A. $104.44.

Q. Was that note renewed?

A. Yes, sir.

Q. By note of what date?

A. January 23d, at 90 days, $5,000, discount, $104.44.

Q. Was that note renewed?

A. Yes, sir.

Q. By note of what date?

A. April 23d, 1872; 90 days for $5,000, discount charged, $104.44.

Q. Was that note renewed?

A. Yes, sir.

Q. By note of what date?

A. July 23d, 1872, $5,000, at 90 days, discount charged, $104.44.

Q. That was renewed by note?

A. I paid $1,000 on that note, and renewed it by one of October 24th, 1872, for $4,000 at 90 days. Discount $83.56. The next
35 one, 90 days, January 25th, 1873, renewal with a $1,000 payment on the $4,000. This is for $3,000.

Q. Discount what.

A. $62.67.

Q. That was renewed?

A. Yes, sir; the 28th of April, 1873, at 90 days, for $3,000, discount $62.67. That note was renewed July 24th, by a $3,000 note at 90 days, discount, $62.61. That was renewed October 25th, 1873, $3,000 at 90 days and discount charged, $70.50. January 27th, 1874, that last note was renewed by another at 90 days for $3,000, and discount charged, $70.50. That note was renewed April 30th, 1874, at 90 days for $3,000, and discount, $70.50. That was renewed July 31st, 1874, 90 days, $3,000, discount, $62.61. That was renewed by a $3,000 note, October 31st, 1874, at 90 days, discount $62.67. Renewed January 30th, 1875, 90 days, for $3,000, and discount charged, $70.50. May 3d, 1875, $3,000, at 90 days, and discount charged, $78.32. August 2d, 1875, $3,000, 90 days, for the renewal of the other, and interest charged, $78.32. November 3d, 1875, $3,000 at 90 days, discount charged, $70.50. Feb'y 4th, 1876, 90 days, for renewal, discount, $70.50. August 7th, 1876, 90 days, $3,000, for renewal, discount, $70.50. November 8th, 1876, $3,000, 90
36 days, discount, $70.50. Feb'y 9th, 1877, note 90 days, for $3,000, for renewal, $117.50. This error occurred; it is the rate they charged me on $5,000, but it was on the $3,000 renewed. They corrected it on the next $5,000 note. The next, May 12th, 1877, $3,000, at 90 days, discount, $70.50. That was the last of the series of $3,000 notes.

Q. Please state upon what other date you had an original note discounted by the Second National Bank.

A. Let me see the first note. I then had a note for $5,000 discounted Sept. 25th, 1872, at 90 days.

Q. What was the discount charged upon that?

A. $104.44.

Q. Was that note renewed?

A. Yes, sir; by a note December 27th, 1872, at 90 days, for $5,000; discount charged, $104.44. That note was renewed by note of March 27th, 1873, 90 days, $5,000; discount, $104.44. Renewed June 28th, 1873, $5,000, 90 days; discount, $104.44. Renewed by note of September 27th, 1873, for $5,000, at 90 days; discount, $104.44. December 26th, 1873, renewed by note for $5,000, at 90 days, and discount $117.50. Renewed M'ch 28th, 1874, for $5,000, at 90 days; discount, $117.50. Renewed June 30th, 1874, 90 days, for $5,000; discount, $105.56.
37 Renewed Sept. 30th, 1874, $5,000; discount, $104.44. Renewed December 31st, 1874, $5,000, at 90 days, with discount $104.44. Renewed by note April 3d, 1875, $5,000, at 90 days; discount charged, $130.56. That was renewed July 3d, 1875, $5,000, at 90 days; discount *discount*, $130.56. October 4th, 1875, $5,000, at 90 days; discount, $130.56. Renewed January 5th, 1876, $5,000, at 90 days; discount, $117.50. Renewed April 7th, 1876, at 90 days, $5,000; discount, $117.50. Renewed July 8th, 1876, at 90 days, $5,000, and the discount was $117.50. That was renewed by note October 6th, 1876, at 90 days, for $5,000, and discount $130.55. That was renewed January 6th, 1877, $5,000, at 90 days, and discount charged, $117.50. Renewed by note of April, 1877, at 90 days, for $5,000, and discount was charged $117.50. That was renewed by a note July 11th, 1877, $5,000, 30 days; discount, $42.50. On July 11th Mr. Spalding came to the Valley House and called me into the reading-room, and told me that they had negotiated with the government to buy $50,000 worth of bonds; that they were short of money; that if I would change my last note to thirty days that they could get money from Nesbit; that they wanted money; and I told them I would

do anything to accom'odate them if Stark was willing, but that
38 I could not meet it. They said they would take care of it. I called on Stark, and we made this note. And when this note came due, the $5,000 and the $3,000, they were merged into one note of $8,000.

Q. Is that the note in suit?

A. Yes, sir; that is the note given.

Q. I understand that the $8,000 note, in suit, was given to renew the $3,000 and $5,000 notes, which you have already spoken of, due August 13th?

A. Yes, sir. Here is another discount, $5,000 note, August 16th, 1871. That is when I borrowed the second $5,000 at 90 days, discount, $104.44. Now, for renewal of that note, there is one November 17th, 1871, $5,000, at 90 days, on which they charged $104.44. For the renewal of that note here is one of February 15th, 1872, $5,000, at 90 days, $104.44 discount. Renewed May 16th, 1872, $5,000, at 90 days; discount, $104.44. For the renewal of that a $5,000 note, at 90 days, dated August 15th, 1872; discount, $104.44. November 16th, 1872, $5,000, at 90 days, renewal; discount, $104.44. Renewal February 17th, 1873, $5,000, at 90 days; discount, $104.44. For the renewal of that, May 20th, 1873, at 90 days, $5,000; discount, $104.44. Renewal August
21st, 1873, $5,000, at 90 days; discount, $104.44. For the re-
39 newal of that November 21st, 1873, $5,000, at 90 days; discount, $104 44. For the renewal of that note Feb'y 21st, 1874, $5,000, at 90 days; discount, $117.50. For the renewal of that, May 25th, 1874, $5,000, at 90 days; discount, $104.44. August 26th, 1874, for renewal, $5,000, at 90 days; discount, $130.56. For the renewal of that Nov. 27th, 1874, $5,000, at 90 days; discount, $104.44. For the renewal of that February 27th, 1875, $5,000, at 90 days; discount, $119.00. For the renewal of that May 28th, 1875, $5,000, at 90 days; discount, $130.56. August 28th, 1875, renewal, $5,000, at 90 days; discount, $130.56. November 29th, 1875, $5,000, at 90 days; discount, $117.50. March 1st, 1876, $5,000, at 90 days, renewal; discount, $117.50. May 13th, 1876, $5,000, at 90 days, renewal; discount, $117.50. Sept. 1st, 1876, $5,000, at 90 days, renewal; discount, $117.50. December 2d, 1876, $5,000, at 90 days, renewal; discount, $117.50. March 5th, 1877, $5,000, at 90 days, renewal; discount, $70.56. There is where that error comes in. It puts the largest discount on to the smallest note, and the smallest discount on to the largest note.

Q. Was that note renewed; and, if so, when?

A. No, sir; this note was not renewed.

Q. There was a note discounted June 5th?

A. Oh, yes.

40 Q. Was that answer correct that you just made; that it was not renewed.

A. Oh, yes; this was renewed.

Q. On what date?

A. On the 5th of March, 1877.

Q. Renewed on what day?

A. Discounted on the 6th day of June, 1877.

Q. And what was the discount charged?

A. $117.50.

Q. (Note in suit shown witness.) Was the note in suit, of Sept. 6th, 1877, $5,000, a renewal of the note of June 5th, 1877?

A. Yes, sir.

Q. Please state from your bank book what discount was charged you on the $8,000 note in suit.

A. Well, I cannot name the amount without figuring.

Q. $188 00?

A. Yes, sir.

Q. What discount was charged you on the $5,000 note in suit?

A. 117.50.

DEFENDANT'S COUNSEL. We named the amount of interest charged at $6,901.41. We did not include the interest on the notes in suit; with your honor's permission we will include that.

Cross-examination:

Q. I call your attention to the note of the 11th of July, 1877; state how you received the proceeds of that note; by whose check.

A. I did not receive the proceeds at all.

41 Q. Did you not receive it by check from Mr. Nesbit?

A. No, sir; I did not receive it all. My bank book shows it is credited to me.

Q. Was not that the credit you received by the check of Mr. Nesbit, and not by discount?

A. No, sir; they took my check for $42.50 for the interest for thirty days.

Q. You gave a check upon that note?

A. Yes, sir.

Q. Your recollection and that of Mr. Spalding differ as regards that note?

A. I certainly did not receive the check at all. They merely took my check for the thirty days' discount.

(It is admitted that in Pennsylvania the lawful rate of interest for the loan or use of money in all cases where no express contract shall have been made for a less rate, shall be six per cent. per annum, as provided by the act of the 28th of May, 1858.)

Defendants rest.

E. A. SPALDING sworn for pl'ffs.

Q. Are you cashier of the 2nd National Bank of Wilkes Barre?

A. Yes, sir.

Q. How long have you been?

A. Since January, 1872.

Q. State at what rate the notes were discounted which have been spoken of in evidence?

42 A. From eight to ten per cent.

Q. Any in excess of ten per cent.?

A. No, sir; not that I am aware of. That was the agreement.

Q. What was the agreement?

A. The agreement was, a portion of the time, that Mr. Driesbach was to pay ten per cent., a portion of the time nine, and a portion of the time eight.

Q. Was the discount paid in pursuance and in accordance with the terms of that agreement?

A. Yes, sir.

Q. I call your attention to the note of July, 1877, for $5,000; was that note ever discounted at the bank?

A. It was not, sir.

Q. State what you know of it.

A. About that time the bank was purchasing bonds, and we desired

to reduce our loans. I requested Mr. Driesbach to pay the note that matured about the date of this note.

Q. State what date particularly.

A. I cannot say whether this was the same date. I think it was, though. A note of his fell due on the 11th of July, 1877. I requested him to pay that note, for the reason that we wanted to reduce our loans. I requested Mr. Driesbach to pay the note that matured that date. He did so by a check of Mr. Nesbit's, which went to his credit on the
43 account, and the note which was due at that time was charged to his account. The bank did not discount the note, or did not receive the discount on it in any way.

Q. Is that the thirty-day note?

A. Yes, sir; Mr. Driesbach understood it at the time.

Q. What discount of the bank followed the payment of the note due on the 11th of July, for $5,000?

A. A note for $8,000, discounted on the 11th of August.

Q. Was that the beginning of a new transaction in whole or in part?

A. It was, with the exception that the note of $3,000 was charged to his account a day or two after this note was discounted.

Q. There was a note of $5,000 of Driesbach's coming due at the bank at about the time that this thirty-day note of $5,000 was given?

A. At that time the $5,000 note was discounted by Nesbit; there was one fell due about that time. Yes, sir.

Q. The $5,000 note—the thirty-day $5,000 note—was credited to him in his account in full?

A. No, sir; it was not. The bank had nothing to do with that note.

Cross examination:

Q. Who is Mr. Nesbit?

A. At that time vice-president; at this time president.

44 Q. Do you think Driesbach knew anything of the transaction?

A. Yes, sir; I told him at the time.

Q. Did not you have the check for the discount?

A. He may have given it to Nesbit.

Q. Did not he give it to the bank?

A. No, sir.

Q. At about the time the $5,000 note came due the bank did discount an $8,000 note?

A. Yes, sir.

Q. Which would cover the $5,000 and $3,000 they had been carrying?

A. About that amount.

Q. You claim it was not a continuation of the old discount because one of the officers of the bank discounted the note in place of the bank?

A. No, sir.

By the COURT. Ask him about the facts.

Q. This agreement that you speak of, do you say that there was an agreement between Mr. Driesbach and the bank, entered into in terms as to the amount of interest.

A. Yes, sir; for the reason that I called Driesbach's attention to the fact that his deposits in the bank were very light, and that the bank could not afford to loan him money at a rate, without his keeping money on deposit, as low as they could loan to a man who kept money there; and told him that under those rules we would have to increase the rate unless he increased the amount of his deposits. I told him we
45 must charge him ten per cent., and he agreed to it. He afterwards came and said the rate was high, and asked me if I could

not afford to reduce it. It was then reduced, at his request, to nine per cent., and carried for a time at that rate, and the same, or nearly the same, conversation ensued, and it was then reduced to eight per cent.

Q. When did Mr. Driesbach get that $5,000 30 day note? Who gave it to him? Where did he get it?

A. I should presume he manufactured it. It looks like his note.

Q. They were in your bank?

A. Yes, sir.

Q. Did not you give it to him back again?

A. It may have been charged to his account. The appearance of that note indicates that it has passed through our bank for collection. It has the collection stamp on it.

Redirect examination:

Q. Is your collection stamp and stamp for notes discounted different?

A. Yes, sir.

Q. What is the difference?

A. One is stamped "Property of the Second National Bank," and the other is stamped "Second National Bank."

46 Plaintiff's counsel offer to prove in rebuttal that since the year 1869 the following State banks of issue have been organized in the State of Pennsylvania under and by virtue and authority of the laws of the State, namely:

Manayunk Bank, by the act of	14th	June,	1871,	P. L.,	pp..	1359
Southwark "	"	"	"	"	" ..	1360
Petroleum "	"	20th Nov.,	"	"	" ..	1381
Franklin "	"	April,	1870,	"	" ..	737
United States B'k'g Co.,	"	2d June,	1871,	"	" ..	987
Lycoming Co. Sav'gs B'k,	"	14th M'ch,	1872,	"	" ..	1017
Somerset Co. Bank,	"	29th "	"	"	" ..	1041
Butcher & Drovers',	"	27th April,	1870,	"	" ..	1538
Watsontown Bank,	"	27th March,	1872,	"	" ..	1044
Harrisburg Sav'gs' "	"	24th April,	1867,	"	" ..	1311
Germain Sav'gs " Pittsburg,	"	8th "	1870,	"	" ..	1050

That the said banks were authorized by the laws creating them, respectively, to charge upon discounts and loans a rate of interest as follows, to wit: The first nine of said banks at such rates of discount as might be agreed upon by the parties, and the other two any rate of discount not exceeding ten per cent.; that some of the said banks were organized before the original loans were made by the plaintiff to D. G. Driesbach, the maker of the note in suit, and some have been since organized with the right to receive and charge upon discounts made by them, respectively, a rate of interest equal to or not exceeding the rate of discount which the said Driesbach agreed to pay upon the original notes and the renewals thereof; that the same State banks above named are all located and have their place of business within the State of Pennsylvania.

47 Plaintiff's counsel also offer in evidence the several acts of assembly incorporating the foregoing State banks specified; also the act of May, 1861, relating to banking companies, Pamphlet Laws, 503; also the act entitled, "An act regulating banks," approved the 16th of April, 1850, Pamphlet Laws, 477, &c., &c.

Counsel for defendants object to the offer—

First. Because evidence as to the powers of particular banks incorporated under special acts of the assembly is irrelevant.

Second. Because under section 5197 of the Revised Statutes of the United States national banks are only allowed to charge and receive such rate of interest or discount as is allowed by the law of the State in which the bank is located, or such rate as is limited for banks of issue organized under State laws, and that the several charters offered in evidence do not show that the banks chartered by them were banks of issue, and the plaintiffs do not offer to show that the said banks so chartered by special act of assembly were authorized to transact business as banks of issue.

Third. Because where no rate of interest is limited as in charters offered, the act of Congress fixes the rate of interest.

Fourth. Because it is incompetent to effect the construction of the act of Congress in question by the evidence of particular laws.

Fifth. Because it is generally irrelevant and incompetent.

48 Objection overruled and evidence admitted. Defendant excepts and bill sealed.

It is admitted that the several banks named in the offer have been organized under and in pursuance of the acts of assembly referred to in the offer as creating them respectively.

Testimony closed.

Counsel for the defendants request the court to charge the jury:

First. It appearing from the evidence that the defendant was charged by and paid to plaintiff discount at the rate of eight to ten per cent. per annum, whereas the lawful rate of interest in the State of Pennsylvania is six per cent. and no more, and it appearing from the evidence that the entire amount of discount paid by the said defendant to the said bank on the line of renewals which culminated in the notes in suit was $7,206.91, the defendant is entitled to offset that amount against the plaintiff's claim in this suit.

Second. That under section 5197 of the Revised Statutes of the United States, the plaintiff was authorized to charge and receive interest or discount at the rate of six per cent. per annum, and no more, that being the lawful rate of interest as provided by the general laws of the State of Pennsylvania.

Third. That the several private charters introduced by the
49 plaintiff in evidence are not the charters of banks of issue, and no special rate of discount or interest is provided by said special acts.

Fourth. That the National Banking Association, plaintiff, is authorized to charge and receive as discount or interest only the rate allowed by the general laws of the State of Pennsylvania, or such different rate as may be limited to banks of issue organized under the general laws of Pennsylvania, and the several banking associations whose charters have been offered in evidence are not such banks of issue as are contemplated in the act of Congress.

All the foregoing points are denied.

W. McKENNAN,
Circuit Judge.

Defendant excepts; bill sealed.

CHARGE TO THE JURY.

GENTLEMEN OF THE JURY: These suits are founded upon two several promissory notes, drawn by D. G. Driesbach and endorsed by J. B. Stark. The notes have been given in evidence and their execution admitted, and the fact that they were discounted by the plaintiff here, and that the plaintiff is the bona fide holder, under these circumstances. if
50 there was nothing more in the case, the plaintiff would be entitled to your verdict.

The defendant alleges and there is no doubt of the fact that the discount taken by the plaintiff, and paid by the defendant, exceeded six per cent., or that these notes were discounted at rates ranging between eight and ten per cent., some at eight and some at ten, and he claims, therefore, under the act of Congress, a deduction of the whole amount of interest thus alleged to be illegally paid and charged. Whether the plaintiff had a right to charge more than six per cent., or the rate charged in this case, depends upon the consideration of the act of Congress touching the right of national banks to charge and receive interest and discount. It is provided by that act that every such association shall take, receive and charge upon every discount, &c., &c., interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more, except that where by the laws of any State a different rate is limited, the rate so limited shall be allowed the association.

Now this section of the act of Congress has received the construction of the Supreme Court, and more recently by this court, in the case of the First National Bank of Mount Pleasant. It is to be observed that in the first clause of the section, the rate of interest or discount
51 to be charged by a national bank is limited to the rate allowed by the laws where the bank is located. Under that law the bank, plaintiff, would be authorized to charge only six per cent., but by the exception national banks may charge a different rate, if such rate is limited or allowed for banks of issue organized in the State in which the national bank is located and doing business; so that the question here is, whether there are such laws as are contemplated by the exception, which have been enacted by the State of Pennsylvania, and under which banks of issue have been organized.

The plaintiff has offered in evidence a large number of acts of assembly incorporating banks, by which it is claimed that a greater rate of interest than six per cent. is authorized to be charged by said banks. If that be so, and these are banks of issue, then the rate of interest charged by plaintiff here was authorized by law, and the defence of the defendant would fail. The construction of those acts of assembly is for the court. Although I have not examined all of them referred to in the statement furnished by the plaintiff's counsel, yet I have examined a number of them, and I have no doubt that by the charters of those banks they are authorized to charge in some instances not exceed-
52 ing ten per cent., and in other instances any rate of interest which may be agreed upon by the lender and borrower, so that there are banks chartered in Pennsylvania, within the contemplation of the act of Congress, so far as the right to charge interest is concerned, which may charge more than the rates fixed by the general laws of the State.

The only remaining question is, whether these are banks of issue. Although by the special charters of these several banks nothing is said as to the right to issue paper money, yet by an act passed in 1861, a general law of the State, all banks incorporated by special charter, after the passage of that act, are made subject to its provisions. In other

words, all the franchises conferred by that act upon banks chartered under it may be made available to the banks subsequently chartered by special acts.

Among the franchises conferred by the general law is the right to issue paper money, so that all the banks, or at least a number of them, so far as I have been able to make an examination, by authority of the general law of the State, may issue paper money, circulating money. And although they may not have availed themselves of that privilege, still they are not thereby taken out of the category of banks of issue.

If they have the privilege, and do not choose to exercise it, it does
53 not change the character of such banks as are described in the act of Congress to which I have called your attention.

So there is undisputed evidence of the incorporation of banks by special law of the State of Pennsylvania, which are banks of issue and which are authorized to charge the rate of interest charged in this case, or more, and the plaintiff therefore has but exercised the right which the act of Congress conferred upon him in making the contract upon which these suits are founded. This is sufficient to disposes of the defence set up here; and as the plaintiff has made out his case, he is entitled to your verdict for the amount of these notes with interest.

Counsel for defendants except to the charge.

Bill sealed.

I do hereby certify that the offers of evidence above stated were made by the counsel for the plaintiffs at the trial of the said cause; that they were objected to by the counsel for def't, and were admitted by the court, to which ruling the counsel for the defendant then excepted. That the court was requested by the defendant's counsel to charge the jury as above stated, which request the court refused, and that
54 the said counsel then excepted to said refusal, and that the court substantially charged the jury as above stated, to which charge the defendant's counsel then excepted. All of which exceptions were duly allowed.

Witness my hand and seal September 27th, 1878.

W. McKENNAN, [SEAL.]
Circuit Judge.

And afterwards, to wit, on the 30th day of September, A. D. 1878, the defendant, by his attorney, files the following specifications of error, to wit:

Specifications of error.

Writ of error to the circuit court of the United States for the western district of Pennsylvania, of June sessions, 1878.

D. G. DRIESBACH, PLAINTIFF IN ERROR,
vs.
SECOND NATIONAL BANK OF WILKES BARRE, defendant in error. } No. 124.

The learned judge who tried this cause erred, first, in admitting the testimony embraced in the following offer of the plaintiff below, and in overruling the objections of the defendant below thereto; which offer and objections were as follows:

55 Plaintiff's counsel offer to prove in rebuttal that since the year 1869 the following State banks of issue have been organized in the State of Pennsylvania, under and by virtue and authority of the laws of the State, namely:

Manayunk Bank, by the act of 14th June, 1871, P. L. pp. 1359.
Southwark " " " " " " " " 1360.
Petroleum " " " 20th Nov., " " " 1381.
Franklin " " " April, 1870, " " 737.
United States B'k'g Co., by the act of 2d June, 1871, P. L. pp. 987.
Lycoming Co. Sav'gs Bk., " " 14th March, 1872, P. L. pp. 1017.
Somerset Co. Bank, " " 29th " " " " 1041.
Butchers & Drovers', " " 27th April, 1870, " " 1538.
Watsontown Bank, " " 27th March, 1872, " " 1044.
Harrisburg Savings Bk., " " 24th April, 1867, " " 1311.
German Savings Bank, Pittsburg, " 8th " 1870, " " 1050.

That the said banks were authorized by the laws creating them, respectively, to charge upon discounts and loans a rate of interest, as follows, to wit, the first nine of said banks at such rates of discount as might be agreed upon by the parties, and the other two any rate of discount not exceeding ten per cent.; that some of the said banks were organized before the original loans were made by the plaintiff to D. G. Driesbach, the maker of the note in suit, and some have been since organized with the right to receive and charge upon discounts made by them respectively a rate of interest equal to or not exceeding the
56 rate of discount which the said Driesback agreed to pay upon the original notes and the renewals thereof; that the several State banks above named are all located and have their place of business within the State of Pennsylvania.

Plaintiff's counsel also offer in evidence the several acts of assembly incorporating the foregoing State banks specified; also the act of May, 1861, relating to banking companies, Pamphlet Laws, 503; also the act entitled "An act regulating banks," approved the 16th of April, 1850, Pamphlet Laws, 477, &c., &c.

Counsel for defendants object to the offer:

First. Because evidence as to the powers of particular banks incorporated under special acts of the assembly is irrelevant.

Second. Because under section 5197 of the Revised Statutes of the United States national banks are only allowed to charge and receive such rate of interest or discount as is allowed by the law of the State in which the bank is located, or such rate as is limited for banks of issue organized under State laws; and that the several charters offered in evidence do not show that the banks chartered by them were banks of issue; and the plaintiffs do not offer to show that the said banks so chartered by special act of assembly were authorized to transact business as banks of issue.

57 Third. Because when no rate of interest is limited, as in charters offered, the act of Congress fixes the rate of interest.

Fourth. Because it is incompetent to effect the construction of the act of Congress in question by the evidence of particular laws.

Fifth. Because it is generally irrelevant and incompetent.

2. The learned judge who tried the cause erred, second, in denying the following points presented by defendant below and refusing to charge the jury as therein requested.

Counsel for the defendant request the court to charge the jury:

First. It appearing from the evidence that the defendant was charged by, and paid to plaintiffs, discount at the rate of eight to ten per cent. per annum, whereas the lawful rate of interest in the State of Pennsylvania is six per cent., and no more; and it appearing from the evidence that the entire amount of discount paid by the said defendant to the said bank on the line of renewals which culminated in the notes in suit

was $7,206.91, the defendant is entitled to offset that amount against the plaintiff's claim in this suit.

Second. That under section 5197 of the Revised Statutes of the United States the plaintiff was authorized to charge and receive interest
58 or discount at the rate of six per cent. per annum, and no more, that being the lawful rate of interest as provided by the general laws of the State of Pennsylvania.

Third. That the several private charters introduced by the plaintiff in evidence are not the charters of banks of issue, and no special rate of discount or interest is provided by said special acts.

Fourth. That the National Banking Association, plaintiff, is authorized to charge and receive as discount or interest only the rate allowed by the general laws of the State of Pennsylvania, or such different rate as may be limited to the banks of issue organized under the general laws of the State of Pennsylvania; and the several banking associations whose charters have been offered in evidence are not such banks of issue as are contemplated in the act of Congress.

3. In that portion of the charge to the jury in which the court said: "So that there are banks chartered in Pennsylvania, within the contemplation of the act of Congress, so far as the right to charge interest is concerned, which may charge more than the rates fixed by the general laws of the State."

The only remaining question is whether these are banks of issue, although by the special charters of these several banks nothing is said as to the right to issue paper money, yet, by an act passed in 1861,
59 a general law of the State, all banks incorporated by special charter after the passage of that act are made subject to its provisions; in other words, all the franchises conferred upon banks chartered under it may be made available to the banks chartered by special acts.

Among the franchises conferred by the general law is the right to issue paper, so that all the banks, or at least a number of them, so far as I have been able to make an examination, by authority of the general law of the State may issue paper money—circulating money. And although they may not have availed themselves of that privilege, still they are not thereby taken out of the category of banks of issue. If they have the privilege and do not exercise it, it does not change the character of such banks as are described in the act of Congress to which I have called your attention. So there is undisputed evidence of the incorporation of banks by special law of the State of Pennsylvania which are banks of issue and which are authorized to charge the rate of interest charged in this case, or more; and the plaintiff therefore has but exercised the right which the act of Congress conferred upon him in making the contract upon which these suits are founded.

This is sufficient to dispose of the defence set up here, and as the plaintiff has made out his case he is entitled to your verdict for the amount of these notes, with interest.

60 For which reasons the defendant below, and plaintiff in error, prays that the judgment entered in the said cause by the said circuit court of the United States for the western district of Pennsylvania may be reversed and set aside by the Supreme Court of the United States, and a venire facias de novo be awarded.

JAMES O. PARKER,
Counsel for D. G. Driesbach, Pl'ff in Error and Def't in the said Circuit Court of the United States.

SEPTEMBER 30TH, 1878.

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Pennsylvania, in the third circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between the Second National Bank of Wilkesbarre, a banking association established in the western district of Pennsylvania, under the laws of the United States providing for national banking associations, plaintiff, and D. G. Driesbach, a citizen of the State of Pennsylvania, and a resident of the western district thereof, defendant, a manifest error hath happened to the great damage of the said D. G. Driesbach, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the Supreme Court to be then and there held; that the record and proceedings aforesaid be inspected, the said Su-

62 preme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the said United States at Williamsport, this first day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and in the one hundred and second year of the Independence of the said United States.

[SEAL.] B. S. BENTLEY, JR.,
Clerk C. C. U. S., W. D. Pa.

(Indorsed:) D. G. Driesbach, plaintiff in error, vs. Second National Bank of Wilkesbarre, Pa., defendant in error. Writ of error.

63 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

I, B. S. Bentley, jr., clerk, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, in a certain suit therein lately depending, between the Second National Bank of Wilkesbarre, Pennsylvania, plaintiff, and D. G. Driesbach, defendant.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court at Williamsport, this eleventh day of October, A. D. 1878, and in the one hundred and third year of the Independence of the United States.

[SEAL.] B. S. BENTLEY, JR.,
Clerk Circuit Court of the U. S., Western Dist. Penn'a.

(Indorsement on cover:) No. 302. D. G. Driesbach, plaintiff in error, vs. the Second National Bank of Wilkesbarre. W. Pennsylvania, C. C. U. S. Filed 19th October, 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~203.~~ 59

J. B. STARK, PLAINTIFF IN ERROR,

vs.

THE SECOND NATIONAL BANK OF WILKES BARRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 19, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 303.

J. B. STARK, PLAINTIFF IN ERROR,

vs.

THE SECOND NATIONAL BANK OF WILKES BARRE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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1 In the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit. No. 125. June sessions, 1878.

THE SECOND NATIONAL BANK OF WILKES-Barre, a banking association established in the western district of Pennsylvania under the laws of the United States providing for national banking associations,
vs.
J. B. STARK, A CITIZEN OF THE STATE OF Pennsylvania, and a resident of the western district thereof.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, of June sessions, 1878. No. 125.

It is thus contained:

Be it remembered that on the twenty-first day of February, in the year of our Lord one thousand eight hundred and seventy-eight, the Second National Bank of Wilkes-Barre, Pa., by her attorneys, Armstrong & Linn, comes into court here and sues forth therefrom a writ of summons against J. B. Stark, the præcipe for which, with the
2 endorsement thereof and the return to said writ of summons, is in the words and figures following, to wit:

3 In the circuit court of the United States for the eastern district of Pennsylvania, at Williamsport, No. , June t., 1878.

THE SECOND NATIONAL BANK OF WILKES-Barre, a banking association established in the western district of Pennsylvania, under the laws of the United States, providing for national banking associations,
vs.
J. B. STARK, A CITIZEN OF THE STATE OF Pennsylvania, and a resident of the western district thereof.

Issue summons in trespass on the case upon promises, returnable next return day.

ARMSTRONG & LINN,
Atty's for Pl'ff.

FEB'Y 21ST, 1878.
To B. S. BENTLEY, JR., Esq., *Clerk, &c.*

(Endorsed:) No. 125. June t., 1878. Second Nat. Bank, Wilkes-Barre vs. J. B. Stark. Præcipe for summons. Filed Feb'y 21st, 1878. A. & L.

REC. 303—1

4 UNITED STATES,
Western District of Pennsylvania, sct:

The President of the United States to the marshal of the western district of Pennsylvania, greeting:

We command you that you summon J. B. Stark, a citizen of the State of Pennsylvania, and a resident of the western district thereof, late of your district, if he may be found therein, so that he be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court, to be holden at Williamsport, on the first Monday of March next, to answer to The Second National Bank of Wilkes-Barre, a banking association established in the western district of Pennsylvania, under the laws of the United States, providing for national banking associations, in a plea of trespass on the case upon promises; and have you then and there this writ.

Witness the honorable Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, at Williamsport, this twenty-first day of February, A. D. 1878, and in the one hundred and second year of the Independence of the said United States.

[SEAL.] B. S. BENTLEY, JR., *Clerk.*

5 (Endorsed:)
FEB'Y 23d, 1878.—I thereby accept service of the within writ.
E. N. WILLARD,
Att'y for Def't.

(Endorsed:) No. 125. June term, 1878. The Second National Bank of Wilkes Barre, Pa., vs. J. B. Stark. Summons in trespass on the case upon promises. Armstrong & Linn.

6 And thereupon afterwards, to wit, on the fourth day of March, A. D. 1878, the plaintiff, by her attorneys, comes into court here and files her declaration, together with copy of instruments, on which the plaintiff's claim is founded, also affidavit thereto; which said declaration, copy of instruments on which plaintiff's claim is founded, being read, are as follows, to wit:

7 In the circuit court of the United States for the western district of Pennsylvania, at Williamsport. No. , June T., 1878.

THE SECOND NATIONAL BANK OF WILKES-Barre, a banking association, established in the western district of Pennsylvania, under the laws of the United States providing for national banking associations,
vs.
J. B. STARK, A CITIZEN OF THE STATE OF Pennsylvania and a resident of the western district thereof.

UNITED STATES,
West. Dist. Pennsylvania, ss:

J. B. Stark, a citizen of the State of Pennsylvania and a resident of the western district thereof, defendant, was summoned to answer The Second National Bank of Wilkes-Barre, a banking association, established in the western district of Pennsylvania, under the laws of the

United States providing for national banking associations, plaintiff, of a plea of trespass on the case upon promises; whereupon, the said plaintiff, by Armstrong & Linn, her attorneys, complains:

For that, whereas, one D. G. Driesbach, on the eleventh day of August, A. D. one thousand eight hundred and seventy-seven, at Wilkes-Barre, Pa., to wit, at the district aforesaid, made his certain promissory note in writing, and promised thereby to pay to the order of J. B. Stark, the said defendant, eight thousand dollars, at the Second National Bank of Wilkes-Barre, without defalcation, value received, in ninety days after the date thereof, which period had elapsed before the commencement of this suit, and delivered the same to J. B. Stark, the said defendant, and the said defendant then endorsed the same to the said D. G. Driesbach, and the said D. G. Driesbach then endorsed the same to the Second National Bank of Wilkes Barre, the said plaintiff; and the said D. G. Driesbach did not, nor did any other person or persons pay the amount thereof, although the same was duly presented at the Second National Bank of Wilkes Barre aforesaid for payment on the day when it became due, according to the tenor and effect thereof, of all which the defendant then had notice, and in consideration of the premises, then promised the plaintiff to pay her the amount of the said note on request. 8

And also for that whereas the said D. G. Driesbach, on the sixth day of September, A. D. one thousand eight hundred and seventy-seven, at Wilkes-Barre, to wit, at the district aforesaid, made his certain other promissory note in writing, bearing date the day and year last aforesaid, and then delivered the same to the said J. B. Stark, defendant, and promised thereby to pay to the order of the said J. B. Stark, defendant, five thousand dollars, at the Second National Bank of Wilkes-Barre, without defalcation, value received, in ninety days after the date thereof, which period had elapsed before the commencement of this suit, and the said J. B. Stark defendant, then endorsed the same to the said D. G. Driesbach, and the said D. G. Driesbach then endorsed the same to the Second National Bank of Wilkes-Barre, the said plaintiff; and the said D. G. Driesbach did not, nor did any other person or persons pay the amount of the said note, although the same was duly presented at the Second National Bank of Wilkes Barre aforesaid for payment on the day when it became due, according to the tenor and effect thereof; of all which the defendant then had due notice, and in consideration of the premises, then promised the defendant to pay her the amount of said note on request. 9

Nevertheless, the said defendant, not regarding his said several promises and undertakings in this behalf, has not as yet paid the several sums of money, or any part thereof, although often requested so to do, but to pay the same has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the plaintiff twenty-six thousand dollars.

And therefore she brings suit, &c.

ARMSTRONG & LINN,
Att'ys for Pl'ff.

10 Copy of claim.

The plaintiff's claim is founded upon two promissory notes, of which the following are copies:

$8,000.] WILKES BARRE, PA., *August 11th*, 1877.

Ninety days after date, I promise to pay to the order of J. B. Stark,

eight thousand dollars, at the Second National Bank of Wilkes Barre, without defalcation; value received.

D. G. DRIESBACH.

(On the back of which are the following endorsements:) J. B. Stark, D. G. Driesbach.

For value received, I hereby waive protest on the within note.
Nov. 12th, 1877.

J. B. STARK.

$5,000.] WILKES BARRE, PA., *Sept. 6th*, 1877.

Ninety days after , I promise to pay to the order of J. B. Stark five thousand dollars, at the Second National Bank of Wilkes Barre, without defalcation; value received.

D. G. DRIESBACH.

(On the back of which are the following endorsements:) J. B. Stark, D. G. Driesbach.

For value received, I hereby waive protest on the within note.
Dec. 8th, 1877.

J. B. STARK.

RECAPITULATION.

Note dated Aug. 11th, 1877 ..... $8,000
Int. Nov. 12th, '77, to .....

Amt. due .....

Note dated Sept. 6th, 1877 ..... $5,000
Int. Dec. 8th, 1877, to .....

Amt. due .....

11 UNITED STATES,
West. Dist. Pennsylvania, ss:

John H. Mitchell, att'y for pl'ff, being duly sworn, saith that he verily believes the amount above stated, with interest, to be due to the plaintiff from the defendant.

JOHN H. MITCHELL.

Sworn and subscribed to before me, this 4th day of March, A. D. 1878.
B. S. BENTLEY, Jr., *Clerk.*

(Endorsed:) No. 125, June t., 1878. Second National Bank, Wilkes Barre, vs. J. B. Stark. Narr., copy claim, statement, am't due, and aff't. Filed M'ch 4th, 1878. A. & L.

And thereupon afterwards, to wit, on the fourth day of March, A. D. 1878, the defendant, by his attorney, J. O. Parker, esquire, comes into court here and files his affidavit of defence, which being read, is as follows, to wit:

12 No. 125, June t., 1878. In the circuit court of the United States for the western district of Pennsylvania.

THE SECOND NATIONAL BANK, OF WILKSES Barre, Pa.,
vs.
J. B. STARK.

J. B. Stark, the above named defendant, being duly sworn according to law, says that he has a full, complete, and defense to the whole of the plaintiff's claim in the above stated action except as to the sum of three thousand nine hundred and thirty-two dollars and ninety six cents, the nature and character of which is as follows, viz:

The action is founded on two certain promissory notes made by D. G. Driesbach and endorsed by the deponent, payable to the order of this deponent at the said Second National Bank, one of them bearing date August 7th, 1877, at ninety days, for the payment of the sum of eight thousand dollars, and the other bearing date Sept. 4th, 1877, at ninety days, for the payment of the sum of five thousand dollars. And this deponent further says that he is informed and believes that said two notes are made up as follows: One, April 21st, 1871. D. G. Driesbach, the maker, had his note discounted for the sum of five thousand dollars, and the same wa srenewed every ninety days from that time till Dec. 4th, 1877, and regularly discounted and renewed by said bank during
13 all that time. That on August 17th, 1871, said Second National Bank discounted for D. G. Driesbach another note for five thousand dollars, which was renewed every ninety days from that time till August 7th, 1877, by said bank. That on July 25th, 1873, said bank discounted another note for D. G. Driesbach, the maker, for three thousand dollars ($3,000), which was renewed from time to time by said bank, till August 7th, 1877, at which time said last two notes were incorporated into the eight thousand dollar note upon which this suit is founded; and said last named note became due November 11th, 1877, and the said bank refused to renew the same, and on Dec. 4th, 1877, the said note first described, amounting to five thousand dollars, became due, and the said bank refused to renew the same. That said notes upon which this action is founded are the last renewals of the three notes dated April 21st, 1871, August 17th, 1871, and January 25th, 1873.

And this deponent says that during all of said time said bank has charged, and said D. G. Driesbach, the maker, has paid to said bank interest on said notes amounting to from over eight to over ten per centum per annum; the maker never having paid less than eight per centum per annum thereon. That the legal rate of interest in the
14 State of Pennsylvania is six per centum per annum, and all interest so paid by D. G. Driesbach, maker, is usurious, and was received by said bank in violation of sections 5197 and 5198 of the Revised Statutes of the United States.

And deponent is further informed and believes that the usurious interest thus paid by the said maker on account of said notes, and others of which those in suit are renewals, amount, with interest from their respective dates of payment, to the sum of eight thousand four hundred and sixty-seven dollars and four cents, which he claims as so much in payment of said notes.

And deponent further says that he is informed and believes that the said D. G. Driesbach has an offset amounting to the further sum of at least seven hundred dollars, being the amount of usurious interest paid

by said D. G. Driesbach to said bank on other paper discounted by said bank for him within six years last past, so that this deponent is only liable to said bank in the sum of three thousand nine hundred and thirty-two dollars and ninety-six cents, on account of his endorsements of said notes, and he is further informed and believes that said notes are paid, with the exception of $3,932.96, all of which deponent avers he will be able to prove on the trial of the case, to the best of his knowledge and belief.

15 J. B. STARK.

Sworn and subscribed to before me, Feb'y 27th, 1878.

GUSTAVE HAHN,
United States Commissioner.

(Endorsed:) No. 125, June t., 1878. The Second National Bank of Wilkes Barre, Pa., vs. J. B. Stark. Affidavit of defence. Filed M'ch 4th, 1878. E. N. Willard, att'y for def't.

And afterward, to wit, on the sixth day of May, A. D. 1878, the defendant, by his attorney J. O. Parker, esquire, files his plea as follows, to wit:

16 U. S. C. C., W. D. of Pa. No. 125. June T. 1878.

SECOND NATIONAL BANK OF WILKES BARRE
vs.
J. B. STARK.

Defendant pleads non assumpsit, payment, payment with leave to introduce special matter in evidence and set-off.

May 6th, 1878.

J. O. PARKER,
Att'y for Def't.

(Endorsed:) Bank vs. Stark. Plea. Filed May 6th, 1878.

And afterwards, to wit, on the twenty-fifth day of June, A. D. 1878, a jury being called, came, to wit:

1. R. M. Frick,
2. M. L. Wortman,
3. F. M. Hartshorne,
4. Wm. Ewing,
5. James Cravens,
6. E. B. England,
7. Lewis Martin,
8. Ralph Peters,
9. J. M. Foster,
10. Thomas Kernan,
11. R M. Foresman,
12. J. G. L. Shindle,

who are respectively sworn or affirmed to try the issues joined, &c.

17 And afterwards, to wit, on the twenty-sixth day of June, A. D. 1878, the jurors aforesaid, on their oath and affirmation aforesaid, respectively, do say that in the issues joined they find for the plaintiff in the sum of thirteen thousand four hundred and sixty-six dollars and seventy-four cents ($13,466.74), with costs.

Whereupon, it is considered and adjudged by our said circuit court of the United States that the said plaintiff, the Second National Bank of Wilkes Barre, do recover against the said defendant, the said J. B. Stark, her debt of thirteen thousand four hundred and sixty-six dollars and seventy-four cents; and also the sum of one hundred and four dollars and sixty cents, for her costs and charges in this behalf expended,

which said debt, costs, and charges, in the whole, amount to thirteen thousand five hundred and seventy-one dollars and thirty-four cents ($13,571.34).

And the said defendant, in mercy, &c.

18 *Citation sur writ of error.*

THE SECOND NATIONAL BANK OF WILKES Barre, a banking association, &c.,
vs.
J. B. STARK, A CITIZEN, &C.

UNITED STATES OF AMERICA, *ss:*

To the Second National Bank of Wilkes Barre, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Pennsylvania, wherein you, The Second National Bank of Wilkes Barre, are defendant, and J. B. Stark is plaintiff, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable W. W. Ketchum, judge of the circuit court of the United States for the western district of Pennsylvania, this 1st day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

W. W. KETCHUM, *Judge.*

19 This citation was served upon us personally this day.
July 2d, 1878.

ARMSTRONG & LINN,
Att'ys for Pl'ff.

(Endorsed:) Second National Bank of Wilkes Barre vs. J. B. Stark. Citation.

20 *Bond sur writ of error.*

Writ of error to the circuit court of the United States, west. dist. of Pennsylvania. No. 125. June term, 1878.

THE SECOND NATIONAL BANK OF WILKES Barre, a banking association established in the western district of Pennsylvania, under laws of the United States providing for national banking associations,
vs.
J. B. STARK, A CITIZEN OF THE STATE OF Pennsylvania, residing in the western district thereof.

Know all men by these presents that we, J. B. Stark, Samuel Raul, and Isaac Tripp, all of Luzerne County, State of Pennsylvania, in said district, are held and firmly bound unto The Second National Bank of

Wilkes Barre, in the State of Pennsylvania, in the sum of twenty thousand dollars, to be paid to the said Second National Bank of Wilkes Barre, her successors or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this twenty-ninth day of June, A. D. 1878.

21 Whereas the above-named J. B. Stark hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Pennsylvania:

Now, therefore, the condition of this obligation is such that if the above-named J. B. Stark shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

J. B. STARK. [SEAL.]
SAMUEL RAUL. [SEAL.]
ISAAC TRIPP. [SEAL.]

Witness:
E. B. STARK.

Now, July 1st, 1878, the foregoing bond is approved and ordered filed.

W. W. KETCHUM, *Judge.*

(Endorsed:) Second National Bank of Wilkes Barre vs. J. B. Stark. Bond.

22 And afterwards, to wit, on the 30th day of September, A. D. 1878, the defendant, by his attorneys, file the following bill of exceptions, to wit:

Be it remembered that in June sessions (No. 125), A. D. 1878, came Second National Bank of Wilkes Barre, Pa., into the circuit court of the United States for the western district of Pennsylvania, and impleaded J. B. Stark, of Pennsylvania, in a certain plea of trespass on the case, &c., in which the said plaintiff declared as follows:

Narr.

In the circuit court of the United States, of June sessions, 1878. No. 125.

WESTERN DIST. PENNSYLVANIA, *ss:*

J. B. Stark, a citizen of the State of Pennsylvania, and a resident of the western district thereof, defendant, was summoned to answer The Second National Bank of Wilkes Barre, a banking association established in the western district of Pennsylvania, under the laws of the United States providing for national banking associations, plaintiff, of a plea of trespass on the case upon promises; whereupon the said plaintiff, by Armstrong & Linn, her attorneys, complains:

For that whereas one D. G. Driesbach, on the eleventh day of August, A. D. one thousand eight hundred and seventy-seven, at Wilkes Barre,
Pa., to wit, at the district aforesaid, made his promissory note in
23 writing, and promised thereby to pay to the order of J. B. Stark, the said defendant, eight thousand dollars, at the Second Na-

tional Bank of Wilkes Barre, without defalcation, value received, in ninety days after date thereof, which period had elapsed before the commencement of this suit, and delivered the same to J. B. Stark, the said defendant, and the said defendant then endorsed the same to the said D. G. Driesbach, and the said D. G. Driesbach then endorsed the same to the Second National Bank of Wilkes Barre, the said plaintiff; and the said D. G. Driesbach did not, nor did any other person or persons, pay the amount thereof, although the same was duly presented at the Second National Bank of Wilkes Barre, aforesaid, for payment, on the day when it came due, according to the tenor and effect thereof, of all which the defendant then had notice, and in consideration of the premises then promised the plaintiff to pay the amount of the said note on request.

And, also, for that whereas the said D. G. Driesbach, on the sixth day of September, A. D. one thousand eight hundred and seventy-seven, at Wilkes Barre, to wit, at the district aforesaid, made his certain other promissory note in writing, bearing date the day and year last aforesaid, and then delivered the same to the said J. B. Stark, defendant, and promised thereby to pay to the order of the said J. B. Stark, defendant, five thousand dollars, at the Second National Bank of Wilkes Barre, without defalcation, value received, in ninety days after
24 the date thereof, which period had elapsed before the commencement of this suit, and the said J. B. Stark, defendant, then endorsed to the same to the said D. G. Driesbach, and the said D. G. Driesbach then endorsed the same to the Second National Bank of Wilkes Barre, the said plaintiff, and the said D. G. Driesbach did not, nor did any other person or persons, pay the amount of the said note, although the same was duly presented at the Second National Bank of Wilkes Barre, aforesai l, for payment, on the day when it became due, according to the tenor and effect thereof; of all which the defendant then had due notice, and in consideration of the premises then promised the plaintiff to pay her the amount of the said note on request.

Nevertheless the said defendant, not regarding his said several promises and undertakings in this behalf, has not as yet paid the several sums of money, or any part thereof, although often requested so to do, but to pay the same has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the plaintiff twenty-six thousand dollars.

And therefore she brings suit, &c.

ARMSTRONG & LINN,
Att'ys for Pl'ff.

25 (Endorsed:) No. 125. June T., 1878. Second National Bank of Wilkes Barre vs. J. B. Stark. Narr.

And the said defendant pleads as follows:

U. S. C. C., W. D. of Pa. No. 125. June T., 1878.

SECOND NATIONAL BANK OF WILKES BARRE
vs.
J. B. STARK.

Defendant pleads non-assumpsit, payment, payment with leave to introduce special matter in evidence, and set-off.

May 6th, 1878.

J. O. PARKER,
Att'y for Def't.

(Endorsed:) Bank vs. Stark. Plea. Filed May 6th, 1878.

26 And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the city of Williamsport aforesaid, before the honorable Wm. McKennan, one of the justices of the said court, on Tuesday, the twenty-fifth day of June, A. D. 1878, the 'foresaid issue between the said parties came to be tried by a jury of the said district, for that purpose duly empannelled, as follows:

1. R. M. Frick.
2. M. L. Wortman.
3. F. M. Hartshorne.
4. Wm. Ewing.
5. James Cravens.
6. E. B. England.
7. Lewis Martin.
8. Ralph Peters.
9. J. M. Foster.
10. Thomas Kernan.
11. R. M. Foresman.
12. J. G. L. Shindle.

At which day came as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid, empannelled to try the said issue, being also called came, and were then and there in due manner chosen, sworn, or affirmed to try the said issue; and upon the trial the following proof and testimony was introduced:

27 Plaintiff's counsel offer in evidence the note bearing date "Wilkes Barre, August 11th, 1878. Ninety days after date, I promise to pay to the order of J. B. Stark $8,000, &c., &c. Signed D. G. Driesbach; endorsed J. B. Stark and D. G. Driesback. Also, for value received, I hereby waive protest on within note. Nov. 12th, 1877. J. B. Stark."

Plaintiff's counsel offer in evidence note dated "Wilkes Barre, Sept. 6th, 1877. Ninety days after date, I promise to pay to the order of J. Stark, $5,000, &c., &c. Signed D. G. Driesbach; endorsed J. B. Stark and D. G. Driesbach. Also, for value received, I hereby waive protest on the within note. Dec. 8th, 1877. Signed J. B. Stark."

Plaintiffs rest.

D. G. DRIESBACH sworn for defendant:

Counsel for defendants offer to prove by the witness on the stand, defendant Driesbach, in this action, that on or prior to the 21st of April, 1871, he made an arrangement with the Second National Bank of Wilkes Barre, the plaintiffs, to give him a line of discounts of from twelve to fifteen thousand dollars; that in pursuance of that arrangement
28 the plaintiffs discounted, on or about the 21st of April, 1871, the note of the defendant in the sum of $5,000; that on subsequent dates, in the same or following years, the said plaintiffs discounted two other notes of the defendant, each in the sum of $5,000, at ninety days; that these three several notes as they fell due were renewed by the said bank by discounting other notes of the defendant Driesback, and that each line of renewals was maintained continuously from the first note discounted by said bank, with a payment upon one of the $5,000 notes, of the sum of $2,000; and that finally one of the $5,000 notes and the $3,000 note became incorporated in the $8,000 note sued upon of August 11th, 1877, and the remaining note sued upon of $5,000, dated Sept. 6th, 1877, is the last line of renewals of one of the $5,000-notes originally given; that during this entire period the said bank plaintiffs charged a usurious rate of interest, varying from eight to ten and one-half per cent., and that the total amount of interest charged the defendant by

said bank and paid by the defendant as discount upon the said notes amounted to the sum of $6,901.41.

By the COURT. How much of that was in excess of six per cent.?

Mr. PARKER. About $2,900 it would be.

Offer continued: For the purpose of showing that the said
29 plaintiffs, knowingly took, received, reserved, and charged a rate of interest greater than is allowed by the act of Congress, and that the entire amount of interest charged upon the said notes and the several renewals thereof is forfeited by said bank, and in connection therewith the defendants propose to show that the legal rate of discount allowed by the laws of the Stats of Pennsylvania, where the bank plaintiffs is located, is six per cent.

Plaintiff's counsel object, for the reason that since the year 1869, the following State banks of issue have been organized in the State of Pennsylvania, under and by virtue and authority of the laws of the State, namely:

Manayunk,	by the act of	14th	June,	1871,	P. L.	pp. 1359.
Southwark,	"	"	"	"	"	1360.
Petroleum,	"	"	20 Nov.	"	"	1381.
Franklin,	"	"	Ap'l,	1870,	"	737.
United States B'k'g Co.,	"	"	2d June,	1871,	"	987.
Lycoming Sav'gs B'k,	"	"	14th March,	1872,	"	1017.
Somerset Co. Bank,	"	"	29 "	"	"	1041.
Butchers' & Drovers'	"	"	27th April,	1870,	"	1538.
Watsontown Bank,	"	"	27th M'ch,	1872,	"	1044.
Harrisburg Sav'gs Bank,	"	"	24th April,	1867,	"	1311.
German Sav'gs Bank, Pittsburg,	"	8th "		1870,	"	1050.

That the said banks were authorized by the laws creating them, respectively, to charge upon discounts and loans a rate of interest, as follows, to wit: the first nine of said banks at such rates of discount as
30 might be agreed upon by the parties; and the other two any rate of discount not exceeding ten per cent.; that some of the said banks were organized before the original loans were made by the plaintiffs to D. G. Driesbach, the maker or the note in suit, and some have been since organized with the right to receive and charge upon discounts made by them respectively a rate of interest equal to or exceeding the rate of discount which the said Driesbach agreed to pay upon the original notes and the renewals thereof; that the several State banks above-named, are all located and have their places of business within the State of Pennsylvania; and in this connection offer the several acts of assembly incorporating the foregoing State banks specified; also the act of May, 1861, relating to banking companies, Pamphlet Laws, 503; also the act entitled "An act regulating banks," approved the 16th of April, 1850, Pamphlet Laws, 477, &c., &c., of all of which acts of assembly, and the banks organized thereunder, the court will take judicial cognizance.

Objections overruled; evidence received.

Plaintiff's counsel except, and bill sealed.

Q. Where do you reside?

A. Beech Haven.

Q. Luzerne County?

A. Yes, sir.

31 Q. Please look at the two notes that have been put in evidence, and on which these suits have been brought—those are your notes, signed by you?

A. Yes, sir.

Q. When did you first obtain discounts at the Second National Bank of Wilkes Barre?

A. I do not know as I can remember exactly; 1871 was when I commenced doing a regular banking business there; in April, 1871.

Q. Please state what arrangement you made with the Second National Bank, in regard to a line of discounts in 1871, and about when it was?

A. Well, Avery, who was cashier at that time, and J. B. Stark, and Samuel Hoyt, who were directors, had frequently invited me to come there and do my business. That was the year before. Along in the spring of 1871, Mr. Avery and Stark met me and invited me again. They had plenty of money, more money than they could use, they said, and Stark said Avery would come to the Valley House at 2 o'clock to see me, which he did, and made me an offer to give me a line of discounts. J. B. Stark was voluntarily my endorser; offered me a line of discounts of $50,000. I told them I did not want $50,000, that I would probably want $12,000 or $15,000, which I wanted as a permanent loan, to be renewed. I took $5,000, I think, on the 20th of April, 1871, and I think I got another $5,000, that I renewed in July.

Q. When did you obtain the first discount, in pursuance of that arrangement.

32 A. I think on the 20th of April, 1871. It is entered in my book on the 21st.

Q. Is that the note (paper shown witness)?

A. I should say it was.

Q. What discount was charged you on that note?

A. They charged $104.44, on this note for ninety days.

Q. Was that note renewed?

A. Yes, sir.

Q. When?

A. On the 25th. It is in my book discounted the 25th of July. But I generally had my notes there, oftentimes three or four days before they were due, and sometimes I did not go, and I enclosed my note and sent to Stark to endorse, then sent to the bank, and it was not put in my book for thirty, sixty, or ninety days. My book was not settled up often, and these entries in the books are a little irregular in dates.

Q. Have you the note given in renewal?

A. Yes, sir.

Q. What is the date?

A. July 22d for $5,900, at 90 days.

Q. What was the discount charged by the bank on that note?

A. $104.44.

Q. Was that note renewed?

A. Yes, sir; by note of Oct. 23d, 1871, in the amount of $5,000, at 90 days.

33 Q. How much discount was charged?

A. $104.44.

Q. Was that note renewed?

A. Yes, sir.

Q. By note of what date?

A. January 23d, at 90 days, $5,000; discount, $104.44.

Q. Was that note renewed?

A. Yes, sir.

Q. By note of what date?

A. April 23d, 1872, for 90 days, $5.000; discount charged, $104.44.

Q. Was that note renewed?

A. Yes, sir.

Q. By note of what date?

A. July 23d, 1872, $5,000, at 90 days; discount charged, $104.44.

Q. That was renewed by note?

A. I paid $1,000 on that note, and renewed it by one of October 24th, 1872, for $4,000, at 90 days; discount, $83.56. The next one, 90 days, January 25th, 1873, renewal with a $1,000 payment on the $4,000. This is for $3,000.

Q. Discount what?

A. $62 67.

Q. That was renewed?

A. Yes, sir; the 28th of April, 1873, at 90 days, for $3,000; discount, $62.67. That note was renewed July 24th, by a $3,000 note, at 90 days; discount, $62.67. That was renewed Oct. 25th, 1873, $3,000, at 90
34 days; discount, charged $70.50. January 27th, 1874, that last note was renewed by another, at 90 days, for $3,000, and discount charged, $70.50. That note was renewed April 30th, 1874, at 90 days, for $3,000; and discount, $70.50. That was renewed July 31st, 1874, 90 days, $3,000; discount, $62.67. That was renewed by a $3,000 note, October 31st, 1874, at 90 days; discount, $62.67. Renewal January 30th, 1875, 90 days, for $3,000; and discount, $78.32. August 2d, 1875, $3,000, 90 days, for the renewal of the other; and interest charged, $78.32. November 3d, 1875, $3,000, at 90 days; discount, charged $70.50. February 4th, 1876, 90 days, $3,000, for renewal; discount, $70.50. February 9th, 1877, note 90 days, for $3,000, for renewal; discount, $117.50. This error occur'ed; it is the rate they charged me on $5,000; but it was on the $3,000 renewal. They corrected it on the next $5,000 note. The next, May 12th, 1877, $3,000, at 90 days; discount, $70.50. That was the last of the series of $3,000 notes.

Q. Please state upon what other date you had an original note discounted by the Second National Bank?

A. Let me see the first note; I then had a note for $5,000 discounted Sept. 25th, 1872, at 90 days.

Q. What was the discount charged upon that?

A. $104.44.

35 Q. Was that note renewed?

A. Yes, sir; by a note of December 27th, 1872, at 90 days, for $5,000; discount charged, $104.44. That note was renewed by note of March 27th, 1873, 90 days, $5,000; discount, $104.44. Renewed June 28th, 1873, $5,000, 90 days; discount, $104.44. Renewed by note of September 27th, 1873, for $5,000, at 90 days; discount, $104.44. December 26th, 1873, renewed by note for $5,000, at 90 days, and discount, $117.50. Renewed March 28th, 1874, for $5,000, at 90 days; discount, 117.50. Renewed June 30th, 1874, 90 days, for $5,000; discount, $105.56. Renewed Sept. 30th, 1874, $5,000; discount, 104.44. Renewed December 31st, 1874, $5,000, at 90 days, with discount, $104.44. Renewed by note April 3d, 1875, $5,000, at 90 days; discount charged, $130.56. That was renewed July 3d, 1875, $5,000, at 90 days; discount, $130.56. October 4th, 1875, $5,000, at 90 days; discount, $130.56. Renewed January 5th, 1876, $5,000, at 90 days; discount, $117.50. Renewed April 7th, 1876, at 90 days, $5,000; discount, $117.50. Renewed July 8th, 1876, at 90 days, $5,000, and the discount was $117.50. That was renewed by note October, 1876, at 90 days, for $5,000, and discount, $130.55. That was renewed January 6th, 1877, $5,000, at 90 days, and discount charged, $117.50. Renewed by note of April, 1877, at 90 days, for $5,000, and discount was charged, $117.50. That was renewed

by a note July 11th, 1877, $5,000, 30 days; discount, $42 50.
36 On July 11th, Mr. Spaulding came to the Valley House and called me into the reading room, and told me they had negotiated with the government to buy $50,000 worth of bonds; that they were short of money; that if I would change my last note to thirty days that they could get money from Nesbit; that they wanted money; and I told them I would do anything to accom'odate them if Stark was willing, but that I could not meet it. They said they would take care of it. I called on Stark, and we made this note, and when this note came due, the $5,000 and $3,000, they were merged into one note of $8,000.

Q. Is that the note in suit?

A. Yes, sir; that is the note given.

Q. I understand that the $8,000 note in suit was given to renew the $3,000 and $5,000 notes, which you have already spoken of, due August 13th?

A. Yes, sir. Here is another discount $5,000 note, August 16th, 1871. That is when I borrowed the second $5,000, at 90 days; discount, $104.44. Now, for renewal of that note there is one November 17th, 1871, $5,000, at 90 days, on which they charged $104.44. For the renewal of that note here is one of February 15th, 1872, $5,000, at 90 days, $104.44 discount. Renewed May 16th, 1872, $5,000, at 90 days; discount, $104.44. For the renewal of that a $5,000
37 note, at 90 days, dated August 15th, 1872; discount, $104.44. November 16th, 1872, $5,000, at 90 days, renewal; discount, $104.44. Renewal, February 17th, 1873, $5,000, at 90 days; discount, $104.44. For the renewal of that May 20th, 1873, at 90 days, $5,000; discount, $104.44. Renewal August 21st, 1873, $5,000, at 90 days; discount, $104.44. For the renewal of that November 21st, 1873, $5,000, at 90 days; discount, $104.44. For the renewal of that note February 21st, 1874, $5,000, at 90 days; discount, $117.50. For the renewal of that, May 25th, 1874, $5,000, at 90 days; discount, $104.44. August 26th, 1874, for renewal, $5,000, at 90 days; discount, $130.56. For the renewal of that Nov. 27th, 1874, $5,000, at 90 days; discount, $104.44. For the renewal of that Feb'y, 1875, $5,000, at 90 days; discount, $119.00. For the renewal of that May 28th, 1875, $5,000, at 90 days; discount, $130.56. August 28th, 1875, renewal, $5,000, at 90 days; discount, $130.56. Nov. 29th, 1875, $5,000, at 90 days; discount, $117.50. March 1st, 1876, $5,000, at 90 days, renewal; discount, $117.50. May 13th, 1876, $5,000, at 90 days, renewal; discount, $117.50. September 1st, 1876, $5,000, at 90 days, renewal; discount, $117.50. December 2d, 1876, $5,000, at 90 days, renewal; discount, $117.50. March 5th, 1877, $5,000, at 90 days, renewal; discount, $70.50. There is where that error comes in. It puts the largest discount on the
38 smallest note and on to the largest note.

Q. Was that note renewed; and if so, when?

A. No, sir; this note was not renewed.

Q. There was a note discounted June 5th?

A. Oh, yes.

Q. Was that answer correct that you just made, that it was not renewed?

A. Oh, yes; this was renewed.

Q. On what date?

A. On the 5th of March, 1871.

Q. Renewed on what day?

A. Discounted on the 6th day of June, 1877.

Q. And what was the discount charged?

A. $117.50.

Q. (Note in suit shown witness.) Was the note in suit of September 6th, 1877, $5,000, a renewal of the note of June 5th, 1877?

A. Yes, sir.

Q. Please state from your bank-book what discount was charged you on the $8,000 note in suit.

A. Well, I cannot name the amount without figuring.

Q. $188.00?

A. Yes, sir.

Q. What discount was charged you on the $5,000 note in suit?

A. $117.50.

DEFENDANT'S COUNSEL.—We name the amount of interest charged at $6,901.41. We did not include the interest on the notes in
39 suit. With your honor's permission we will include that.

Cross-examination:

Q. I call your attention to the note of the 11th of July, 1877. State how you received the proceeds of that note; by whose check.

A. I did not receive the proceeds at all.

Q. Did you not receive it by check from Mr. Nesbit?

A. No, sir; I did not receive it at all. My bank-book shows it is credited to me.

Q. Was not that the credit you received by the check of Mr. Nesbit, and not by discount?

A. No, sir; they took my check for $42.50 for the interest for thirty days.

Q. You gave a check upon that note?

A. Yes, sir.

Q. Your recollection and that of Mr. Spalding differ as regards that note?

A. I certainly did not receive the check at all. They merely took my check for the thirty days' discount.

(It is admitted that in Pennsylvania the lawful rate of interest for the loan or use of money in all cases where no express contract shall have been made for a less rate shall be six per cent. per annum, as provided by the act of the 28th of May, 1858.)

Defendants rest.

E. A. SPALDING sworn for plaintiffs.

Q. Are you cashier of the 2d National Bank of Wilkes Barre?

A. Yes, sir.

40 Q. How long have you been?

A. Since January, 1872.

Q. State at what rate the notes were discounted which have been spoken of in evidence.

A. From eight to ten per cent.

Q. Any in excess of ten per cent.?

A. No, sir; not that I am aware of. That was the agreement.

Q. What was the agreement?

A. The agreement was a portion of the time that Mr. Driesbach was to pay ten per cent., a portion of the time nine, and a portion of the time eight.

Q. Was the discount paid in pursuance and in accordance with the terms of that agreement?

A. Yes, sir.

Q. I call your attention to the note of July, 1877, for $5,000; was that note ever discounted at the bank?

A. It was not.

Q. State what you know of it.

A. I cannot say whether this was the same date. I think it was, though. A note of his fell due on the 11th of July, 1877. I requested him to pay that note, for the reason that we wanted to reduce our loans. I requested Mr. Driesbach to pay the note that matured that date. He did so by check of Mr. Nesbit's, which went to his
41 credit on the account, and the note was due at that time was charged to his account. The bank did not discount the note, or did not receive the discount on it in any way.

Q. Is that the thirty-day note?

A. Yes, sir. Mr. Driesbach understood it at the time.

Q. What discount of the bank followed the payment of the note due on the 11th of July, for $5,000?

A. A note for $8,000, discounted on the 11th of August.

Q. Was that the beginning of a new transaction, in whole or in part?

A. It was, with the exception that the note of $3,000 was charged to his account a day or two after this note was discounted.

Q. There was a note of $5,000 of Driesbach's coming due at the bank at about the time that this thirty-day note of $5,000 was given?

A. At that time the $5,000 note was discounted by Nesbit—there was one fell due about that time; yes, sir.

Q. The $5,000 note—the 30-day $5,000 note—was credited to him in his account in full?

A. No, sir; it was not. The bank had nothing to do with that note.

Cross examination:

Q. Who is Mr. Nesbit?

A. At that time vice-president; at this time president.

Q. Do you think Driesbach knew anything of the transaction?

A. Yes, sir; I told him at the time.

Q. Did not you have the check for the discount?

A. He may have given it to Nesbit.

42 Q. Did not he give it to the bank?

A. No, sir.

Q. At about the time the $5,000 note came due, the bank did discount an $8,000 note?

A. Yes, sir.

Q. Which would cover the $5,000 and $3,000 they had been carrying?

A. About that amount.

Q. You claim it was not a continuation of the old discount, because one of the officers of the bank discounted the note in place of the bank?

A. No, sir.

By the COURT. Ask him about the facts.

Q. This agreement that you speak of—do you say that there was an agreement between Mr. Driesbach and the bank, entered into in terms, as to the amount of interest?

A. Yes, sir; for the reason that I called Driesbach's attention to the fact that his deposits in the bank were very light, and that the bank could not afford to loan him money at a rate, without his keeping money on deposit, as low as they could loan to a man who kept money there, and told him that under those rules we would have to increase the rate, unless he increased the amount of his deposits. I told him we must charge him ten per cent., and he agreed to it. He afterwards came and said the rate was high, and asked me if I could not afford to reduce
43 it. It was then reduced, at his request, to nine per cent., and car-

ried for a time at that rate; and the same, or nearly the same, conversation ensued, and it was then reduced to eight per cent.

Q. When did Mr. Driesbach get that $5,000 30-day note; who gave it to him; where did he get it?

A. I should presume he manufactured it. It looks like his note.

Q. They were in your bank?

A. Yes, sir.

Q. Did not you give it to him back again?

A. It may have been charged to his account. The appearance of that note indicates that it has passed through our bank for collection. It has the collection stamp on it.

Redirect examination:

Q. Is your collection stamp and stamp for notes discounted different?

A. Yes, sir.

Q. What is the difference?

A. One is stamped, "Property of the Second National Bank," and the other is stamped, "Second National Bank."

Plaintiff's counsel offer to prove in rebuttal, that since the year 1869 the following State banks of issue have been organized in the State of Pennsylvania, under and by virtue and authority of the laws of the State, namely:

Manayunk Bank,	by the act of	14th June,	1871,	P. L.,	pp.	1359.
Southwark	"	"	"	"	"	1360.
44 Petroleum Bank,	by the act of	20th Nov.,	1876,	P. L.,	pp.	1381.
Franklin	"	" April,	1870,	"	"	737.
United States B'k'g Co.,	"	" 2d June,	1871,	"	"	987.
Lycoming Co. Sav'gs B'k,	"	" 14th M'ch,	1872,	"	"	1017.
Somerset Co. Bank,	"	" 29th "	"	"	"	1041.
Butchers' & Drovers'	"	" 27th April,	1870,	"	"	1538.
Watsontown Bank,	"	" 27th March,	1872,	"	"	1044.
Harrisburg Sav'gs	"	" 24th April,	1867,	"	"	1311.
Germain Sav'gs Bank, Pittsburg,	"	8th April,	1870,	"	"	1050.

That the said banks were authorized by the laws creating them, respectively, to charge upon discounts and loans a rate of interest as follows, to wit: The first nine of said banks at such rates of discount as might be agreed upon by the parties; and the other two, any rate of discount not exceeding ten per cent.; that some of the said banks were organized before the original loans were made by the plaintiff to D. G. Driesbach, the maker of the note in suit, and some have been since organized, with the right to receive and charge upon discounts made by them, respectively, a rate of discount equal to or not exceeding the rate of discount which the said Driesbach agreed to pay upon the original notes and the renewals thereof; that the several State banks above named are all located and have their place of business within the State of Pennsylvania. Plaintiff's counsel also offer in evidence the
45 several acts of assembly incorporating the foregoing State banks specified; also the act of May, 1861, relating to banking companies, Pamphlet Laws, 503; also the act entitled, "An act regulating banks," approved the 16th of April, 1850, Pamphlet Laws, 477, &c., &c.

Counsel for defendants object to the offer—

First. Because evidence as to the powers of particular banks incorporated under special acts of the assembly is irrelevant.

Second. Because, under section 5197 of the Revised Statutes of the

United States, national banks are only allowed to charge and receive such rate of interest or discount as is allowed by the law of the State in which the bank is located, or such rate as is limited for banks of issue organized under State laws, and that the several charters offered in evidence do not show that the banks chartered by them were banks of issue, and the plaintiffs do not offer to show that the said banks, so chartered by special act of assembly, were authorized to transact business, as banks of issue.

Third. Because where no rate of interest is limited, as in charters offered, the act of Congress fixes the rate of interest.

Fourth. Because it is incompetent to effect the construction of the act of Congress in question by the evidence of particular laws.

Fifth. Because it is generally irrelevant and incompetent.

46 (Objections overruled and evidence admitted.)

Defendant excepts, and bill sealed.

It is admitted that the several banks named in the offer have been organized under and in pursuance of the acts of assembly referred to in the offer as creating them, respectively.

Testimony closed.

Counsel for the defendants request the court to charge the jury—

First. It appearing from the evidence that the defendant was charged by and paid to plaintiffs, discount at the rate of eight to ten per cent. per annum, whereas the lawful rate of interest in the State of Pennsylvania is six per cent. and no more; and it appearing from the evidence that the entire amount of discount paid by the said defendant to the said bank on the line of renewals which culminated in the notes in suit, was $7,206.91, the defendant is entitled to offset that amount against the plaintiff's claim in this suit.

Second. That under section 5197 of the Revised Statutes of the United States, the plaintiff was authorized to charge and receive interest or discount at the rate of six per cent. per annum, and no more, that being the lawful rate of interest as provided by the general laws of the State of Pennsylvania.

47 Third. That the several private charters introduced by the plaintiff in evidence are not the charters of banks of issue, and no special rate of discount or interest is provided by said special acts.

Fourth. That the national banking association, plaintiff, is authorized to charge and receive as discount or interest only the rate allowed by the general laws of the State of Pennsylvania, or such different rate as may be limited to banks of issue organized under the general laws of Pennsylvania; and the several banking associations whose charters have been offered in evidence are not such banks of issue as are contemplated in the act of Congress. All the foregoing points are denied.

W. McKENNAN,
Circuit Judge.

Defendants except. Bill sealed.

Charge to the jury.

GENTLEMEN OF THE JURY: These suits are founded upon two several promissory notes drawn by D. G. Griesbach, and endorsed by J. B. Stark. The notes have been given in evidence, and their execution admitted, and the fact that they were discounted by the plaintiff here, and that the plaintiff is the bona fide holder. Under these circumstances, if there was nothing more in the case, the plaintiff would be entitled to your

verdict. The defendant alleges, and there is no doubt of the fact, that the discount taken by the plaintiff and paid by the defendant ex-
48 ceeded six per cent., or that the notes were discounted at rates ranging between eight and ten per cent.—some at eight and some at ten—and he claims, therefore, under the act of Congress, a deduction of the whole amount of interest thus alleged to be illegally paid and charged. Whether the plaintiff had a right to charge more than six per cent. or the rate charged in this case, depends upon the consideration of the act of Congress touching the right of national banks to charge and receive interest and discount. It is provided by that act that every such association shall take, receive, and charge upon every discount, &c., &c., interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where by the laws of any State a different rate is limited, the rate so limited shall be allowed the association.

Now this section of the act of Congress has received the construction of the Supreme Court, and more recently by this court, in the case of the First National Bank of Mount Pleasant. It is to be observed that in the first clause of the section the rate of interest or discount to be charged by a national bank is limited to the rate allowed by the laws where the bank is located. Under that law the bank plaintiff
49 would be authorized to charge only six per cent., but by the exception national banks may charge a different rate of interest if such rate is limited or allowed for banks of issue organized in the State in which the national bank is located and doing business. So that the question here is whether there are such laws as are contemplated by the exception which have been enacted by the State of Pennsylvania, and under which banks of issue have been organized.

The plaintiff has offered in evidence a large number of acts of assembly incorporating banks by which it is claimed that a greater rate of interest than six per cent. is authorized to be charged by said banks. If that be so, and these are banks of issue, then the rate of interest charged by plaintiff here was authorized by law, and the defence of the defendant would fail. The construction of those acts of assembly is for the court. Although I have not examined all of them referred to in the statement furnished by the plaintiff's counsel, yet I have examined a number of them, and I have no doubt that by the charters of those banks they are authorized to charge, in some instances, not exceeding ten per cent., and in other instances any rate of interest which may be agreed upon by the lender and borrower. So that there are banks chartered in Pennsylvania, within the contemplation of the act of Congress,
50 so far as the right to charge interest is concerned, which may charge more than the rates fixed by the general laws of the State.

The only remaining question is whether these are banks of issue. Although by the special charters of these several banks nothing is said as to the right to issue paper money, yet by an act passed in 1861, a general law of the State, all banks incorporated by special charter, after the passage of that act, are made subject to its provisions. In other words, all the franchises conferred by that act upon banks chartered under it may be made available to the banks subsequently chartered by special acts.

Among the franchises conferred by the general law is the right to issue paper money; so that all the banks, or at least a number of them, so far as I have been able to make an examination, by authority of the general law of the State, may issue paper money—circulating money; and although they may not have availed themselves of that privilege,

still they are not thereby taken out of the category of banks of issue. If they have the privilege and do not choose to exercise it, it does not change the character of such banks as are described in the act of Congress, to which I have called your attention.

So there is undisputed evidence of the incorporation of banks by
51 special law of the State of Pennsylvania which are banks of issue, and which are authorized to charge the rate of interest charged in this case or more, and the plaintiff, therefore, has but exercised the right which the act of Congress conferred upon him in making the contract upon which these suits are founded. This is sufficient to dispose of the defence set up here, and as the plaintiff has made out his case, he is entitled to your verdict for the amount of these notes with interest.

Counsel for defendants except to the charge. Bill sealed.

I do hereby certify that the offers of evidence above stated were made by the counsel for the plaintiffs at the trial of the said cause, that were objected to by the counsel for defendant, and were admitted by the court; to which ruling the counsel for the defendant then excepted; that the court was requested by the defendant's counsel to charge the jury as above stated, which request the court refused, and that the said counsel then excepted to said refusal; and that the court substantially charged the jury as above stated, to which charge the defendants' counsel then excepted.

All of which exceptions were duly allowed.

Witness my hand and seal September 27th, 1878.

[SEAL.] W. McKENNAN,
Circuit Judge.

52 And afterwards, to wit, on the 30th day of September, A. D. 1878, the defendant, by his attorney, files the following specifications of error, to wit:

Specifications of error.

Writ of error to the circuit court of the United States for the western district of Pennsylvania, of June sessions, 1878.

J. B. STARK, PLAINTIFF IN ERROR,
vs.
SECOND NATIONAL BANK OF WILKES BARRE, defendant in error. } No. 125.

The learned judge who tried this cause erred, first, in admitting the testimony embraced in the following offer of the plaintiff below, and in overruling the objections of the defendant below thereto; which offer and objections were as follows:

Plaintiff's counsel offer to prove in rebuttal that since the year 1869 the following State banks of issue have been organized in the State of Pennsylvania under and by virtue and authority of the laws of the State, namely:

Manayunk Bank, by the act of 14th June, 1871, P. L., pp. 1359.
Southwark, " " " " " 1360.
53 Petroleum Bank; by the act of 20th Nov., 1871, P. L., pp 1381.
Franklin " " " April, 1870, " " 737.
United States B'g Co.; " " 2d June, 1871, " " 987.
Lycoming Co. Savings B'k; " " 14th March, 1872, " " 1017.

Somerset Co. Bank;	"	"	29	"	"	"	"	1041.
Butchers & Drovers';	"	"	27th	April,	1870,	"	"	1538.
Watsontown Bank;	"	"	27th	Mch.,	1872,	"	"	1044.
Harrisburg Savings B'k;	"	"	24th	April,	1867,	"	"	1311.
Germain S'v'gs B'k, Pittsburg;	"	"	8th	"	1870,	"	"	1050.

That the said banks were authorized by the laws creating them, respectively, to charge upon discounts and loans a rate of interest as follows, to wit: The first nine of said banks at such rates of discount as might be agreed upon by the parties, and the other two any rate of discount not exceeding ten per cent.; that some of the said banks were organized before the original loans were made by the plaintiff to D. G. Driesbach, the maker of the note in suit, and some have since organized with the right to receive and charge upon discounts made by them, respectively, a rate of interest equal to or not exceeding the rate of discount which the said Driesbach agreed to pay upon the original notes and the renewals thereof; that the several State banks above named are all located and have their place of business within the State of Pennsylvania.

Plaintiff's counsel also offer in evidence the several acts of assembly incorporating the foregoing State banks specified; also the act of
54 May, 1861, relating to banking companies, Pamphlet Laws, 503; also the act entitled "An act regulating banks," approved the 16th of April, 1850, Pamphlet Laws, 477, &c., &c.

Counsel for defendants object to the offer—

First. Because evidence as to the powers of particular banks incorporated under special acts of the assembly is irrelevant.

Second. Because under section 5197 of the Revised Statutes of the United States, national banks are only allowed to charge and receive such rates of interest or discount as is allowed by the law of the State in which the bank is located, or such rate as is limited for banks of issue organized under State laws, and that the several charters offered in evidence do not show that the banks chartered by them were banks of issue, and the plaintiffs do not offer to show that the said banks so chartered by special act of assembly were authorized to transact business as banks of issue.

Third. Because when no rate of interest is limited, as in charters offered, the act of Congress fixes the rate of interest.

Fourth. Because it is incompetent to effect the construction of the act of Congress in question by the evidence of particular laws.

Fifth. Because it is generally irrelevant and incompetent.

55 2. The learned judge who tried the cause erred, second, in denying the following points presented by defendant below, and refusing to charge the jury as therein requested:

Counsel for the defendant request the court to charge the jury—

First. It appearing from the evidence that the defendant was charged and paid to plaintiffs discount at the rate of eight to ten per cent. per annum, whereas the lawful rate of interest in the State of Pennsylvania is six per cent. and no more, and it appearing from the evidence that the entire amount of discount paid by the said defendant to the said bank on the line of renewals which culminated in the notes in suit was $7,206.91, the defendant is entitled to offset that amount against the plaintiff's claim in this suit.

Second. That under section 5197 of the Revised Statutes of the United States the plaintiff was authorized to charge and receive interest or discount at the rate of six per cent. per annum, and no more, that

being the lawful rate of interest as provided by the general laws of the State of Pennsylvania.

Third. That the several private charters introduced by the plaintiff in evidence are not the charters of banks of issue, and no special rate of discount or interest is provided by said special acts.

56 Fourth. That the national banking association, plaintiff, is authorized to charge and receive as discount or interest only the rate allowed by the general laws of the State of Pennsylvania, or such different rate as may be limited to the banks of issue organized under the general laws of the State of Pennsylvania, and the several banking associations whose charteas have been offered in evidence are not such banks of issue as are comtemplated in the act of Congress.

3. In that portion of the charge to the jury in which the court said:

"So that there are banks chartered in Pennsyluania within the contemplation of the act of Congress, so far as the right to charge interest is concerned, which may charge more than the rates fixed by the general laws of the State.

"The only remaining question is whether these are banks of issue, although by the special charters of the several banks nothing is said as to the right to issue paper money, yet by an act passed in 1861, a general law of the State, all banks incorporated by special charter after the passage of that act are made subject to its provisions. In other words, all the franchises conferred upon banks chartered under it may be made available to the banks chartered by special acts.

"Among the franchises conferred by the general law is the right
57 to issue paper, so that all the banks or at least a number of them, so far as I have been able to make an examination, by authority of the general law of the State may issue paper money, circulating money. And although they may not have availed themselves of that privilege, still they are not thereby taken out of the category of the banks of issue. If they have the privelege and do not exercise it, it does not change the character of such banks as are described in the act of Congress to which I have called your attention.

"So there is undisputed evidence of the incorporation of banks by special law of the State of Pennsylvania, which are banks of issue, and which are authorized to charge the rate of interest charged in this case, or more; and the plaintiff therefore has but exercised the right which the act of Congress conferred upon him, in making the contract upon which these suits are founded.

"This is sufficient to dispose of the defense set up here, and as the plaintiff has made out his case he is entitled to your verdict for the amount of these notes, with interest."

For which reasons the defendant below and plaintiff in error prays that the judgment entered in the said cause by the said circuit court of the United States for the western district of Pennsylvania may be reversed and set aside by the Supreme Court of the United States, and a venire facias de novo be awarded.

58 JAMES O. PARKER,

Counsel for J. B. Stark, Plaintiff in Error and Def't in the said Circuit Court of the United States.

SEPTEMBER 30TH, 1878.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the

circuit court of the United States for the western district of Pennsylvania, in the third circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you or some of you, between The Second National Bank of Wilkes Barre, a banking association established in the western district of Pennsylvania, under the laws of the United States, providing for national banking associations, plaintiff, and J. B. Stark, a citizen of the State of Pennsylvania, and a resident of the western district thereof, defendant, a manifest error hath happened to the great damage of the said J. B. Stark, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send
59 the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Wait, Chief Justice of the Supreme Court of the said United States, at Williamsport, this first day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and in the one hundred and second year of the Independence of the said United States.

[SEAL.]

B. S. BENTLEY, JR.,
Clerk C. C. U. S., W. D. Pa.

(Endorsed:) J. B. Stark, plaintiff in error, vs. Second National Bank of Wilkes Barre, defendant in error. Writ of error.

60 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

I, B. S. Bentley, jr., clerk, do hereby certify that the foregoing is a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, in a certain suit therein lately depending between the Second National Bank of Wilkes Barre, Pennsylvania, plaintiff, and J. B. Stark, defendant.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the said circuit court, at Williamsport, the eleventh day of October, A. D. 1878, and in the one hundred and third year of the Independence of the United States.

[SEAL.]

B. S. BENTLEY, JR.,
Clerk Circuit Court of the U. S., Western Dist. Penn'a.

(Indorsement on cover:) No. 303. J. B. Stark, plaintiff in error, vs. The 2nd National Bank of Wilkes Barre. W. Pennsylvania C. C. U. S. Filed 19th October, 1878.

FILED
APR 11 1881
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

No. 302.

D. G. DREISBACH, Plaintiff in Error,

vs.

THE SECOND NATIONAL BANK OF WILKESBARRE.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Brief of Argument for Plaintiff in Error.

Gazette and Bulletin Printing House, Williamsport, Pa.

STATEMENT.

The Second National Bank of Wilkesbarre, Pennsylvania, the defendant in error, brought suit against D. G. Driesbach, the maker, and J. B. Stark, the endorser, of two promissory notes, one for $8,000 and the other for $5,000. These notes were the last of a long series of renewals which had been regularly discounted by said bank. Interest was charged and paid at the rate of from eight to ten per cent. on the whole line of renewals, and the defendants, alleging that these rates were usurious, claimed under the National Bank Act the right to offset against the face of the notes sued upon the whole amount of interest paid and received. (Rev. Stat., Sec. 5197).

The court below, however, held that there were banks chartered by special acts, in the State of Pennsylvania, which were banks of issue under the State law, and were authorized to charge the rates of interest which had been paid by the maker of these notes, Driesbach, and that therefore these rates were not usurious within the contemplation of the National Bank Act.

This was the sole question raised in the court below.

SPECIFICATIONS OF ERROR.

The learned judge who tried this cause erred, first, in admitting the testimony embraced in the following offer of the plaintiff below, and in overruling the objections of the defendant below thereto, which offer and objections were as follows:

Plaintiff's counsel offer to prove in rebuttal that since the year 1869 the following State banks of issue have been organized in the State of Pennsylvania, under and by virtue and authority of the laws of the State, namely:

Manayunk Bank, by the act of 14th of June, 1871, P. L., p. 1358.

Southwark Bank, by the act of 2d June, 1871, P. L., p. 1359, of 1872.

Petroleum Bank, by the act of 20th November, 1871, P. L., p. 1381, of 1872.

Franklin Bank, by the act of 1st April, 1870, P. L., p. 736.

United States Banking Company, by the act of 2d June, 1871, P. L., p. 987, of 1873.

Lycoming County Savings Bank, by the act of 14th March, 1872, P. L., p. 1016, of 1873.

Somerset County Bank, by the act of 26th March, 1872, P. L., p. 1040, of 1873.

Butchers & Drovers' Bank, by the act of 27th April, 1870, P. L., p. 1537, of 1871.

Watsontown Bank, by the act of 27th March, 1872, P. L., p. 1043, of 1873.

Harmony Savings Bank, by the act of 24th April, 1867, P. L., p. 1311.

Germania Savings Bank, Pittsburg, by the act of 8th April, 1870, P. L.; p. 1050.

That the said banks were authorized by the laws creating them, respectively, to charge upon discounts and loans a rate of interest as follows, to wit, the first nine of said banks at such rates of discount as might be agreed upon by the parties, and the other two any rate of discount not exceeding ten per cent.; that some of the said banks were organized before the original loans were made by the plaintiff to D. G. Driesbach, the maker of the note in suit, and some have been since organized with the right to receive and charge upon discounts made by them respectively a rate of interest equal to or not exceeding the rate of discount which the said Driesbach agreed to pay upon the original notes and the renewals thereof; that the several State banks above named are all located and have their place of business within the State of Pennsylvania.

Plaintiff's counsel also offer in evidence the several acts of

Assembly incorporating the foregoing State banks specified; also the act of May, 1861, relating to banking companies, P. L., 503; also the act entitled "An act regulating banks," approved the 16th of April, 1850, P. L., 477, &c., &c.

Counsel for defendants object to the offer:

First. Because evidence as to the powers of particular banks incorporated under special acts of the Assembly is irrelevant.

Second. Because under Section 5197 of the Revised Statutes of the United States, national banks are only allowed to charge and receive such rate of interest or discount as is allowed by the law of the State in which the bank is located, or such rate as is limited for banks of issue organized under State laws; and that the several charters offered in evidence do not show that the banks chartered by them were banks of issue, and the plaintiffs do not offer to show that the said banks so chartered by special act of Assembly were authorized to transact business as banks of issue.

Third. Because when no rate of interest is limited, as in charters offered, the act of Congress fixes the rate of interest.

Fourth. Because it is incompetent to effect the construction of the act of Congress in question by the evidence of particular laws.

Fifth. Because it is generally irrelevant and incompetent.

2. The learned judge who tried the cause erred, second, in denying the following points presented by defendant below, and refusing to charge the jury as therein requested.

Counsel for the defendant request the court to charge the jury:

First. It appearing from the evidence that the defendant was charged by, and paid to plaintiffs, discount at the rate of eight to ten per cent. per annum, whereas the lawful rate of interest in the State of Pennsylvania is six per cent., and no more; and it appearing from the evidence that the entire

amount of discount paid by the said defendant to the said bank on the line of renewals which culminated in the notes in suit was $7,206.91, the defendant is entitled to offset that amount against the plaintiff's claim in this suit.

Second. That under Section 5197 of the Revised Statutes of the United States, the plaintiff was authorized to charge and receive interest or discount at the rate of six per cent. per annum, and no more, that being the lawful rate of interest as provided by the general laws of the State of Pennsylvania.

Third. That the several private charters introduced by the plaintiff in evidence are not the charters of banks of issue, and no special rate of discount or interest is provided by said special acts.

Fourth. That the National Banking Association, plaintiff, is authorized to charge and receive as discount or interest only the rate allowed by the general laws of the State of Pennsylvania, or such different rate as may be limited to the banks of issue organized under the general laws of the State of Pennsylvania, and the several banking associations whose charters have been offered in evidence are not such banks of issue as are contemplated in the act of Congress.

3. In that portion of the charge to the jury in which the court said: "So that there are banks chartered in Pennsylvania, within the contemplation of the act of Congress, so far as the right to charge interest is concerned, which may charge more than the rates fixed by the general laws of the State.

The only remaining question is whether these are banks of issue. Although by the special charters of these several banks nothing is said as to the right to issue paper money, yet, by an act passed in 1861, a general law of the State, all banks incorporated by special charter after the passage of that act are made subject to its provisions; in other words, all the franchises conferred upon banks chartered under it may be made available to the banks chartered by special acts.

Among the franchises conferred by the general law is the

right to issue paper, so that all the banks, or at least a number of them, so far as I have been able to make an examination, by authority of the general law of the State, may issue paper money—circulating money. And although they may not have availed themselves of that privilege, still they are not thereby taken out of the category of banks of issue. If they have the privilege and do not exercise it, it does not change the character of such banks as are described in the act of Congress to which I have called your attention. So there is undisputed evidence of the incorporation of banks by special law of the State of Pennsylvania which are banks of issue, and which are authorized to charge the rate of interest charged in this case, or more; and the plaintiff therefore has but exercised the right which the act of Congress conferred upon him in making the contract upon which these suits are founded.

This is sufficient to dispose of the defense set up here, and as the plaintiff has made out his case he is entitled to your verdict for the amount of these notes, with interest."

For which reasons the defendant below, and plaintiff in error, prays that the judgment entered in the said cause by the said Circuit Court of the United States for the Western District of Pennsylvania may be reversed and set aside by the Supreme Court of the United States, and a *venire facias de novo* be awarded.

JAMES O. PARKER,
Counsel for Pl'ff in Error and Def't in said Circuit Court of the United States.

September 30, 1878.

BRIEF FOR PLAINTIFF IN ERROR.

The notes in suit, made by D. G. Driesbach and endorsed by J. B. Stark, were the last of a long line of renewals discounted by the Second National Bank of Wilkesbarre, Pa.

Upon this line of renewals the bank had "received, reserved and charged" as interest or discount the sum of $7,206.91, which was about $3,000.00 in excess of the legal rate of interest in Pennsylvania.

Upon the trial, the maker, who had become insolvent, and his accommodation endorser, Stark, sought to offset, under the national bank act, the interest paid, on the ground that the bank, having reserved a greater rate of interest than was allowed, forfeited the entire interest agreed to be paid thereon.

The plaintiff then sought to rebut this position by offering in evidence the private acts of Assembly of Pennsylvania incorporating eleven banks of the class known as savings banks and banks of deposit, in most of which charters the bank is authorized to "discount any bill of exchange, foreign or domestic, promissory note or other negotiable paper, and the interest may be received in advance, at such rates as may be agreed upon by the parties," &c.

Upon this evidence, admitted under exception, his Honor, the Judge of the Circuit Court, held and so charged the jury "that there are banks chartered in Pennsylvania within the contemplation of the act of Congress, so far as the right to charge interest is concerned, which may charge more than the rates fixed by the general laws of the State," and "so there is undisputed evidence of the incorporation of banks by special law of the State of Pennsylvania, which are banks of issue and which are authorized to charge the rate of interest charged in this case, or more; and the plaintiff therefore has but exercised the right which the act of Congress conferred upon him in making the contract upon which these suits are founded."

The jury thereupon returned a verdict for the full amount of the notes in suit, with interest, without allowing the set-off claimed, and judgment was so entered on the verdict.

The act in question (Rev. Stats., Sec. 5,197), is as follows:

"Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State, territory or district where the bank is located, and no more, except that where, by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State or territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum," &c.

We contend, *first*, that this act contemplates only a general law of the State regulating the rate of interest for *all* citizens; or *secondly*, where, as is the case in some States, a different but uniform rate is allowed to banks of issue, in such State national banks may charge the same rate; but that the act does not contemplate such unusual privileges as may in isolated instances be granted by special charters.

In Pennsylvania the legal rate of interest is six per cent., (act 28th May, 1858, Purd. Dig., p. 803), and by the last general banking act of the State the same rate is limited to banks of issue.

"Every bank may take, reserve, receive and charge on any loan or discount made, or upon any note or bill of exchange, or other evidence of debt, at the rate of six per centum per annum on the amount of any such note, bill of exchange or other evidence of debt so discounted, and no more." (Act May 1, 1861, Pamphlet Laws, 503; Purd. Dig., p. 123, Pl. 36.)

But there is a distinction even here. By the general law but six per cent. can be charged on the amount loaned. By the general law relating to banks of issue six per cent. of the

face of the note, bill, &c., may be deducted as discount in advance. In other words, in the former case the borrower from the individual would receive on a note for $1,000.00, at sixty days, $989.60; in the latter, he would receive from the bank only $989.50.

The bank is put on a more favorable footing than the individual by the *general law* of the State, and the intention of this act of Congress was, we submit, to place a national banking association upon the same footing as banks of issue under the general laws of the State in which it may be established. In other words, this section contemplates, first, the general enactment applicable to all the citizens of a State; secondly, if, by a general law, banks of issue in that State are empowered to charge a different rate, then such rate may be limited for national associations in such State. It does not contemplate, thirdly, a special, exceptional provision in a private charter at variance with such general law, even though that private charter be the charter of a bank of issue; otherwise a solitary ancient charter, in which exceptional power had been given to charge and receive *any* rate of interest or discount that might be agreed upon, would authorize every national bank in that State to exercise a like power.

The act of Congress is dealing with a *class*, not with exceptions. It purposes to put national banks in any State on an equal footing with banks of issue in such State *as a class*. Any other construction would give the national banks advantages over the State banks by putting them all on a footing with the most exceptionally advantageous special charter in that State. Surely Congress did not so intend to injure State banks as a class. Is it not clear that Congress only sought to secure to national associations the benefit of the general policy of each State in which such associations might be established?

But even if this position be not sound, it is only such a different rate as is limited to *banks of issue* as will authorize a national bank to charge any other than the legal rate of the State.

The eleven private charters offered in evidence authorize the collection of rates of interest higher than six per cent.; in most cases such rate as may be agreed upon is allowed, but the real question is, are these the charters of banks of issue? If not, then their charters were inadmissible for the purpose for which they were offered, and there was no evidence justifying the charge to the jury that there was "undisputed evidence of the incorporation of banks by special law of the State of Pennsylvania, which are banks of issue, and which are authorized to charge the rate of interest charged in this case," &c.

We contend that the said eleven banks were not banks of issue:

1st. Because they have been declared not to be by the Supreme Court of the State of Pennsylvania, whose judgment upon that point is conclusive and final.

2d. Because no power to issue bills is given in any of the charters in evidence.

3d. Because no such power is given by any general enactment applicable to these eleven banks.

I. In *First National Bank of Clarion vs. Gruber*, reported in 8 Weekly Notes of Cases, 119, but not yet, at the time of the preparation of this brief, reported in the State Reports of Pennsylvania, the action being debt by Gruber against the bank to recover under the provisions of the act of Congress of June 3, 1864, double the amount of certain payments of usurious interest made within two years, the defendant "filed a special plea setting forth the charters of incorporation of eighteen banks doing business in the State of Pennsylvania, all of which defendant averred were banks of issue, and authorized to take and receive interest at a higher rate than six per cent. per annum, wherefore defendant alleged that the First National Bank of Clarion was in like manner, under the provisions of the 5,197th section of the Revised Statutes of

the United States, authorized to receive interest at a higher rate than six per cent."

The Supreme Court of Pennsylvania ruled (opinion filed Oct. 27, 1879, over a year after judgment rendered in the case at bar): "The learned judge of the court below properly ruled that the banks created by the several acts of Assembly given in evidence by the defendant were not banks of issue. These acts specifically define the powers of the several corporations created by them, but among them is not found the power to issue circulating notes, commonly known as bank notes; but the rule is that, as corporations are purely statutory creatures, powers not specifically granted are to be taken as withheld, and cannot be raised by implication, unless they are auxiliary to and necessary for the proper exercise of those granted. The defendant then having failed to show that the banks referred to were banks of issue, it cannot, under the act of Congress, claim the right of these banks to take more than six per cent. interest on loans and discounts."

The eighteen banks whose charters were thus passed upon were as follows, with dates of charters:

Western Savings Bank and Safe Deposit Company of Pittsburg, April 20, 1866.

Franklin Bank of Philadelphia, April 1, 1870.

People's Bank of Philadelphia, Feb. 25, 1870.

Bank of America, Philadelphia, April 27, 1870.

Butchers and Drovers' Bank, Philadelphia, April 27, 1870.

Market Bank of Philadelphia, April 27, 1870.

Quaker City Bank, May 23, 1871.

Iron Bank, May 19, 1871.

Manayunk Bank, Philadelphia, June 14, 1871.

Twenty-Second Ward Bank, Germantown, May 17, 1871.

Petroleum Bank, Philadelphia, Nov. 20, 1871.

Southwark Banking Company, Philadelphia, June 2, 1871.

West End Bank, Philadelphia, Nov. 20, 1871.

United States Banking Company, Philadelphia, June 2, 1871.

Iron and Glass Dollar Savings Bank, Birmingham, March 1, 1872.

State National Bank, June 2, 1871.

Tenth Ward Bank, Pittsburg, March 12, 1872.

Safe Deposit and Trust Company, Wheatland, April 5, 1872.

The charters offered in evidence in the case at bar, for a like purpose, were:

Manayunk Bank, Philadelphia, June 14, 1871.

Southwark Banking Company, Philadelphia, June 2, 1871.

Petroleum Bank, Philadelphia, Nov. 20, 1871.

Franklin Bank, Philadelphia, April 1, 1870.

United States Banking Company, Philadelphia, June 2, 1871.

Butchers and Drovers' Bank, Philadelphia, April 27, 1870.

Lycoming County Savings Bank, March 14, 1872.

Somerset County Bank, March 26, 1872.

Watsontown Bank, March 27, 1872.

Harmony Savings Bank, April 24, 1867.

Germania Savings Bank of Pittsburg, April 8, 1870.

The first six of these charters, therefore, were among those passed upon by the Supreme Court of Pennsylvania, in *First National Bank of Clarion vs. Gruber.* Of the remaining five, in the charters of the Lycoming County Savings Bank and the Watsontown Bank the rate of interest is limited to six per cent. Instead of the words used in the remaining charters, viz., "may discount any bill of exchange, foreign and domestic, promissory note or other negotiable paper, and the interest may be received in advance at such rates as may be agreed upon by the parties," we have in these two charters, "may discount any bill of exchange, foreign or domestic, promissory note or other negotiable paper, and the interest, *at legal rates*, may be received in advance;" so that these two charters are not evidence for the plaintiff's purpose, because they limit the rate to six per cent. The Somerset County Bank charter recites in express terms, in section 12, that "it is not a bank of issue," so that it, too, may be disregarded.

There are then only nine charters of banks in evidence which authorize a larger rate of interest than six per cent., six of which have been declared by the Supreme Court not to be banks of issue, one recites in express terms that it is not a bank of issue, and the two remaining—the Harmony Savings Bank and Germania Savings Bank—show from their titles they belong of the class of savings banks, not of banks of issue, and their charters bear a sufficiently close resemblance, in regard to the limited powers granted, to the charters passed upon in *Bank vs. Gruber* to be ruled by that decision.

This adjudication by the Supreme Court of Pennsylvania is conclusive upon all private charters of this character. The construction and effect of the acts of Assembly of any State it is the peculiar province of its State Courts to determine, and when determined by the highest court of that State such adjudication will be accepted by the federal courts as binding upon them. It is needless to cite authorities upon a point so often ruled. The question at issue comes under no one of the exceptions to the general rule, and we submit, therefore, that it is not now or here open to question that the private charters offered in evidence by the defendant are not the charters of banks of issue. The evidence was irrelevant and the charge of the learned judge was error.

II. and III. Irrespective of the adjudication relied upon, it is clear upon examination that these banks had no power, by the terms of their charters or by general enactment, to issue notes and bills.

It is not pretended anywhere that in any one of these charters is power given to issue bank notes, nor is it contended that a banking corporation would have such power by implication, or without the right were specifically granted, but it is asserted that a general act of the Assembly of Pennsylvania conferred that power upon all banks incorporated by private act, and that the eleven banks in question had such power by virtue of that general law.

The court below refers to such supposed legislation in a very indefinite way. He says in the charge: "The only remaining question is whether these are banks of issue. Although by the special charters of these several banks nothing is said as to the right to issue paper money, yet by an act passed in 1861, a general law of the State, all banks incorporated by special charter after the passage of that act are made subject to its provisions; in other words, all the franchises conferred upon banks chartered under it may be made available to the banks chartered by special acts."

The plaintiff put in evidence two general acts of the Assembly of Pennsylvania: Act of May 1, 1861, "To establish a system of free banking," and act of April 16, 1850, relating to banking companies. We may expect to find such general power, then, in one of these two acts, if at all. As the court below only cited the act of 1861, we will consider that first. Nowhere from its first to last section, or in any supplement, do we find any such provision as the learned judge below cites, that "all banks incorporated by special charter after the passage of that act are made subject to its provisions," or any terms which would bear such construction. It begins on page 503 of the Pamphlet Laws of Pennsylvania for 1861, and in Purdon's Digest of the Laws of Pennsylvania, page 115. It contains 43 sections, and the only sections relating to banks incorporated under special charters are the 37th and 39th. The 37th reads: "That the several banks and banking associations of this Commonwealth incorporated for the purposes of banking under special charters are hereby authorized, by a vote of the stockholders of said institutions, *to call in and cancel their circulating notes and to carry on the business of banking under the provisions of this act*, and that any association of citizens who have declared their intention to make application to the present Legislature for an act of incorporation to organize a *bank of issue*, and have caused such advertisement to be made of the same as is required by law, may, with their associates, establish a bank under the provisions of this act at any time after its passage."

Section 39: "That the banks of this Commonwealth doing business under other laws than this act are hereby authorized, by a vote of the stockholders of each of said institutions, *to call in not less than twenty-five per centum per annum of their circulating notes*, and upon depositing with the Auditor General an equal amount of the bonds of this Commonwealth or of the United States, as provided in the 10th section of this act, shall be entitled to receive an equal amount of circulating notes in blank of the denominations * * * * * * * * * * * and when fifty per centum of the circulating notes of the old bank are called in and canceled, the said bank shall be entitled to letters patent from the Governor, and have all the privileges and advantages of this law," &c.

The two are the only sections relating to banks incorporated by special charter, or by or under any other law of the State.

They do not make banks incorporated by special charter or other law subject to its provisions.

They only *authorize* such other banks, by a vote of their stockholders. to avail themselves of its provisions.

From the portions of the sections we have italicized it is evident the act has reference solely to such other banks as are already banks of issue, or who have (at the date of the act) declared their intention to make application to the Legislature to incorporate them as banks of issue. In both sections the banks so incorporated by special or other acts are authorized *to call in and cancel their circulating notes.* Only banks of issue so chartered by special or other laws are contemplated by these sections therefore.

And finally, such other banks so accepting this act of May, 1861, are to be from thenceforth under its provisions, and one of these provisions is that contained in the 33d section, to wit: "That every bank may take, reserve, receive and charge on any loan or discount made, or upon any note or bill of exchange, or other evidence of debt, at the rate of *six per centum*

per annum on the amount of any such note, bill of exchange or other evidence of debt so discounted, *and no more.*"

So the effect of this act would seem to be quite the contrary of that which the learned judge inadvertently gave to it, and if these eleven banks came under its provisions in any mode prescribed they were all limited to a rate of discount of six per centum.

The act of the 16th of April, 1850, also a general banking law, but whose provisions were to a large extent superseded by the act of 1861, already analyzed, will be found at length in the Pamphlet Laws of 1850, pp. 477, &c., and in Purdon's Digest, p. 128, it is digested with the other general banking laws of Pennsylvania passed prior to the act of 1861. It regulates the incorporation, organization, management, powers, duties and liabilities of *banks of issue* alone, and its first section is as follows:

"Every banking corporation hereafter created by any special act of the General Assembly, and every bank hereafter rechartered, or the charter of which shall be hereafter extended or renewed by any such act of Assembly, shall be subject to the provisions of this act."

Section 2 provides: "Whenever a special act of the General Assembly shall be passed creating a new bank, the capital stock of such bank shall be divided into shares of fifty dollars," &c. The remainder of section 2, and sections 3, 4 and 5, regulate subscriptions to and payment of the capital stock.

Sections 6, 7 and 8 prescribe the mode of organization, and define the powers of such banks; section 9, the rechartering, extending or renewing the charter of any incorporated bank.

Section 10 prescribes that "The following rules, restrictions, limitations and provisions shall form and be the fundamental articles of the constitution of every bank which shall be hereafter incorporated and of every incorporated bank hereafter rechartered, or of which the charter shall be hereafter extended or renewed."

Then follows the most minute provisions for the regulation of such corporations. Among them it is sufficient for our purpose to notice but three. These are:

a. That the capital stock of said banks *shall* be divided into shares of fifty dollars each.

b. The election of directors *shall* be held annually on the third Monday of November.

c. The stockholders may fix the number of directors at their annual meeting.

It will be manifest now from a comparison of this act with the special charters in question that they belong to a wholly different class from those contemplated in the act, and that none of its provisions are applicable to them.

In the first place, every one of these eleven private acts of incorporation contain provisions wholly at variance with those positively prescribed in the act of 1850 for all banks embraced within its meaning.

We have noticed that the act provides, *inter alia*, that the capital stock of all banks contemplated by it *shall* be divided into shares of fifty dollars each, that the annual election of directors *shall* be held annually on the third Monday of November, and the stockholders may fix the number of directors.

In every one of the eleven charters the number of directors is fixed in the charter. In all of them but the Somerset, Watsontown and Harmony, the shares are fixed at one hundred dollars or one thousand dollars each, and the annual election of directors is in *every* charter fixed at a different time from that prescribed in the general act (in seven of them on the second Tuesday in January), except that in the Lycoming County Savings Bank the date is left to be fixed in the by-laws.

Is it conceivable that the Legislature would embody in the private acts wholly different regulations from those contained in the general act if these private charters were of the class contemplated in the general act? The argument is as follows:

A Legislature passes a general act, prescribing the powers and limitations of the class of banks known as banks of issue, enacts that "the following rules, restrictions, limitations and provisions *shall* form the fundamental articles of the constitution of every bank which shall be hereafter incorporated."

Thereafter the same Legislature incorporates eleven banks with rules, restrictions, limitations and provisions differing from those made obligatory in such general act.

Therefore these eleven banks are not among those contemplated by the said general act.

Again, it is manifest that the act of 1861, being a general free banking law, was intended to take the place of all prior general laws on the same subject, including the act of 1850; it provides for a mode of adopting its provisions by every bank of issue then chartered; it plainly contemplates that every bank of issue to be thereafter organized will be organized under its provisions, and it prescribes a uniform rate of interest which may be charged and received. In this view it would be a violent and strained construction to hold that these eleven banks were incorporated as banks of issue under the provisions of an earlier act, containing no limitation as to rate of interest and with whose provisions their own were in conflict. There is certainly no power to issue bank bills found in their charters. We can find no such power given to them in any general act. The settled rule of construction is that if the power claimed by a corporation is not expressed in plain words, or by necessary implication, it does not exist. If there be room for doubt as to the right to exercise a power, then the power is not there. *Commonwealth vs. Erie and North-East R. R. Co.*, 27 Pa. St. Rep., 351.

There is an able review by Agnew, late Chief Justice of Pennsylvania, of the legislation in that State upon the subject of banks and banking since 1814, in an opinion filed in *Gruber vs. First National Bank of Clarion*, when that case was first before our Supreme Court, reported in 8 Weekly Notes of Cases, 113. He reaches conclusions in harmony with those

expressed in this brief, and his view was affirmed by the opinion of all the judges in the less elaborate opinion already referred to (supra. p.), when the same case was a second time before that court.

The charters of the Manayunk Bank, the Watsontown Bank and the Germania Savings Bank of Pittsburg are appended.

JAMES O. PARKER,
E. N. WILLARD,
For Plaintiff in Error.

AN ACT

To incorporate the Manayunk Bank, located in the city of Philadelphia.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same*, That Charles F. Abbott, James M. Preston, John W. Dixon, W. Anderson, J. R. Shelton, their proxies and their assigns, associates and successors, shall be and they are hereby created a body politic and corporate, by the name and style of the Manayunk Bank, to be located in the city of Philadelphia, and by that name shall have perpetual succession, and may sue and be sued, plead and be impleaded in any court whatsoever, may have a common seal, may renew or alter the same, also may have the right to own and hold real estate and improve or dispose of the same at pleasure.

SECTION 2. The capital stock of said bank shall consist of five hundred shares, of the value of one hundred dollars each, with the privilege of increasing the same from time to time, by a vote of the directors, to an amount not exceeding five thousand shares, of like value per share; and when the capital stock is so increased the stockholders shall have the right to take the shares authorized by such increase at such price as the board of directors may name: *Provided*, That if such shares of new stock are not taken by the stockholders within ten days after receiving notice of such increase, then the board of directors may dispose of such shares of such stock in such manner as they may deem best.

SECTION 3. The corporators, or a majority of them, shall have power to open books for subscriptions to the capital stock, at such times and places as they may deem expedient; and when two hundred shares or more of said stock shall have been subscribed, and ten per centum thereon of the same paid in, the shareholders may elect a president and six directors to

serve until the next annual election, or until their successors shall have been duly elected and qualified; vacancies arising from death, resignation or inability to serve to be filled by the board.

SECTION 4. The said bank shall have power and may borrow or lend money for such periods as the said bank may think proper, may discount any bill of exchange, foreign or domestic, promissory note or other negotiable paper, and the interest may be received in advance, at such rates as may be agreed upon by the parties, and shall have the right to hold in trust, or as collateral security for loans or advances or discounts, estate, real, personal or mixed, including the notes, bonds, obligations or accounts of the United States, individuals or corporations, and to purchase, collect and adjust the same, and to dispose thereof for the benefit of the said bank, or for the payment of the debts as security for which the same may be held in any market of the world, without proceedings in law or equity, and for such price and such terms as may be agreed upon by the said corporation and the parties contracting therewith.

SECTION 5. The board of directors shall make all by-laws necessary for properly conducting the business of the bank, not inconsistent with the laws of the State or of the United States, and shall have power to require payments of any amount remaining unpaid on the stock of said bank, at such times and in such proportions as they think proper, and after thirty days' notice, under penalty, in case of non-payment as required, of forfeiture to the bank of such stock and all previous payments thereon.

SECTION 6. The said bank may receive money to keep for its depositors, either with or without interest payable thereon, and may buy or sell bullion, buy, sell, draw or negotiate bills of exchange, bills of lading, stocks and bonds of all companies, States and of the United States, or other good and sufficient securities, at such rates of interest as may be agreed upon by said bank and the borrowers.

SECTION 7. That it shall be lawful for said bank to transact financial business as a natural person, and as such to become and act as a treasurer and financial agent of charitable, literary, manufacturing, financial and religious institutions and corporations, and as financial agent of the State of Pennsylvania, and other States and city governments, and counties and districts, in the management of their business, and shall give security to such institutions, States and governments for the faithful performance of the duties if required.

SECTION 8. The board of directors shall have power to declare and pay dividends out of the earnings of the bank, to the stockholders, at such times and in such amounts as to them may seem proper.

SECTION 9. The annual election for the president and directors shall be on the second Tuesday of January of each year, unless changed by the by-laws of the bank; the directors shall have power to elect all officers or agents they may deem necessary for conducting the business of the bank, except president; stockholders shall be entitled to one vote for each share of stock, and may vote in person or by written proxy, but said proxy must be dated within six months of and five days prior to the election for which such proxy was given; twenty days' notice, by publication in one or more daily newspapers, shall be given of the time and place where such election will be held, and said election shall be conducted according to the by-laws.

SECTION 10. That the said corporation shall pay into the treasury of the Commonwealth such bonus and taxes as now or may hereafter be required by law; and this charter shall continue for twenty years.

JAMES H. WEBB,
Speaker of the House of Representatives.

WILLIAM A. WALLACE,
Speaker of the Senate.

Approved—The fourteenth day of June, Anno Domini one thousand eight hundred and seventy-one.

JOHN W. GEARY.

AN ACT

To incorporate the Watsontown Bank, to be located at Watsontown, in the county of Northumberland.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same*, That R. G. Cook, George Burns, John H. Goodman, Samuel M. Miller, Samuel Caldwell, Joseph Hollopeter, Isaac Vincent, John Bly, A. J. Guffy, John M'Farland, A. T. Goodman, William F. Kirk, E. H. Russell, Philip Shay, Levi Lynn, Robert Russell, and the Hon. Joseph Nicely, their proxies, assigns, associates and successors, shall be and they are hereby created a body politic and corporate, by the name, style and title of the Watsontown Bank, to be located at Watsontown, in the county of Northumberland, and by that name shall have perpetual succession; may sue and be sued, plead and be impleaded in any court whatever; may have a common seal; may renew or alter the same, and may have the right to own and hold real estate requisite for the transaction of their business, or in security for or satisfaction of debts, and improve or dispose of the same for the benefit of said bank.

SECTION 2. The capital stock of said bank shall be thirty thousand dollars, to be divided into shares of fifty dollars each, with the privilege of increasing the same, by a vote of the directors, to two hundred thousand dollars of like par value per share; the stockholders shall have the right to take such increased shares at such price as the board of directors may name, and if not taken within ten days after receiving notice of such increase the directors may dispose of the same as they may deem best.

SECTION 3. The corporators or a majority of them shall have power to open books for subscriptions to the capital stock at such times and places as they may deem expedient, and when thirty thousand dollars shall have been subscribed, and twenty thousand dollars of the capital paid in, the stockholders may elect eight directors to serve until the next annual

election or until their successors shall have been duly elected and qualified.

SECTION 4. The said bank shall have power and may borrow or lend money for such periods as the said bank may think proper, may discount any bill of exchange, foreign or domestic, promissory notes or other negotiable paper, and the legal rate of interest may be received in advance, and shall have the right to hold in trust or as collateral security for loans or advances or discounts, estate, real, personal or mixed, including the notes, bonds, obligations or accounts of the United States, individuals or corporations, and to purchase, collect and adjust the same and to dispose thereof, for the benefit of the said bank or for the payment of the debts as security for which the same may be held, in any market of the world, and for such price and such terms as may be agreed upon by the said corporation and the parties contracting therewith.

SECTION 5. The bank may receive money to keep for its depositors, either with or without interest payable thereon, and may buy or sell bullion, buy, sell, draw or negotiate bills of exchange, bills of lading, stocks or bonds of all companies, States and of the United States, or other good and sufficient securities as may be agreed upon by said bank and the borrowers.

SECTION 6. That it shall be lawful for said bank to transact financial business as a natural person, and as such to become and act as a treasurer and a financial agent of charitable, literary, manufacturing, financial and religious institutions and other corporations, and shall give security for faithful performance if required.

SECTION 7. The board of directors shall make all by-laws necessary for conducting the business of the bank not inconsistent with the laws of the State or of the United States, and shall have power to require the payment of the unpaid stock of said bank at such time and in such proportions as they may think proper, and after thirty days' notice, under penalty

in case of non-payment as required, of forfeiture to the bank of such stock and all previous payments thereon, and shall have power to fill all vacancies arising from death, resignation or inability to serve, to declare and pay dividends out of the earnings of the bank to the stockholders, at such times and in such amounts as to them may seem proper, and to elect all officers or agents they may deem necessary for conducting the business of the bank, including president.

SECTION 8. The annual election for directors shall be on the last Monday of January of each year, unless changed by the by-laws of the bank; stockholders shall be entitled to one vote for each share of stock, and may vote in person or by written proxy; said proxy must be dated within three months of and five days prior to the election for which the proxy was given; twenty days' notice by publication in one or more newspapers shall be given of the time and place when such election will be held, and the election shall be conducted according to the by-laws.

SECTION 9. That the said corporation shall pay into the treasury of the Commonwealth such bonus and taxes as are now or may hereafter be required by law, and this charter shall continue for twenty-five years.

SECTION 10. This charter shall continue for twenty years, and the stockholders are individually liable in double the amount of stock held by them.

SECTION 11. The Legislature reserves the right to alter, amend or revoke this charter at any time the interest of the Commonwealth may require it: *Provided however*, That no injustice be done to the incorporators.

Approved—The twenty-seventh day of March, Anno Domini one thousand eight hundred and seventy-two.

JOHN W. GEARY.

AN ACT

To incorporate the Germania Savings Bank of Pittsburg.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same*, That H. P. Muller, Adam Reineman, A. S. Bell, James L. Graham, G. Schleiter, Philip Mutz, Joseph Abel, C. Meyran, Mon. G. Schmertz, John F. Havecotti, Charles F. Schwartz, and their successors, be and are hereby made and created a corporation and body politic, by the name and style of the Germania Savings Bank of Pittsburg, and by that name shall have perpetual succession, and by law be capable to hold and dispose of property, to sue and be sued, plead and be impleaded, answer and defend in all courts of law and equity, or in any other place whatsoever, and to make, have and use a common seal, and the same to alter and renew at pleasure, and generally to do every act and thing necessary to carry into effect the provisions of this enactment, and promote the object and design of this act of incorporation, to be located in the city of Pittsburg and county of Allegheny: *Provided*, That a misnomer of the said corporation, in any instrument, shall not vitiate the same if the intent of the parties can be clearly ascertained.

SECTION 2. That for the greater security of depositors in the said bank, it is hereby enacted that a capital stock shall be created, to consist of one hundred and fifty thousand dollars, divided into one hundred and fifty shares of one thousand dollars each; that each of the corporators shall be the owner of at least one share, the rest to be disposed of as they shall see fit; the said capital to be paid in, or secured to be paid, by the several corporators and owners of the same, and to be always liable for the payment to the depositors of the principal and accrued interest thereon; that it shall not be lawful for any stockholder to sell or transfer his stock, except to the corporation or otherwise, as may be provided in the by-laws

of the board of corporators; the said corporators shall regulate, by their by-laws, the rate of interest, not exceeding six per centum per annum, that shall be paid on deposits; and the surplus earnings, after paying interest to depositors and defraying the expenses of the corporation, may be divided among the corporators, or may be created into stock and distributed *pro rata* among the stockholders for the greater security of the depositors; the said capital of one hundred and fifty thousand dollars, and any greater sum to which, under the provisions of this section, it may be increased, shall be at all times liable to the depositors for the payment of their deposits and the interest thereon.

SECTION 3. That the business of the said corporation shall be to receive on deposit, from time to time, such sums of money, not less than three dollars for the first deposit, and not less than one dollar for all subsequent deposits, as may be offered, and to invest the same in the stocks of this Commonwealth, or of the United States, or in stocks or bonds of any city authorized to be issued by any act of the Legislature of this Commonwealth, or in other stocks, and in bonds and mortgages, and also to buy and sell bonds and mortgages and promissory notes not having more than six months to run, with such bonds and endorsements as may be approved by the corporators, and such real estate as they may deem desirable: *Provided however*, That no rate of interest or discount exceeding ten per centum shall be charged in any such purchase of stocks, bonds, et cetera, authorized by the provisions of this enactment; the said corporation shall receive all sums of money that may be offered as aforesaid, and shall invest the same in the manner aforesaid as soon as practicable; they shall allow to the depositors interest upon the deposits, to be regulated as aforesaid, and they shall pay the amounts deposited, with the interest thereon, at the bank of said corporation, at any time during business hours, on demand: *Provided however*, That not more than twenty-five dollars shall be required to be paid to any one depositor on any one day, unless

a written notice be given in accordance with the by-laws of said corporation.

SECTION 4. That said corporation shall be regulated in all other matters, not mentioned in the preceding sections or at variance therewith, by the provisions of the act of Assembly to incorporate the Dime Savings Institution of Pittsburg, approved the eleventh day of April, Anno Domini one thousand eight hundred and sixty-two, and the supplement thereto, approved the fourth day of April, Anno Domini one thousand eight hundred and sixty-five; *Provided*, That said corporation shall pay into the treasury of the Commonwealth such bonus and taxes as are now or may hereafter be required by law.

SECTION 5. That the stockholders shall be personally liable in an amount equal to the capital stock in addition thereto.

BUTLER B. STRANG,
Speaker of the House of Representatives.

CHARLES H. STINSON,
Speaker of the Senate.

Approved—The eighth day of April, Anno Domini one thousand eight hundred and seventy.

JOHN W. GEARY.

OFFICE
OCT 17 1895
JAMES H. MCKENNEY, CLERK

IN THE

Supreme Court of the United States.

No. 202.

D. G. DRIESBACH, Plaintiff in Error,

vs.

THE SECOND NATIONAL BANK OF WILKESBARRE.

Error to the Circuit Court of the United States for the Western District of Pennsylvania.

ARGUMENT FOR DEFENDANT IN ERROR.

Sterling Publishing House, Williamsport, Pa.

IN THE

Supreme Court of the United States.

No. 302.

D. G. DRIESBACH, Plaintiff in Error,

vs.

THE SECOND NATIONAL BANK OF WILKESBARRE.

Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

ARGUMENT FOR THE DEFENDANT IN ERROR.

There are no material disputed facts. The question is one of law only, and involves the construction of the National Bank Act (sections 5197 and 5198), which limit the rate of interest which national banks may take.

On the 20th of April, 1871, the bank discounted for Driesbach his note, endorsed by J. B. Stark, for $5,000, at ninety days, which was renewed every ninety days thereafter.

On the 24th of October, 1872, $1,000 was paid, and it was renewed for $4,000.

January 25, 1873, $1,000 was paid, and it was renewed for $3,000, and subsequently renewed every ninety days for $3,000 until the note of May 12, 1877, which was the last of the series of this note.

September 12, 1872, the bank discounted for Driesbach another note, endorsed by J. B. Stark, for $5,000, at ninety days. This note was in like manner renewed every ninety days for the same amount, and with the same endorsement. until July 11, 1877, when it was paid by the check of Mr. Nesbit, who discounted the note of Driesbach for $5,000, at thirty days. This note matured at the same time as the $3,000 note, and

IN THE

Supreme Court of the United States.

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on the 11th day of August the two notes were consolidated into one note, at ninety days, for $8,000, which the bank discounted, and which is one of the notes in suit (p. 15).

There was also another note of Driesbach, endorsed by Stark, August 16, 1871, for $5,000, at ninety days, discounted by the bank, which also was renewed every ninety days for the same amount, and ended in the note of September 6, 1877, for $5,000, at ninety days, which is the second note in suit (p. 4).

It is not disputed that the original notes were discounted under an arrangement for a line of discount upon notes, to be renewed from time to time and to be carried, upon the agreement of Driesbach, "to pay discount at ten per cent. a portion of the time, a portion of the time nine and a portion of the time eight," and which "discount was paid in pursuance and in accordance with the terms of that agreement" (p. 15).

The bank charges on the first discount of the three several notes were deducted from the face of the note and the net proceeds passed to the credit of the maker, but the interest or discount for all the renewals was paid to the bank when the notes were renewed.

Driesbach, in his affidavit of defense (p. 5), swears that he "has *paid* to said bank interest on said notes," &c.

The counsel for the defendant, in the points submitted to the court, say: "It appearing from the evidence that the defendant was charged by and *paid* to plaintiff discount at the rate of eight to ten per cent. per annum," &c., (p. 18).

Mr. Spalding, the cashier (p. 15), swears that the discount was *paid* in pursuance of the agreement, &c.

It is not, therefore, to be doubted that the rate of interest in controversy has been paid by the defendant to the bank from time to time as the notes were renewed.

The whole amount is stated (p. 15) at $6,901.41, and to which is to be added the interest on the notes in suit, and all which the defendant claimed should be set off against the plaintiff's claim.

The court refused the instruction asked for by the defendant and charged that the plaintiff was entitled to a verdict for the amount of the notes, with interest.

Section 5197 of the Bank Act limits the rate of interest which the bank "may take, receive, reserve and charge." Section 5198 prescribes the penalty for "taking, receiving, reserving or charging" usurious interest.

It is not denied that the interest thus paid to the bank was in accordance with a certain and well defined contract between the parties.

In Oates v. National Bank, 10 Otto, 250, it is said: "The National Banking Act does not declare the contract, under which the usurious interest is paid, to be void. It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid."

In Barnet v. National Bank, 8 Otto, 558, the penal section was carefully considered, and it is said: "Two categories are thus defined and the consequences denounced:

"1. Where illegal interest has been knowingly stipulated for, but not paid, there only the sum lent, without interest, can be recovered.

"2. Where such illegal interest has been paid, there twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action against the offending bank, brought by the persons paying the same, or their legal representatives."

It is further held that, the statute having prescribed that as a penalty for such taking, the person paying such unlawful interest may recover back twice the amount so paid; "he can resort to no other mode or form of procedure."

In National Bank v. Adams, 9 W. N. C., 472, (March 3, 1881,) the Supreme Court of Pennsylvania, upon the authority of Barnet v. National Bank, reverse their previous decisions in Lucas v. Bank, 78 P. S. R., 228, and Oberholt v. Bank,

82 P. S. R., 490, and hold that "usurious interest actually received by a national bank in the renewals of a series of notes cannot be set off in a suit brought by the bank on the last renewal note of the series. The forfeiture of the interest only occurs where illegal interest has been stipulated for, but not paid.

"The only remedy of the defendant is by an action of debt against the bank, under the National Bank Act, to recover the penalty therein prescribed."

The case in hand, if the interest taken was unlawful, falls wholly within the second clause of the section. The interest in controversy does not stand as interest "stipulated for but not paid." In that event it may be admitted the interest-bearing quality of the note is destroyed, and in an action upon it the entire interest would be deemed forfeited. The contract would be then executory only; but in this case, the interest having been actually paid, the contract as to the payment of the interest—and this is the only question here involved—was fully executed, and the transaction falls exclusively under the penalty of the second clause, and the defendant cannot avail himself of such defense by way of set-off in this action.

We regard this position as conclusive of the case, but do not feel justified in omitting to bring to the notice of the court other considerations which we regard as equally conclusive.

We contend that the bank, in charging interest as she did from eight to ten per cent., did not transgress the law of Congress.

National banks have been national favorites, and construction will not be strained against them. The statute under which it is sought to subject them to a penalty must be strictly construed.

It authorizes them to take "interest at the rate *allowed* by the laws of the State."

In Tiffany v. National Bank of Missouri, 18 Wal., 409, it was held that "National banks may take the rate of interest

allowed by the State to natural persons generally, and a higher rate, if State banks of issue are authorized by the laws of the State to take it."

In Missouri the banks of issue organized under the State laws are limited to *eight per cent.*, but the rate of interest *allowed* by the laws of the State generally *is ten per cent.*

Justice Strong, delivering the opinion of the court, rests the judgment upon the necessity of protecting the national banks from the hazard of unfriendly legislation by the States, or to ruinous competition with State banks. It affirms their right to take such interest as the State "allows" her citizens to take. The statute as to this question, being penal, must be literally construed. It is not said that it must be at a "rate allowed" to citizens generally, nor to citizens, nor by general law, or general policy; neither does it make any distinction between persons natural or artificial, but in the broadest terms allows national banks to take "the rate allowed by the laws of the State."

In First National Bank of Mount Pleasant v. Duncan & Brother, (Pittsburg Legal Journal, June 12, 1878,) before Strong, Circuit Justice, and McKennan, Circuit Judge,—error to the District Court,—Judge Strong, delivering the opinion of the court, in which McKennan, J., concurs, strongly affirms the same doctrine.

The district judge, in construing these sections, had charged the jury: "Congress deals with general rules, and when it excepts banks of issue under the State laws it means the general law applicable to the whole State, and relating to banks of issue all over the State." The court say: "In this opinion we do not concur. It interpolates in the statute words which are not there, and it disregards the plain purpose for which the excepting clause was inserted. The act of Congress declares that where, by the laws of any State, a rate of interest different from the general rate shall be limited or allowed for State banks of issue, national banks shall be allowed the same. It says not a word of allowance to the banks of gen-

eral law. Charters offered by special law, granting special privileges to those who accept the offer, are as clearly laws of the State as are the most general enactments."

"And if we look to the purpose of Congress exhibited in the National Banking Act (the purpose of which we have spoken), what difference does it make whether State banks are authorized to take more than the interest allowed to natural persons, by special or by general laws? In either case they would encounter favored rivals and a destructive competition, against which they could not stand if they were not permitted to reserve and take interest at the rate accorded to State institutions. In either case the unfriendly State legislation, and the ruinous competition against which Congress intended to guard, would be equally possible. States may establish banks alongside of every national bank, and give them power against which the national banking associations could not compete. A construction of the act of Congress that opens the doors to such results cannot be accepted as the true one. It is inconsistent with the letter of the act, and still more with its purpose and spirit."

"We hold, therefore, that the evidence offered by the defendants should have been received. If there are State banks of issue in Pennsylvania authorized either by general or special laws to take interest on loans made by them at such rates as may be agreed upon between them and the borrowers, the defendants have transgressed no act of Congress by taking nine per cent. from the plaintiffs (that having been the rate agreed upon), and they are not liable in this action."

The same court reaffirmed this ruling in National Bank v. Tinstman. 36 Legal Intelligence, 238; Brown's National Bank Cases, 182. See, also, the charters cited in this case.

The Circuit and District Courts of Pennsylvania have uniformly so held the law down to the present time.

The banks in Pennsylvania, whose charters were offered in evidence, and many others, are allowed to take a rate of interest, some of them not exceeding ten per cent., and others

any rate which may be agreed upon. The policy of the State to allow these institutions to take ten per cent., or the "rate agreed upon," is as distinctly evident as the policy which limits her citizens to six. But it is not necessary that the rate, in order to be "allowed," should be within any general or defined policy, nor is the extent of such allowance material to the enquiry. We are seeking to interpret an act of Congress, and it is sufficient to know that the State has allowed any of her citizens to take a rate of interest to place the national banks upon the same footing. The interpretation of the act does not depend upon whether the law of the State allowed few or many to take interest at ten per cent., or more. And if it did, how should such enquiry be made, and what number shall be held to be sufficient? That there are many the charters in evidence show; that there are very many more no one will question.

To hold that the "rate allowed" by the laws of the State must be interpreted to mean by general law only, is to interpolate the statute—to lay the ground for imposing a penalty. Yet this court has held that the statute must be construed strictly. These charters show that very many banks of discount in the State are "allowed by the laws of the State" to charge as much and more interest than the defendant paid to the plaintiff in this case. Such charters are strictly within the terms of the statute, and would seem to be conclusive of the question.

The exception "that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed" for national bank associations, is a mere proviso, and cannot limit the enacting clause, which is an enabling provision, and allows the national banks to take whatever interest is allowed by the laws of the State without any limitation as to time, place or persons, natural or artificial, or any other qualification whatever.

But the bank is justified even under the exception, for we think it will appear not only that the banks whose charters are in evidence are banks of issue, but that all banks incor-

porated under the laws of the State, and not specifically prohibited from issuing notes, are banks of issue.

Every special bank charter and every general banking act invests the incorporated banking company with the general powers of a corporation, under which they may contract and be contracted with.

In no instance, unless possibly in some private act which has escaped examination, has the State ever passed an enabling act, other than the general and usual corporate powers, to enable any bank to issue its promissory notes—which become notes of circulation, simply from convenience and the faith which attaches to them that they will be redeemed in money, viz., gold and silver, on demand.

Homan's Bankers' Manual, 197: "Bank notes are promissory notes made by a bank or banker. They are ordinarily put in circulation as currency, and accordingly they usually pass and are received as cash or ready money." 1 Burr, 457, Miller v. Race; Morse, 458.

"At common law the right of banking pertains equally to every member of the community. Its free exercise can be restricted only by legislative enactment." Morse on Banking, 1.

"Restraining statutes being really in derogation of common law rights, will always be interpreted with reasonable liberality in favor of the infringer, and when they are penal in their character they will be construed with considerable strictness in his favor." Id., 1, 2.

"Banking corporations or associations, like others, may come into existence either under a charter or special act of incorporation, or under a general organic law. In the former case the courts seem generally to have regarded the acts of incorporation, and likewise, of course, all acts supplementary thereto, as public laws not requiring to be established by special proof, but to be judicially noticed within the State where the bank is situated." Id., 3.

The earliest incorporated bank in Pennsylvania was the Bank of North America, chartered by the act of April 1, 1782, repealed by the act of September 13, 1785, and revived for fourteen years by the act of March 17, 1787, (2 Smith's Laws, 399). It was continued for fourteen years from March 17, 1801, by the act of March 29, 1799. It was again extended by the act of March 21, 1814, which was the first general bank act, and provided for the establishment of thirty-nine banks in twenty-seven districts, scattered throughout the State, and subjecting all incorporated banks to its provisions.

Neither the act of 1787, nor any supplement, nor the general act of 1814, contained any enabling provision under which banks issued promissory notes; yet this bank, under its general corporate powers, issued promissory notes, and has always been a bank of issue, and among the largest in capital and circulation in the State, and so continued until it became a national bank.

From the earliest history of the State, individuals, private partnerships, and companies incorporated for any purpose, issued notes promising to pay money to order, or to the bearer, in the nature of bank notes, and which notes passed as currency, and were received on deposit. Some private associations claimed that they were not individually liable for the notes thus issued, except as provided by the terms of their private articles of association.

To correct this the act of March 28, 1808, was passed, (4 Smith's Laws, 536,) entitled "An act relating to the association of individuals for the purpose of banking."

"Section 1. That if any association of citizens, or others, shall hereafter be formed within this Commonwealth for the purposes of banking, or of borrowing or loaning money in any manner or upon any terms whatever, each and every person becoming a member of such association, or interested therein by subscription, contribution, stock or agreement to participate in profit or otherwise, and his assigns, shall be individually and personally liable for the debts and engagements

of such association in like manner, and to the same extent, as if he, she or they had personally contracted such debt or made such engagement, any agreement of such association with their creditors or others, or any declaration by them in any manner made to the contrary notwithstanding."

Section 2 provided that no company incorporated by laws of any other of the United States shall establish within this Commonwealth any banking house or office of discount and deposit.

It was then claimed, to avoid personal liability, that this act had constituted such associations corporations, but it was held not to have this effect in Myers v. Irvin, 2 S. & R., 368.

But abuses continued, and by an act supplementary to the act of 1808, passed March 19, 1810, (5 Smith's Laws, 108,) it was enacted:

Section 1. "That from and after the first day of May next, it shall be unlawful for any association of persons who now are, or hereafter may be connected for the purpose of banking, and who are not incorporated by law, to make, utter or issue any bills or notes in the nature of bank notes, payable to bearer or order, or otherwise; to loan any sum or sums of money upon any actual or accommodation note or notes; to receive any sum or sums in the nature of deposits, or to perform any other act which an incorporated banking company may lawfully do."

Then follow several sections providing penalties for violation of the law, and in the last section declaring that nothing in the act shall extend to any partnership in trade or business, "but only to the business of banking, or making, issuing or uttering of bills or notes payable to bearer, or order, or otherwise; to receive deposits, and loaning moneys on discount, in the manner herein referred to."

After most careful examination I can find no enabling provision authorizing banks to issue promissory notes, except that which necessarily inheres in corporate powers. Every refer-

ence to the issue of notes is in limitation of the power which is everywhere assumed to exist, and which was without limitation as to amount until the act of March 21, 1814, (P. L., 154,) entitled "An act regulating banks," which enacts, Article 6 of section 7, that "The total amount of the debts which any of the said corporations may at any time owe, whether by bond, bill, note or other contract, excepting the amount of money deposited in the bank for safe keeping, shall not exceed double the amount of their capital stock actually paid in."

"Section 8. That bills obligatory and of credit under the seal of the said corporations shall be assignable by endorsement," &c., "and bills or notes which may be issued by any of the said corporations, signed by the president and countersigned by the cashier thereof, promising the payment of money to any person or persons, his, her, or their order, or to bearer, though not under the seal of such corporation, shall be binding and obligatory upon the same in like manner and with like force and effect as upon any private person or persons, if issued by him, her, or them, in his, her, or their private capacity or capacities, and shall be assignable and negotiable in like manner as if they were so issued by such private person or persons; that is to say, those which shall be payable to any person or persons, his, her, or their order, shall be assignable by endorsement in like manner and with like effect as foreign bills of exchange now are, and those which are payable to bearer shall be negotiable by delivery only," &c.

The same section has a proviso that no note shall be issued by any of the said corporations of lower denomination than five dollars.

Section 12 provides "that the State Treasurer, in January of every year, shall publish a list of all the banks, or associations for the purpose of banking, and individuals and corporations issuing orders or notes payable to bearer or order in *the manner or nature of bank notes.*"

"Section 13. That all orders and notes in the manner or

nature of bank notes which shall be issued after the first day of January next by any unlawful and unincorporated bank, and all orders and notes payable to bearer or order in the manner or nature of bank notes which shall be issued after said day by any individual or corporation not incorporated for banking purposes by this or a special act of the General Assembly for that purpose, shall be absolutely null and void, and have no effect either in law or equity, and irrecoverable in any court within this Commonwealth."

The same general corporate powers are conferred, and the same and no other limitations to the issue of notes of circulation are expressed in the same words in the act of 1824, (P. L., 59, Art. 8,) which was the next general act, and are again re-enacted in the act of 1850, entitled "An act regulating banks," (P. L., 477, Art. 14,) which is still in force.

Nor is authority to issue notes of circulation conferred by special charter to particular banks. A few are prohibited from issuing such notes, but it does not seem ever to have been deemed necessary to confer the power affirmatively. When not prohibited it was assumed to exist, and the law was content to prohibit individuals, and corporations other than banks, from issuing such notes, and declaring in express terms that such notes, when issued by banking corporations, should be binding upon the bank, though not under the seal of the bank.

At common law a corporation could bind itself only by deed under its seal. But this rule, although long ago abandoned, sufficiently explains the purpose of the acts of 1814, 1824 and 1850, declaring that the notes of incorporated banking companies, promising to pay money, should be binding, although not under seal.

In Bank of Columbia v. Patterson, 7 Cranch, 306, Story, J., discussing the liability of corporations upon parol contracts, says: "The act incorporating the Bank of Columbia (act of Maryland, 1793, Ch. 30) contains no express provision authorizing the corporation to make contracts. And it follows that,

upon principles of the common law, it might contract under its common seal. It is made capable" * * * "to dispose of the money or credit of the bank in the common course of banking." * * "Unless, therefore, a corporation not expressly authorized may make a promise, it might be a serious question how far the bank notes of this bank were legally binding upon the corporation, and how far a depositor in the bank could possess a legal remedy for his property confided to the good faith of the corporation."

Every bank within the Commonwealth is authorized to contract and be contracted with, to sue and be sued, &c., and the notes issued by them are neither more nor less than the promise of the bank to pay money, and they are binding under the general powers of a corporation to bind itself by such obligation. The form adopted was not of the essence of the contract. Each bank adopted for itself the form and size and the devices of the note. They were printed elaborately for convenience and to avoid counterfeiting, but at the expense of the bank, and the blank notes thus printed were their own private property, to be used or not used, in their discretion, subject only to certain limitations in denomination and the aggregate amount.

By the act of March 17, 1817, Sec. 2, (6 Smith's Laws, 441,) "No incorporated body, public officer, association or partnership, or private individual, other than such as have been expressly incorporated or established for the purpose of banking, shall make, issue, re-issue or circulate any promissory note, ticket or engagement of credit in the nature of a bank note of any denomination or amount whatsoever, other than such as have been issued by banks lawfully and expressly established."

The act of March, 1814, having prohibited the issue of notes of less denomination than five dollars, the act of December 28, 1814, gave permission to issue notes under five dollars, during the war with Great Britain and one year after, which was afterwards extended to October 1, 1817.

Small notes having been again authorized, by the act of

April 12, 1828, notes less than five dollars are again prohibited.

By the act of February 23, 1830, notes are prohibited of denominations between five and ten, ten and twenty, and twenty and fifty dollars.

Thus a careful examination of all the acts develops many instances of restraint, or limitation, upon an admitted power in the banks to issue their promissory notes, but nowhere is the right of incorporated banks, not specially prohibited by their particular charter, to issue their notes denied or questioned in any act of Assembly, or in any decision of the courts which we have been able to find.

So late as 1840, Chief Justice Gibson, in Collins v. Smith, 6 Wharton, 294, reviews the acts of 1810, 1814 and 1824, in regard to the right of unincorporated banks to issue their notes, and it is held that the act of 1810, which prohibits such issue, is not repealed. The whole case assumes that, except for that act, unincorporated banks could issue their notes; and it is to be noted that this right of incorporated banks, not specially restrained, was not and never has been questioned.

Judge Gibson says of this act that "it was more effectually to restrain an independent mischief which had survived every attempt to suppress it." In speaking of the act of 1824, he says: "There was no change of temper as to these associations; for their tendency could not be disguised, and the public interest in the banking privilege was too valuable to be thrown open to those who did not pay for it." This refers to the large bonus which incorporated banks were required to pay. The right of all incorporated banks to issue their notes is treated as an acknowledged right not to be questioned.

In Hazleton Coal Company v. Megargel, 4 Barr, 324 (1846), the act of 1817 was reviewed. Gibson, C. J., cites the act in full, and says: "The mischief intended to be prevented was the circulation of an unauthorized paper currency passing by delivery as money." The paper in question was in form a

due-bill, but had the constituent parts of a promissory note. It was held to be unlawful. "The properties of a bank note which distinguish it from any other promissory note are its adaptation to circulate by delivery from hand to hand, and the difficulty it presents to simulation."

Here again the only question was whether the paper issued was within the prohibition of the act. If not, it was a lawful obligation. And again, it is taken for granted that incorporated banks are authorized to issue such notes simply because there is no prohibition to restrain them.

The act of 1850, (P. L., 477, § 10, Art. 14,) re-enacting the acts of 1814 and 1824 hereinbefore recited, finds no necessity for conferring a power always theretofore exercised and never questioned, and is content to re-enact the provision that such notes shall be valid, though not under seal.

By section 17 the limitation of debt is extended to three times the capital instead of twice the capital, as in the acts of 1824 and 1814.

Throughout all these acts the right to issue notes is everywhere assumed, and treated as an existing and unquestioned right, which the Legislature seeks only to regulate and limit.

The first section of the act of 1850 enacts "That every banking corporation hereafter created by any special act of the General Assembly, and every bank hereafter re-chartered, or the charter of which shall be hereafter extended or renewed by any such act of Assembly, shall be subject to the provisions of this act."

It is not a very material enquiry whether or not *savings* institutions are restrained from issuing notes, for there are many banks which are not savings banks authorized to take interest not exceeding ten per cent., or such interest as the parties may agree.

In National Bank v. Gruber, 87 Pa. St. R., 468, what constitutes a "bank of issue" is discussed with reference to the act of Congress; and the decisions and legislation of Pennsyl-

vania relating to banks are reviewed by Agnew, C. J. But Judge Sharswood, delivering the opinion of the court, declares that the question does not arise on the record, and adds, "We give no opinion upon the subject."

Judge Agnew, however, in a collateral opinion, reaches the conclusion that the act of 1850 does not embrace savings and deposit banks, and adds, "I have examined many charters, and all have a provision forbidding the bank to issue its own bills in the manner of bank notes for circulation as money." Assuming that this is accurate as to those banks thus expressly forbidden to issue notes, and which is the distinctive characteristic of a strictly saving and deposit bank, it is not pretended that it applies to banks not thus expressly restrained, of which there are many.

The learned judge refers to the Franklin Bank, chartered by the act of April 1, 1870. (P. L., 736.) which clearly is not a savings bank, and is not prohibited from issuing notes, and is authorized "to lend money and discount paper at such rates of interest as may be agreed upon by the parties." He speaks of it as "the only special charter of the kind we have been referred to," and to avoid its force as applied to the interpretation of the act of Congress, suggests that it is evidently one of those "special laws run through by influence and without consideration of consequences—a shameful piece of legislation, understood by neither the people nor the Legislature itself."

Surely no court can base judicial interpretation upon suspected legislative infidelity, which as applied to the Franklin Bank is a wholly gratuitous and unfounded assumption. In Fletcher v. Peck, 6 Cranch, 87, it was held that "the court cannot enquire into the motives which actuated the members of the Legislature."

The courts will not allow judicial enquiry into legislative dereliction even upon the offer of the clearest proof, much less will they presume it. The authority of Fletcher v. Peck stands approved by the unbroken authority of all subsequent decisions.

But it is almost a necessary deduction from this opinion, that in his judgment the charter of the Franklin Bank does confer upon a bank of issue the right to take "such rate of interest as may be agreed upon by the parties."

But the Franklin Bank is only one among many such charters, and none of which are savings banks.

Its powers are thus defined:

"Section 4. The said bank shall have power and may borrow or lend money for such periods as the said bank may think proper, may discount any bill of exchange, foreign or domestic, promissory note or other negotiable paper, and the interest may be received in advance, at such rates as may be agreed upon by the parties," &c.

"Section 6. The bank may receive money to keep for its depositors, either with or without interest payable thereon, and may buy or sell bullion, buy, sell, draw or negotiate bills of exchange, bills of lading, stocks and bonds of all companies, States and of the United States, or other good and sufficient securities, at such rate of interest as may be agreed upon by said bank and the borrowers."

All the other sections are mere matter of ordinary regulation.

The following banks have precisely similar charters, and the section as to discount and interest is in the same language:

"Manayunk Bank," chartered by act of June 14, 1871. P. L., p. 1358.

The "Southwark Banking Company," chartered by act of June 2, 1871. P. L., 1872, p. 1359.

The "Petroleum Bank," chartered by the act of November 20, 1871. P. L., 1872, p. 1381.

The "United States Banking Company," chartered by act of June 2, 1871. P. L., 1873, p. 987.

The "Germania Bank," chartered by act of June 2, 1871. P. L., 1874, p. 325.

There are a large number of banks with precisely the same privileges, except that in the section equivalent to section 4 of the Franklin Bank the rate of interest prescribed is omitted, but all of which contain the 6th section of that act, which, as in that act, is an additional privilege, and authorizes the bank, *inter alia*, "to buy, sell, draw or negotiate bills of exchange," * * * "or other good and sufficient securities, at such rate of interest as may be agreed upon by said bank and the borrowers."

Such are—

The "Somerset Bank," act of March 26, 1872. P. L., 1873, p. 1040.

"Butchers and Drovers' Bank," act of April 27, 1870. P. L., 1871, p. 1534.

"Watsontown Bank," act of March 27, 1872. P. L., 1873, p. 1043.

"Lycoming County Savings Bank," act of March 14, 1872. P. L., p. 1016, § 6.

"Iron and Glass Dollar Savings Bank of Birmingham," act of March 1, 1872. P. L., p. 191.

"Market Bank," act of April 27, 1870. P. L., 1871, p. 1534.

The "Harmony Savings Bank," act of April 24, 1867., (P. L., p. 1310,) has special provision:

"Section 2. That the purpose of this act is to organize an incorporated bank, to receive money on deposit, and to loan money at such rate or rates of interest as may be agreed upon for the use thereof, not exceeding ten per cent." It is called a savings bank, but its powers are as great and its organization the same as banks of issue in the State.

Still another large class of banks have charters like that of the "Germania Savings Bank of Pittsburg," chartered by act of April 8, 1870, (P. L., p. 1049,) authorized by section 3 to receive deposits and to invest in stocks and bonds, "and also may buy and sell bonds and mortgages and promissory notes

not having more than six months to run," &c.: "*Provided, however, that no rate of interest or discount exceeding ten per centum* shall be charged," &c.

The "Pittsburg Dollar Savings Bank," chartered by act of April 7, 1862, (P. L., p. 418,) has like authority.

There are banks whose charters expressly restrain them from issuing bank notes. In such charters the privileges accorded by the 4th and 6th sections of the Franklin Bank charter are withheld, and ordinarily their investments are limited to mortgages, stocks and other valid securities, and general discounting of commercial paper is not allowed. Such are the—

"Hamburg Savings Bank," act of March 17, 1870. P. L., p. 478, § 1.

"Wilkesbarre Savings Bank," act of March 28, 1870. P. L., p. 651, § 2.

"Girard Savings Bank," act of May 9, 1870. P. L., p. 1309, § 1.

"Pittston Trust Company and Savings Bank," act of March 20, 1871, P. L., p. 424, § 2.

"Wilkesbarre Deposit and Savings Bank," act of May 20, 1871. P. L., p. 1042, § 2.

"Quakertown Savings Bank," act of March 10, 1870. P. L., p. 364, § 1.

"Warren Savings Bank," act of March 4, 1870. P. L., p. 349.

The charters thus cited are not, and are not intended to be exhaustive; but they are fully illustrative, and we believe abundantly sufficient to show that the bank, defendant here, has kept itself within "the rate allowed by the laws of the State."

It is manifestly difficult, as it is unnecessary, for this court to determine what, under the laws of Pennsylvania, constitutes the difference between "savings banks" and "banks of issue."

A general comparison will show—

First. That banks intended to be "savings banks" are so denominated in the act, and are *without capital.*

Second. That banks not distinctively savings banks are spoken of in the acts simply as "banks," and their capital is defined.

Third. That savings banks are usually limited in their investments, and their charters do not contain the 4th and 6th sections of the Franklin Bank, nor any equivalent for them.

It might therefore be admitted, for the argument, that "savings banks and banks of deposit" are not under the act of 1850, and that they are not authorized to issue bank notes, without at all answering the argument that there are numerous banks in Pennsylvania—some of whose charters are in evidence—allowed by the laws of the State to take a rate of interest equal to or greater than that paid by the defendant to the bank. Such banks are "banks of issue." They are incorporated for banking purposes, and not being restrained by any law of the Commonwealth, they have the right to bind themselves by their promissory notes for the payment of money, and such notes are the "issue" of the bank within the clear meaning of the law.

Clearly the banks doing business under the General Bank Act of 1850 are banks of issue, and so far as I know it has never been questioned; yet the banks organized under special charter, and without special reference therein to the act of 1850, have freely invoked its protection. That act confers upon banks a specific lien, and restrains any stockholder indebted to the bank for a debt actually due and unpaid to make a transfer or receive a dividend until such debt is discharged or secured. These banks, I believe, without exception, claim the benefit of this section, and there is now pending in this court the appeal of The Cecil National Bank v. The Watsontown Bank (one of the banks herein cited), in which the appellee defends under this very section.

The act of May 23, 1878, (P. L., p. 110,) makes specific provision that "hereafter every contract for the loan or advance of money by banking corporations heretofore incorporated or hereafter to be incorporated under the laws of this Commonwealth," * * * "where no express contract shall have been made for a less rate, shall be six per cent. per annum," with saving clause as to contracts made prior to its passage, and repealing all laws inconsistent with it.

This act clearly recognizes the banks authorized to take more than six per cent. as "banking corporations" within the banking system and policy of the State, and announces merely a change of policy as to bank interest. The transactions involved in this suit were all prior to the passage of the act.

The act of 1860, (P. L., p. 459,) entitled "An act to establish a system of free banking in Pennsylvania and to secure the public against loss from insolvent banks," provided a mode in which banks may be established and provides for their regulation, and also for the printing and distribution of notes of circulation, under the direction of the Auditor General, upon deposit of the prescribed securities, which is the first provision of the kind within the State.

The act of May 1, 1861, (P. L., p. 503,) entitled a supplement to the act of 1860, virtually supersedes it, but is in substance the same. Neither of these acts repeals the act of 1850, which is left in full force as to all banks not organized under the acts of 1860 and 1861.

But the question does not so much depend upon whether the banks are banks of issue as whether the interest taken by the bank was greater than that "allowed by the laws of the State," within the meaning of the act of Congress. The question is not what each State may declare to be or not to be a "bank of issue," but what did Congress mean by this expression.

The purpose of the act is fully discussed in Tiffany v. National Bank, 18 Wall, 409. It is there said: "It was expected they would come into competition with State banks, and it

was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly legislation." The words of the proviso are, "banks of issue organized under State laws." But it would seem plain that the competition which it was expected the national banks would encounter and against which they were to be protected was not in the issue of currency, but in the matter of discounts. The possible unfriendly State legislation was the possible allowance to State banks of a higher rate of interest than national banks would be allowed to charge, and it could not have been thought important by what name a State banking institution might be called, if its business as a bank came into competition with that of the national banks; nor, it is submitted, will the courts allow the act to be virtually nullified by any cunningly devised expedient of granting to banking companies every franchise of a bank except only the utterly worthless privilege of issuing notes of circulation. This is just what was done in Pennsylvania in a long series of bank charters, some of which (and which were deemed sufficient) are in evidence, and some of which have been cited in this argument, and nearly all of which were enacted after the national bank acts of 1864 and 1865.

Congress intended and avowed the purpose to render the issue of currency by State banks impossible, and for this purpose deliberately taxed such currency out of existence. The sections under consideration were directed exclusively to the control and limitation of the rate of discount, and not to the issues of currency. The acts of 1864 and 1865, being parts of the same system and directed to the same ends, are to be construed together. Nothing in either act looks towards competition in the issue of currency. Such competition was not to be regulated, but destroyed, and it would be in strictest harmony with the plain intent of the act to construe its language so as to protect the banks against the only State bank

competition it was possible for them to encounter. It is to be assumed that Congress had full knowledge that all banking institutions, not specially restrained by law, had inherent right to issue, and were bound by their promises to pay money on demand, and that such obligations constituted the "issue" of the bank, and that all banks having such power were "banks of issue," whether they exercised the power or not.

The "Official Report of the Several Banks and Savings Institutions of Pennsylvania for 1878," (p. 320,) shows that there were eighty-six banks in the State of all kinds. With slight variations they are the same now, and have been for several years.

All these banks, except only the Bank of Pittsburg, chartered in 1814, Farmers and Mechanics' Bank of Pittsburg, chartered the same year, Hanover Saving Fund Society, chartered in 1835, Shrewsbury Savings Institution, chartered in 1850, Spring Garden Bank, in 1851, and Stroudsburg Bank, in 1857, were chartered and organized after 1865, and the greater part of them in 1870 to 1873.

They have an aggregate capital of $8,115,590, an aggregate deposit of $13.221,129, an aggregate of notes and bills discounted of $11.993,956, and yet not one of them had any notes of circulation, except only the Lackawanna Valley Bank, $62,927.74, and this was withdrawn within the year; so that by the report of 1879 there was not one dollar of circulation by any State bank in the Commonwealth, although they come into direct competition with the national banks to so large an amount in capital, deposit and discount, and this not from want of legislative authority to issue notes of circulation, but because by the national bank law it has been taxed out of existence.

The severe competition to which the national banks are subjected appears from the Report of the Comptroller of the Currency for 1880.

It appears (p. 4) that in October, 1880, there were 2,090 national banks, with capital, $457,5553,985, with individual

deposits, $873,537,637, and with loans and discounts, $1,040,977,267.

It is stated (p. 21) that "of the 4,456 (State) banks reporting to the Commissioner of Internal Revenue there are 2,802 private banking institutions, with a total capital of $76,121,962, and deposits of $182,667,237, from which no reports have been received by the Comptroller through State authority." But from other sources it is stated (pp. 19 and 20) that there are State banks, with capital as follows:

	No.	*Capital.*	*Deposits.*	*Loans.*
State Banks and Trust Companies	650	$109,318,451	$298,759,619	$281,496,731
Private Banking Institutions	2802	76,121,962	182,667,237	Not return'd
Savings Banks	629	No capital	819,106,973	385,448,322
	4081		$1,300,533,829	$666,945,053

If the view now urged be correct, the national banks are protected whether the "interest allowed by the laws of the State" be to private individuals, as in Tiffany v. Bank, or to State banks, private companies, trust companies or savings banks. The competition is equally effective to destroy the equality which it was the purpose of Congress to establish between national and State banks, by whatever names they may be called.

The word "issue" in this connection is descriptive only, and may be in full consonance with the act extended to embrace State banks of deposit and discount, such extended meaning being necessary to render effectual the protection intended by the statute and to defeat an evident evasion by the State, and one capable of such easy extension as practically to nullify the National Bank Act in this regard in any State of the Union.

W. H. ARMSTRONG,
SAMUEL LINN,
Attorneys for Defendant in Error.

14-54

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~283.~~ 44

THE CENTRAL NATIONAL BANK OF BALTIMORE, APPEL LANT,

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED OCTOBER 17, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 283.

THE CENTRAL NATIONAL BANK OF BALTIMORE, APPELLANT,

vs.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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Among other were the following proceedings, to wit:

4 THE CONNECTICUT MUTUAL LIFE INSURANCE Company, complainant,
versus
THE CENTRAL NATIONAL BANK OF BALTIMORE, defendant.

Be it remembered that heretofore, to wit, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, came the Connecticut Mutual Life Insurance Company into the circuit court of Baltimore City, here by John Carson, esquire, its solicitor, and exhibited to the said court its bill of complaint in form following, to wit:

To the honorable Campbell W. Pinkney, judge of the circuit court of Baltimore City:

Humbly complaining, sheweth unto your honor, your orator, The Connecticut Mutual Life Insurance Company, a body corporate, duly incorporated under the laws of the State of Connecticut: That for many years past, and long prior to the time hereinafter first mentioned, your orator has, in compliance with the laws of the State of Maryland, and in strict obedience thereto, at all times exercised its franchises in
5 the State of Maryland, and has therein conducted and transacted the business of life insurance pursuant to its said charter.

That prior to the month of December, eighteen hundred and sixty-four, your orator appointed one Asahel H. Dillon, jr., as its general agent, for the territory embraced by the States of Maryland and Delaware, West Virginia and the District of Columbia; that in said month of December, eighteen hundred and sixty-four, the said Asahel H. Dillon, jr., entered upon the discharge of his said duties as general agent of your orator as aforesaid, and taking up his residence in the city of Baltimore aforesaid, and there opening his business office as general agent as aforesaid.

That from the time of his appointment up to the present time, the said Dillon has continuously and uninterruptedly acted as agent of your orator as aforesaid; and nearly the whole if not all the time since his said appointment, said Dillon has used and occupied the same office, No. 8 South street, in said city of Baltimore, which said office of said Dillon is conspicuously designated by signs, stating that he, said
6 Dillon, is the general agent of The Connecticut Mutual Life Insurance Company, and that the business of the company and of said Dillon as its agent as aforesaid, is therein transacted.

And your orator now states that from the time of said Dillon's said appointment up to the present time, so far as it is now aware, the said Dillon has been engaged in no other business save the general agency of your orator.

And your orator further states that it was part of said Dillon's duty, as general agent as aforesaid, to receive all premiums, original, and renewals accruing to your orator from policies of life insurance issued by it to persons residing in the territory aforesaid; and also to pay all losses arising from the death of persons residing in said territory and insured by your orator, and for this latter purpose your orator's checks from the home office at Hartford were usually forwarded to said Dillon to make said payments.

The premiums received from time to time by said Dillon as agent as aforesaid, were usually forwarded by him to the home office aforesaid, twice a month, and all premiums received by him as aforesaid, were fully and finally accounted for and paid over to your orator after the close of each month, the mode of payment being by checks drawn by said Dillon as general agent upon a Baltimore bank to the order of the Secretary of your orator.

7

And your orator further states that prior to the month of April, 1871, the said Dillon kept a bank account as agent in the Chesapeake Bank of Baltimore, wherein he deposited all the money received by him for account of and from your orator, and on which he checked out the money paid from time to time to your orator, as also the expenses incident to his said agency.

Your orator further states that about the month of March, 1871, under the laws of the United States, providing for the formation of national banks, a new bank was created and started in the city of Baltimore called the Central National Bank of Baltimore being a body politic and corporate under the laws aforesaid, and of which said bank, one James O'Connor became president at its formation, and has ever since continued to be president of said bank; and that the place of business of said bank from its commencement up to the present time has been at No. 5 South street, in the city of Baltimore, nearly opposite the office of said Dillon; the windows of said buildings nearly facing each other, and the signs on said Dillon's office being in full view from the windows of said bank.

8

Your orator further states that in the latter part of the month of March, 1871, the said James O'Connor, president as aforesaid, being then aware that said Dillon kept the account as agent of your orator's money, in the Chesapeake Bank as aforesaid, and that at times the balances due thereon to your orator, were large; and he being then also fully aware that said balances were your orator's money, personally solicited said Dillon to remove said account (which the said O'Connor then called the Co.'s account) to his, said O'Connor's, bank.

That accordingly, on the first day of April, 1871, the said Dillon removed said account from the Chesapeake Bank to said O'Connor's bank, opening said account as follows: "Dr., Central National Bank in account with A. H. Dillon, jr., gen'l ag't, cr.," and as thus opened the said account has continued in said Central Bank to the present, the said Dillon depositing from time to time to the credit of said account all the money which he as general agent of your orator, received for account of and from your orator, and out of said money, he, as general agent as aforesaid, has from time to time, checked paying thereby and thereout the expenses incident to his said agency, and remitting usually twice a month to your orator as aforesaid, by checks on said Central Bank, drawn by said Dillon, as general agent, to the order of the secretary of your orator, all of which checks have been regularly paid by said Central Bank up to the 10th day of June last.

9

That on said latter day the said Dillon, as general agent, drew a check on said Central Bank for ($8,000) eight thousand dollars to the order of Jacob L. Greene, secretary of your orator, and remitted the same to him by mail to Hartford, Connecticut; that said check was returned in due course to Baltimore for collection, and on the 13th day of June, last past, the said check, through the First National Bank of Baltimore, was presented for payment to the said Central Bank, and payment thereof was refused by said latter bank, and said check was duly protested for non-payment, although as your orator expressly

10

avers that on the day of the presentment of said check and of the protest thereof, there was to the credit of said account in said Central Bank the sum of (11.000\frac{86}{100}$) eleven thousand dollars and eighty-six cents, of which said sum over four thousand dollars was deposited in said Central Bank between the first and twelfth days, inclusive, of June last, the last two deposits having been made on the eleventh and twelfth days of June, 1874.

And your orator further states that on the 20th day of June, last past, the said Dillon received from the said Central Bank a certain paper writing herewith filed and prayed to be taken as part of this bill of complaint, marked Exhibit C. M. L., No. 1, which states in substance that inasmuch as the said Dillon and his wife, Alice P. Dillon, are the makers of a note for ten thousand dollars, dated 29th November,
11 1873, and maturing on the first day of June, 1874, and not paid, that by order of the board of directors of said bank, the said note has been charged up to the account of said Dillon as general agent, notwithstanding, as your orator avers, that said Alice then and now owned ten shares of the stock of said bank at a par value of one thousand dollars, upon which three hundred dollars of dividends had then accrued and were not paid, but were then retained by said bank.

And your orator further states that on the 24th day of June last past, the said A. H. Dillon, jr., as general agent, drew a check, No. 545, upon said Central Bank, payable to the order of your orator, for the sum of $1,000$\frac{86}{100}$, and requested said bank to certify the same in order that it might be forwarded to your orator; which certification said bank refused to give, and notified said Dillon that it would pay no check of his on said bank.

Your orator also states that since said 24th day of June last, through its attorney, it has notified the said bank that said sum of eleven thousand $\frac{86}{100}$ dollars so on deposit as aforesaid, is the money of your
12 orator, being premiums collected for it by said Dillon as general agent as aforesaid, in the month of May and June last, and deposited as aforesaid, and has demanded payment of said sum from said bank, which it refuses to make, upon the pretence that said money is A. H. Dillon's individually, and said bank has applied it in payment of said Dillon's note.

And your orator now further states, from information derived from said Dillon since the 13th day of June last, that his said wife, Alice P. Dillon, opened an account with the Central National Bank aforesaid on the 9th day of March, 1871, which was continued until the 29th day of June, 1872, when it was closed, the aggregate of deposits, &c., during that time being over fifty-seven thousand dollars, and all the checks thereon were drawn by said A. H. Dillon, jr., for said Alice P. Dillon, and none were drawn by said Alice P. Dillon.

That said Dillon used this account with the full knowledge of the officers of said bank for his private stock operations and for joint operations in stock made by him with James O'Connor, president of said bank; that in these joint stock operations with said O'Connor, he
13 received moneys from said O'Connor which were deposited in said account with the latter's knowledge, and said Dillon frequently gave said O'Connor checks upon said account in their joint stock operations as aforesaid.

That about the month of March, 1872, the said Dillon was required to put up margins to the amount of twelve thousand dollars, or thereabouts, in his said stock speculations, of all which speculations the said O'Connor had full knowledge, and in some of which he was in-

terested, and for that purpose he was directed by said O'Connor to overcheck to the amount of about twelve thousand dollars on the account of said Alice P. Dillon, which said Dillon then did, and said O'Connor caused said checks to be paid by said Central Bank.

And your orator further states that, from information derived as above stated, that for this twelve thousand dollars the said Dillon and wife gave their note, which was renewed from time to time and the interest thereon regularly paid until the fall of 1873, when a partial and limited settlement of recent joint stock operations between said
14 Dillon and said O'Connor was had, and the latter paid over to the former about thirty-three hundred dollars, as follows: Two thousand dollars was applied in part payment of said note, and the residue was used by said Dillon, at said O'Connor's instance and request, in buying ten shares of the stock of said bank for said Alice P. Dillon, which is the same stock mentioned in the former part of this bill of complaint. That said note was then renewed for ten thousand dollars at ten days, and having laid over for some time, was finally renewed by the note of November 29th, 1873, heretofore mentioned.

And your orator further states, from information derived as aforesaid, that during part of the year 1873 the said Dillon kept an individual account with said Central Bank, and gave various individual checks thereon.

And your orator further states that, from the opening of said account of A. H. Dillon, jr., general agent, with said Central Bank, there has been each month large sums to the credit of said account; and your orator further states that said account has not been balanced up
15 or settled since the 17th day of March, 1874; and your orator avers that if said account were properly balanced there would be to the credit of said account at this time the sum of eleven thousand dollars and eighty-six cents, after deducting therefrom all checks drawn thereon by said A. H. Dillon, jr., general agent.

And your orator expressly charges that, from the opening of the said account down to the present time, the said Central National Bank and its officers have each and all, well known that said account was really and in effect an account between your orator and said Central Bank, although kept in the name of A. H. Dillon, jr., general agent.

And your orator further charges that said Central National Bank and its officers have each and all always well known that the money deposited in said account from time to time by said Dillon as general agent was the money and property of your orator, received by said Dillon as general agent, as aforesaid, for the original and renewal premiums upon policies of life insurance issued by your orator or received
16 by said Dillon directly from your orator; and they and each of them have further always well known that said moneys so received by said Dillon as general agent as aforesaid, were trust funds deposited by him as such agent with said bank, and with its full knowledge and the knowledge of its said officers, that they might be transmitted to your orator, or be paid out in discharge of your orator's obligations as aforesaid.

And your orator further charges that said sum of eleven thousand dollars and eighty-six cents is its money and property, exclusively, and belongs exclusively to your orator, and is the proceeds of premiums, original and renewal, collected by said Dillon, as its general agent, for your orator upon policies issued by your orator, and that said collections have been made during the months of May and June last, of all which

your orator charges the said Central Bank and its officers had each and all full knowledge.

And your orator now charges that said Central National Bank is, in equity, by reason of the premises, a trustee for your orator of said sum of eleven thousand dollars and eighty-six cents, and that
17 said sum is trust funds belonging to your orator and received by said bank with full knowledge that the same belonged to your orator and not to said Dillon, and that the same were trust funds temporarily deposited with said Central National Bank with its full knowledge and with the knowledge of its officers, to be transmitted to your orator at Hartford aforesaid.

And your orator avers that the refusal of said bank to pay to it said sum of $\$11{,}000\frac{86}{100}$, and its attempt to apply the same to the payment of the note, which it holds, of said Dillon and wife, is a gross breach of trust on the part of said bank, and is a flagrant wrong upon the rights of your orator.

All of which doings and pretences are contrary to equity and tend to the manifest wrong and injury of your orator.

In tender consideration whereof and forasmuch as your orator is remediless in the premises save in equity.

To the end, therefore, that the Central National Bank of Baltimore, a body politic and corporate as aforesaid, may answer the premises fully and particularly as if the same were here repeated and they
18 thereto specially interrogated, and that an account may be taken, under the direction of this honorable court, of the money from time to time deposited in and checked out of said Central Bank by A. H. Dillon, jr., general agent, in the account aforesaid, and that this court will ascertain the true amount now properly standing to the credit of such account, after and upon such accounting; and that this court will decree that all the moneys deposited by said Dillon, as general agent, in said bank, in the aforesaid account, and not checked out by him, are the moneys and property of your orator, and will also decree that the same be paid by said bank to your orator, and that this court will further decree that said Central Bank may be held as trustee, and be decreed to account to your orator for said sum of eleven thousand dollars and eighty-six cents, and that said sum be decreed trust funds, belonging to and payable to your orator, and that your orator may have such other and further relief in the premises as its case may require—

May it please your honor to grant unto your orator the writ of
19 subpœna to be directed to the Central National Bank of Baltimore, commanding it to be and appear by attorney in this court, on some certain day therein to be named, to answer the premises, and therein to fulfil, abide by, and perform such order and decree as this court may be pleased to pass in the premises.

And as in duty bound will ever pray, &c.,

JOHN CARSON,
Sol. for Comp't, Conn. Mut. Life Ins. Co.

Exhibit marked Exhibit C. M. L., No. 1, referred to in the aforegoing bill of complaint and therewith filed, is as follows, to wit:

Complainant's Exhibit C. M. L., No. 1.

At a meeting of the directors of the Central National Bank of Baltimore it was resolved:

That whereas on the 29th Nov., 1873, a note for $10,000 was dis-

counted, drawn by A. H. Dillon and A. P. Dillon, and endorsed by A. H. Dillon and also by A. P. Dillon, and it was agreed between the makers thereof and this bank that at its maturity the sum of $5,000 cash was to be paid, and, if so, a loan or renewal of $5,000 would be granted for 6 months; and whereas on the 1st day of June, 1874,
20 the $10,000 note matured and the $5,000 cash was not paid upon it or proffered to be paid, and the note fully matured and became due in whole; and whereas the said $10,000 note was made payable at the Central National Bank of Baltimore:

Now resolved this board approve of the act of the acting cashier in charging said note in full to the a/c and funds of A. H. Dillon, jr., general agent, the counsel of this bank having so instructed him in writing.

Resolved, That the a. cashier furnish a copy of this action of the board to Mr. Dillon, and he be notified there is the following sum net to his credit only, namely $1,228.49, and that Mr. Dillon be respectfully referred to George H. Williams, esquire, office Chesapeake Bank Buildings, the attorney and counsel for this bank.

By the board.

N. F. WILLIAMS, JR.,
Acting Cashier.

BALTIMORE, *June 11th*, 1874.

Whereupon subpœna issued as prayed, in form following, to wit:

The State of Maryland to the Central National Bank of Baltimore City, greeting:

21 We command and enjoin you that, all excuses set aside, you be in your person before the circuit court of Baltimore City at the court-house in said city on the second Monday of September next, to answer the complaint of the Connecticut Mutual Life Insurance Company against you in said court exhibited. Hereof fail not as you will answer the contrary at your peril.

Witness the honorable George Wm. Brown, chief justice of the supreme bench of Baltimore City, the 13th of July, 1874.

Issued the 18th day of July, in the year 1874.

[L. S.] JAMES R. BREWER,
Clerk.

And the sheriff of Baltimore City aforesaid, to whom the said subpœna was delivered to be served, made return thereof to the court here, thus endorsed, to wit:

Summoned the Central National Bank of Baltimore by service on Jas. O'Connor, as president.

AUGUSTUS ALBERT,
Sheriff.

And afterwards, to wit, on the 21st day of July, in the year 1874, aforesaid, the following order of appearance was filed in said
22 cause, to wit:

In the circuit court of Baltimore City. May term, 1874 (July rule day).

THE CONNECTICUT MUTUAL LIFE INSURANCE Company
vs.
THE CENTRAL NATIONAL BANK.

Mr. BREWER: Enter my appearance for defendant and make copy of bill.

W. H. DAWSON.

And afterwards, to wit, on the twenty.third day of July, in the year aforesaid, the following order of appearance was filed in said cause, to wit:

In the circuit court of Baltimore City. July term, 1874.

THE CONNECTICUT MUTUAL LIFE INTSURance Co.
vs.
THE CENTRAL NATIONAL BANK.

Mr. BREWER: Enter my appearance for defendant.

R. S. MATTHEWS.

And afterwards, to wit, on the seventh day of November, in
23 the year aforesaid, appeared in court here the said Central National Bank of Baltimore, by George H. Williams and R. Stockett Matthews, esquires, and Messrs. Machen and Gittings, its solicitors, and filed in said cause its answer to the said bill of complaint in form following, to wit:

The answer of the Central National Bank of Baltimore to the bill of complaint of the Connecticut Mutual Life Insurance Company against it in the circuit court of Baltimore City exhibited.

This defendant, answering, supposes that the complainant is a body corporate duly incorporated, but whether it has transacted its business in this State in conformity with the laws thereof, it doth not know, and if it be necessary for the purposes of this suit that the same be proved, leaves the said complainant to such proof thereof as it may thereunto be advised; nor doth it know when or what time nor in what manner the said Dillon in said bill named was appointed an agent of said complainant, nor the extent of his powers and duties as such agent; and as the defendant's corporate existence commenced on the 23d of
24 February, A. D. 1871, can it possibly be legally or actually cognizant of anything antedating said time, and is in fact wholly ignorant thereof.

Further answering, this defendant doth not admit that during said time said Dillon has been wholly occupied with the business matters of complainant; but to the contrary avers and will prove at the proper time when necessary that said Dillon was a general agent and largely engaged in other matters for other principals; or as such general agent attended to all such business for others than complainant that he was able to procure. Nor is the defendant able to perceive or explain why,

if it was said Dillon's business to pay complainan'ts losses upon its policies by its cheques upon its own bank or banks, what relevancy the same has to the matters involved in this suit, especially as the defendant never was the banker of said complainant; nor doth it know anything of said cheques; nor doth it know whether said Dillon fully and finally accounted with said complainant each month, nor how or in what manner he did so for any sums he might owe complainant, however received.

25 And this defendant admits its incorporation as stated, that James O'Connor was and is its president, and that its place of business was and is specified in said bill at No. 5 South street in said city; but it denies that said O'Connor ever solicited any account of said complainant to be kept with it at any time by any person whatsoever.

And this defendant admits that said Dillon, being in business as a general agent, opened an account with it under said name, the same being a proper descriptio personae, so far as he was concerned, but without any intimation whatever that he was the special agent of any one whatever, and that the account was specially that of any one, or in fact that it was the account of any one save that of himself as a general business agent, as it purports to be. And that this defendant, wholly ignorant as to all the deposits made by him therein as to the sources whence the same were received, and also as to all his cheques drawn thereon, yet has ascertained and is able truthfully to aver and prove that much of said money deposited and drawn out was that of other and different persons, and for purposes with which said complainant had no connection; and that if any

26 of said complainant's matters were involved in said account, then the same was, at best, but a mixed account without any notice to this defendant that the same concerned any one save the said Dillon, in his said capacity as a general agent for all who might employ him as such.

Further answering, this defendant says that on the 9th day of December, 1873, said Dillon applied to it as one of its customers for a loan to him of the sum of $10,000, and in consideration of his being such customer, and his wife being a shareholder of this defendant, the same was lent to him, in the manner and upon the terms set forth in the agreement signed by them, a copy whereof is herewith filed as a part of this answer, marked C. N. B. No. 1, and gave their promissory note in accord therewith, a copy of which is also herewith filed, marked C. N. B. No. 2, and the said sum was entered to his credit in account accordingly, and that said note at its maturity being neither paid in whole or in part nor renewed, the same was, as a matter of course, as it by law had a right to do, charged to said account. And the same having been

27 so charged prior to the presentation of said cheque for $8,000, of course the said cheque was not paid, there being no sufficient balance to the credit of said account to meet the same; and that upon complainant's enquiry as to the reason of such non-payment, fully replied explaining the same by letter of the date of 18th June, 1874, now in complainant's possession; and the said complainant, claiming by implication the balance of said account to the credit of said Dillon as and for its own money, for its protection and that of this defendant, wrote to said Dillon a letter, of which it herewith files a copy, marked C. N. B. No. 3, and not until said complainant's demand as aforesaid did they ever refuse to pay any cheque of said Dillon's save the cheque of $8,000 as aforesaid.

Further answering, this defendant denies all knowledge of the alleged

or pretended operations in stocks or anything else between the said Dillon and its president, nor even were the same true hath this defendant any concern therewith; and it denies also as true in fact that all said Dillon's deposit as general agent were of complainant's funds,
28 or that defendant's officers could have known that to be so, when in truth it was the contrary; and it is further denied that such deposits were of any trust money whatever or that said defendant had any such knowledge thereof; and it is further denied that at any time whatever was there any privity of contract of any nature whatsoever, legal or equitable, existing between said complainant and this defendant as to the matters alleged in said bill or any other matters whatsoever, and that upon the allegations of said bill said Dillon is a necessary party hereto, and that without his being such party the said suit is fatally defective and should not proceed.

Further answering, the defendant insists that said complainant in stating the exact amount to the credit of said Dillon's account and not questioning any of the items therein save the debit of said note of $10,000, so charged as aforesaid, deprives himself of all right to our accounting, and his remedy, if any, upon his own showing is complete and adequate at law and in no event would be cognizable in equity.

This defendant therefore denies the jurisdiction of this honor-
29 able court as to the matters complained of, and submits that said bill should be dismissed with costs in this behalf by this defendant most wrongfully sustained.

GEO. H. WILLIAMS.
R. STOCKETT MATTHEWS.
MACHEN & GITTINGS.

CENTRAL NATIONAL BANK OF BALTIMORE.
N. F. WILLIAMS, JR.,
Ass. Cash'r.

{ SEAL OF THE CENTRAL NATIONAL BANK OF BALTIMORE. }

Exhibits marked Defendant's Exhibits C. N. B., Nos. 1, 2, and 3, referred to in the aforegoing answer and filed therewith, are as follows respectively, to wit:

Defendant's Exhibit C. N. B., No. 1.

(Copy.)

BALTIMORE, *December 9th*, 1873.

Whereas at the meeting of the board of directors of the Central Nat. Bank of Baltimore, held this day, the following resolution was passed, viz:

Resolved, That in consideration of Alice P. Dillon being a stockholder in this bank, and of A. H. Dillon, jr., being a customer of the bank, their note for $10,000, dated Nov'r 29th, 1873, at 6 months,
30 be discounted at 6 per c. per annum, provided only that it be agreed in writing between the makers and endorsers of said note and this bank, that at the maturity of the note $5,000 must be paid and a new note at 6 months to be discounted at 6 per c., which at its maturity must be paid in full, being in full payment of the loan.

Now in consideration of value received we do hereby agree to the above terms, and sign this agreement in duplicate.

(Signed) ALICE P. DILLON. [SEAL.]
A. H. DILLON, JR. [SEAL.]
[BANK SEAL.] C. H. PITTS, *A. Cas.* [SEAL.]

Defendant's Exhibit C. N. B., No. 2.

(Copy.)

$10,000.] BALTIMORE, *Nov. 29th*, 1873.

Six months after date, we or either of us promise to pay to the order of A. H. Dillon, jr., and Alice P. Dillon, ten thousand dollars, without defalcation, for value received, payable at the Central National Bank of Baltimore.

(Signed) A. H. DILLON. JR.,
ALICE P. DILLON,

Due May 29–1 June, 1874.

(Endorsed:) A. H. Dillon, jr., Alice P. Dillon.

31 *Defendant's Exhibit C. N. B., No. 3.*

(Copy.) BALTO., *23d June*, 1874.

A. H. DILLON, Jr., Esq.

D'R SIR: It is best to apprise you that we have received from the Connecticut Mutual Life Ins. Co., a letter in which they seem to imply or pretend they should have to their credit in this bank some ten to fifteen thousand dollars. This letter is a complete surprize to us, as their name nowhere appears on our books, nor have we been aware at any time of business dealings with them.

We have informed them of the reasons for the non-payment of your check in their favor, and as they by implication pretend in some way unknown to us to claim your balance, we have to say until this matter is settled, you had better perhaps cease any further to check upon the small amount beyond that of the cheque you have allready given them, but as against any deposits of yours we insist upon the right to set off your note discounted for us by you and of which at maturity you
32 took no notice, and which was in the ordinary course of business duly charged to your account.

Respectfully y'rs,

(Signed) N. F. WILLIAMS,
a/c *Cashier.*

And afterwards, to wit, on the fourth day of March, A. D. 1875, the following petition for leave to amend bill was filed in said cause, to wit:

In the circuit court of Baltimore City.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company
vs.
THE CENTRAL NATIONAL BANK.

To the honorable Campbell W. Pinkney, judge of the circuit court of Baltimore City.

Your petitioner The Connecticut Mutual Life Insurance Company respectfully represents:

That since the filing of its original bill in this cause your petitioner has been advised that it is proper and necessary to amend the same in certain particulars.

Your petitioner further states that the particulars of said amend-

33 ments are fully set forth in an amended bill, which it now submits to your honor and which for the purposes of this petition it prays may be read as part hereof, and it humbly prays that your honor will grant your petitioner leave to amend said original bill in the particulars set forth and appearing in said amended bill exhibited as part hereof, and that to that end that your honor will order that your petitioner be allowed to file said amended bill in this cause.

And your petitioner will ever pray, &c.

JOHN CARSON,
Sol'rs for Pet'rs.

Upon which said petition for leave to amend the court passed and filed in said cause the following order, to wit:

In the circuit court of Baltimore City.

Ordered by the court this 4th day of March, A. D. 1875, upon the foregoing petition that leave to amend be granted as therein prayed, and that the bill exhibited to the court as part of the said petition be received and filed in the case as and for the amended bill of the complainant.

C. W. PINKNEY.

34 Thereupon accordingly, to wit, on the said fourth day of March, in the year aforesaid, the complainant aforesaid, by its solicitor aforesaid, filed in said cause its amended bill of complaint in form following, to wit:

In the circuit court of Baltimore City.

THE CONNECTICUT MUTUAL LIFE INSURance Company
vs.
THE CENTRAL NATIONAL BANK & ASAHEL H. Dillon, jr.

To the honorable Campbell W. Pinkney, judge of the circuit court of Baltimore City.

The amended bill of complaint of the Connecticut Mutual Life Insurance Company, filed by leave of the court first had and obtained, respectfully represents to your honor:

That your orator heretofore filed its bill in this cause against the Central National Bank of Baltimore, in which your orator charged and claimed that the said bank had received on deposit from said Asahel H. Dillon, jr., then and now the general agent of your orator, and one of the defendants to this its amended bill, certain moneys collected by said Dillon for your orator and deposited by him as its general
35 agent; and *and* that said bank had received said moneys with knowledge that the same had been collected and deposited by said Dillon as the agent of your orator, and for the purpose of remitting the same to your orator by drawing the checks of said Dillon upon said bank in favor of your orator.

Said original bill further charged that said Dillon did in fact in the course of his agency for your orator and in accordance with the usage of his business as such agent, and with the knowledge of said bank, draw a check upon said bank, payable to the order of the secretary of your

orator, dated the 10th day of June, 1874, for $8,000, for the purpose of remitting to your orator that amount of money collected by said Dillon as your orator's agent, and deposited by him as such agent in said bank, which check it is alleged in said bill was presented for payment, and payment thereof refused by said bank.

Said bill further charged that said bank refused to pay said check, because it claimed to retain the money standing to the credit of said Dillon, as general agent, for the satisfaction of a certain note
36 for the sum of $10,000, made by said Dillon and wife, and held by said bank, which said note it was set forth in said bill had no connection whatever with the transactions of said Dillon as the agent of your orator, but had been given by him and his wife to said bank for an obligation of said Dillon contracted, not in his capacity as agent of your orator, and that said obligation had been contracted long before any of the money sued for in said original bill had been deposited in said bank by said Dillon.

Said original bill further charged that besides the sum of $10,000 so claimed to be retained by said bank there was other money deposited in said bank by said Dillon to his credit as agent of your orator, with the like knowledge of your orator's rights on the part of said bank, to which your orator was entitled for the same reason as is above set forth, but which the said bank refused to pay to your orator.

Said original bill prayed that an account may be taken to ascertain the amount of money standing to the credit of said Dillon as general agent of your orator, which he had collected as such agent and
37 deposited in said bank; and that the said bank should be decreed to pay to your orator the balance which might appear upon such accounting, and that the claim of said bank to apply any part of said money to pay the personal debt of said Dillon or of said Dillon and wife to said bank might be disallowed by this court.

And your orator now refers to said original bill and prays that it may be read and taken as part of this its amended bill, as if all its allegations were herein repeated, so far as said allegations are material and proper to be regarded for the purpose of this amended bill.

And your orator now respectfully represents that said Central National Bank appeared and answered said bill, alleging, among other things, that the money deposited by said Dillon, in the account kept by him with said bank as general agent, consisted of moneys deposited by said Dillon not only as the agent of your orator, but as the agent of divers other persons, and denying that said money was the money of your orator.

38 Your orator further states and charges that at the time said Central National Bank assumed the right to apply the money deposited by said Dillon to his credit as general agent, to the payment of the claim of said bank against said Dillon, above referred to, a large part, if not the whole, of the money so sought to be applied to the payment of said individual debt of said Dillon to said bank consisted of moneys collected by said Dillon as the general agent of your orator, and deposited by him as such agent; and that said bank, at the time it so assumed to apply said moneys to the payment of its claim against said Dillon, personally was aware of the fact that said moneys were not the moneys of said Dillon, but that they were, in fact, in whole or in a large part, moneys collected by him for your orator and deposited to his credit as general agent by said Dillon for the purpose of being remitted to your orator, or otherwise used for your orator's benefit in the due course of the agency of the said Dillon. And your orator is advised and re-

spectfully insists that said bank, knowing, as your orator charges it did know, that the money deposited to the credit of said Dillon as
39 general agent was in part, if not altogether, as your orator believes, and believing charges, that it was the money of your orator, was not entitled to apply the same to the payment of the note of said Dillon and wife, held by said bank, in the manner in which said bank assumed to apply the same; but your orator claims that so much of said money standing to the credit of said Dillon as general agent, as upon a proper accounting shall appear to have been deposited by him as agent of your orator, and to have consisted of money collected by him for your orator as its agent, and not drawn out by him upon proper checks against his said account as general agent, shall be deemed to be held by said bank in trust for the benefit of your orator, and to be paid your orator.

And your orator now charges that it has ascertained that the account of said Dillon, as general agent, with said bank was not balanced or closed for some time before the filing of said original bill, so that your orator is not able to state or ascertain what amount of money ought to by it to remain to the credit of said Dillon in said bank
40 to which your orator is rightfully entitled without having an account taken.

And your orator is advised that in order to take a proper account of the amount to which it is entitled of the money so standing to the credit of said Dillon as general agent, it is necessary to make the said Dillon a party defendant to this suit.

And your orator further charges that the defendant, the said Central National Bank of Baltimore, has taken proceedings, under the act of Congress under which national banks are organized, to wind up its business and cease to act as a national bank in the city of Baltimore.

Your orator further charges that by the provisions of the said act of Congress said Central National Bank of Baltimore will be entitled, after redeeming in lawful money of the United States its circulating notes, to withdraw from the Treasury of the United States the bonds of the United States deposited by said bank in accordance with law as security for the redemption of said notes, and to distribute said bonds or the proceeds thereof among its stockholders according to their interest therein.

41 And your orator further charges that said bank has no means to which your orator can resort for the satisfaction of its claim against said bank, known to your orator or discoverable by it, except the bonds of the United States so as aforesaid deposited; and your orator charges that if said bank be permitted to withdraw said bonds and to distribute the same or the proceeds thereof among its stockholders before satisfying the claim of your orator, your orator will have no means of collecting its said claims except by proceedings against stockholders among whom said bonds or the proceeds thereof may be distributed, thereby involving your orator in a multiplicity of suits against persons, some of whom your orator charges, upon information and belief, are not within the jurisdiction of this court.

And your orator charges that if said bank be permitted to proceed to wind up its affairs under the provisions of the act of Congress aforesaid, it will become entitled to withdraw said bonds and distribute the same or the proceeds thereof before the rights of your orator can be determined, and before your can enforce the satisfaction of its claim

42 And your orator is advised and respectfully submits, that the

said bonds of said bank and any other property that it may possess, constitutes a trust fund out of which the creditors of said bank are entitled to be paid before any part of said property can be lawfully distributed among the stockholders, and that a court of equity will prevent the distribution of said property of said corporation about to wind up its business among its stockholders before the payment of its debts to prevent the multiplicity of suits to which such a distribution of its property would subject your orator as a creditor of said bank.

And your orator charges that unless said bank be prevented from distributing its property among its stockholders before satisfying the claim of your orator, said property will be distributed among the stockholders of said bank in such manner as to subject your orator to great risk of loosing its said claim altogether, and in any event so as to subject your orator to the expense and delay of many suits against the stockholders of said bank, some of whom, as your orator has above alleged, it is informed and believes, do not reside in the State of Maryland.

43 Forasmuch, therefore, as your orator is remediless in the premises save in a court of equity—

To the end, therefore, that the said Central National Bank of Baltimore may be required to answer this amended bill, and that the said Asahel H. Dillon, jr., may answer the original and this amended bill, and that a decree may be passed requiring an account to be taken of the money deposited by said Dillon as general agent in said bank in order to ascertain how much and what part thereof consists of money collected by said Dillon as the general agent of your orator, and that said bank may be decreed to hold so much of said money as may be found on such accounting to be the money of your orator in trust for the benefit of your orator, and to pay the same to your orator, and that your orator may have such other and further relief in the premises as its case may require.

May it please your honor to grant unto your orator the writ of subpœna, to be directed to The Central National Bank of Baltimore aforesaid, and to the said Asahel H. Dillon, jr., commanding them, and

44 each of them, to be and appear in this court to answer the premises, and to stand to and perform such decree or order as this court may be pleased to pass in the premises, &c.

And forasmuch as your orator believes and charges that the said Central National Bank of Baltimore will, unless restrained by the order of this court, proceed to divide and distribute its assets among its stockholders without paying the demands of your orator, and thereby subject your orator to great expense and many suits as well as to the risk of the loss of its demand—

May it please your honor to grant unto your orator the writ of injunction, restraining and enjoining the said bank from distributing or paying to its stockholders its said assets without retaining in its hands, subject to the further decree of this court, a sufficient amount to satisfy the demand of your orators, which amount your orator charges is not less than eleven thousand dollars, in addition to interest thereon from the 10th day of June last, and such costs as may be adjudged to your orator.

45 And in duty bound will ever pray, &c.

JOHN CARSON,
Sol'r for Compl't.

STATE OF MARYLAND,
Baltimore City, to wit:

I hereby certify that on this 3d day of March, A. D. 1875, before me, the subscriber, a justice of the peace of the State of Maryland, in and

for the city of Baltimore aforesaid, personally appeared Jacob L. Greene, secretary of the Connecticut Mutual Life Insurance Company, the above named complainant, and made oath in due form of law that he is such secretary, and that the matters and facts stated and set forth in the foregoing amended bill of complaint are true to the best of his knowledge and belief.

Sworn before

W. H. HAYWARD, *J. P.*

Whereupon subpœna issued as prayed in said amended bill of complaint in form following, to wit:

The State of Maryland to the Central National Bank and Asahel
46 H. Dillon, jr., of Baltimore City, greeting:

We command and enjoin you that all excuses set aside you be in your person before the circuit court of Baltimore City, at the court-house in said city, on the second Monday of March instant, to answer the original and amended bills of complaint of the Connecticut Mutual Life Insurance Company against you in said court exhibited.

Hereof fail not as you will answer the contrary at your peril.

Witness the honorable George Wm. Brown, chief judge of the supreme bench of Baltimore City, the 11th day of January, 1875.

Issued the 4th day of March, in the year 1875.

[L. S.] JAMES R. BREWER, *Clerk.*

And the sheriff of Baltimore City aforesaid, to whom the said subpœna was delivered to be served, made return thereof to the court here thus endorsed, to wit:

Summoned ambo.

AUGUSTUS ALBERT, *Sheriff.*

And afterwards, to wit, on the sixth day of March, in the year
47 last aforesaid, the following order of appearance was filed in said cause, to wit:

In the circuit court of Baltimore City. January term, 1875.

THE CONNECTICUT MUTUAL LIFE INS. CO.
vs.
THE CENTRAL NATIONAL BANK ET AL.

Mr. BREWER: Enter my appearance for defendant Central National Bank and make copy of bill.

GEO. H. WILLIAMS.

And afterwards, to wit, on the eighth day of March, in the year last aforesaid, the following order of appearance was filed in said cause, to wit:

In the circuit court of Baltimore City. March term, 1875.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company
vs.
ASAHEL H. DILLON AND CENTRAL NATIONAL Bank, of Baltimore.

Mr. BREWER: Enter our appearance for Asahel H. Dillon, defendant.

WALLIS & THOMAS.

48 And afterwards, to wit, on the twenty-seventh day of April, in the year last aforesaid, the said defendant the Central National Bank of Baltimore by its solicitor aforesaid filed and entered in said cause the following pleas, to wit:

The plea of the Central National Bank of Baltimore to the amended bill of complaint of the Connecticut Mutual Life Insurance Company against it in the circuit court of Baltimore City exhibited.

This defendant by protestation not confessing or acknowledging all or any part of the matters and things in the said bill of complaint contained, to be true in manner and form as the same are therein set forth for plea nevertheless to the said bill doth plead and aver:

That the plaintiff is not in any sense a creditor of this defendant.

And for further plea that there never was nor is any privity between the plaintiff as to the various matters alleged in said bill.

And for further plea that this court has no jurisdiction as to
49 the matters alleged; the remedy, if any, being complete and adequate at law.

Wherefore it prays judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill of complaint, and prays to be dismissed with its reasonable costs and charges in this behalf sustained.

GEO. HAWKINS WILLIAMS,
For Defendant.

BALTIMORE CITY, *to wit:*

On this 19th day of April, A. D. 1875, before me the subscriber, a justice of the peace in and for said city, came James O'Connor, president, and made oath in due form of law, that the matters contained in the foregoing plea are true to the best of his knowledge and belief.

GEO. McCAFFRAY, *J. P.*

And afterwards, to wit, on the twenty first day of May, in the year last aforesaid, the court passed and filed in said cause the following order, to wit:

In the circuit court of Baltimore city.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company
vs.
50 THE CENTRAL NATIONAL BANK OF BALTIMORE & others.

Ordered by the circuit court of Baltimore City, that the motion for the appointment of a receiver, and for an injuction against the Central National Bank of Baltimore as prayed in the amended bill, be set for hearing on Tuesday, 1st day of June, 1875, provided that a copy of this order be served on the solicitors, for the defendants, on or before the 22d day of May, 1875.

C. W. PINKNEY.

Upon which said order of court is endorsed the following admission of service, to wit:

22d May, 1875—Service admitted.

R. S. MATTHEWS,
For Resp't.

May 22, '75—Service admitted.

S. T. WALLIS,
Sol'r for A. H. Dillon.
MACHEN & GITTINGS, *Sol'rs.*
GEO. H. WILLIAMS,
Sol. for Central Nat'l Bank.

And afterwards, to wit, on the first day of June, in the year last aforesaid, the following petition of complaint was filed in said cause, to wit:

51 In the circuit court of Baltimore City.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company
vs.
THE CENTRAL NATIONAL BANK OF BALTIMORE & others.

To the honorable Campbell W. Pinkney, judge of the circuit court of Baltimore City:

The complainant respectfully represents to your honor that since the filing of the original and amended bills in this case, the defendant The Central National Bank, your petitioner is informed and believes and therefore avers, has wholly ceased to transact business as a bank, and has vacated the office formerly occupied by it and removed its function and effects.

And your petitioner avers that it is the intention of said bank forthwith to distribute its funds and effects among its stockholders, who are to your petitioner unknown, and to distribute as part thereof the money of your petitioner, so unlawfully and fraudulently withheld by said bank; and your petitioner will be unable, without great delay and expense, if at all, to recover the large sum so unlawfully appropri-
52 ated by the said bank unless your honor shall intervene to protect the rights of your complainant.

And your petitioner avers that since the filing of the amended bill your petitioner has ascertained, and now avers, that the amount of its money so fraudulently appropriated by the said defendant is the sum of $11,000.86, which your complainant avers the said bank now holds as charged in the bill.

Wherefore, insisting upon the motions for the appointment of a receiver and granting an injunction contained in the amended bill, your petitioner prays that the defendant The Central National Bank may be compelled to bring into court the sum of money belonging to this complainant, and so as aforesaid fraudulently appropriated by the said defendant.

And your petitioner will ever, &c.

CHARLES MARSHALL,
JOHN CARSON,
Sol'rs for Comp't.

Which being read and heard the court passed and filed in said cause the following order, to wit:

53 Ordered by the court this 1st day of June, 1875, that the above case be set for hearing on the bill and pleas with such evidence as either party may produce on Tuesday, June 15th, 1875, and leave is granted to the parties to take testimony in the meantime before one of the standing commissioners on the usual notice. And it is further ordered that the motion contained in the above petition and the motions for an injunction and receiver stand for hearing at the same time, upon such evidence as either party may produce under the leave hereby reserved: Provided that a copy of the petition and of this order be served

on the solicitors of the respondent on or before the 3d day of June, 1875.

C. W. PINKNEY.

Which said petition and order are thus endorsed, to wit:

2nd June, 1875.—Copy of the within petition and order of court served on Geo. H. Williams, esq.

JOHN A. BROWN,
Messenger.

And thereupon to wit, on the said first day of June, A. D. 1875, the following petition of defendant to file additional pleas was filed in said cause, to wit:

54 In the circuit court of Baltimore City.

THE CONNECTICUT MUT'L LIFE INS. CO.
vs.
THE CENTRAL NAT'L BANK OF BALT'O.

To the honorable Campbell W. Pinkney, judge:
The defendant in the above cause prays leave to amend by filing an additional plea, and as in duty, &c.

GEO. H. WILLIAMS,
Sol. for Def't.

Upon which said petition to amend the court passed and filed in said cause the following order, to wit:

Ordered this 1st day of June, A. D. 1875, that defendant have leave to amend as prayed.

C. W. PINKNEY.

And thereupon, to wit, on the day and year last aforesaid, the following additional plea was filed in said cause, to wit:

In the circuit court of Baltimore City. In equity.

THE CONNECTICUT MUTUAL LIFE INS. CO.
vs.
THE CENTRAL NAT'L BANK OF BALT'O.

And for a further plea on this behalf, filed under the leave of the court first had and obtained, the defendant saith that it was incorporated under the act of Congress entitled an act for the es-
55 tablishing of national banks, approved June 3d, 1874, and its supplements, and that as such it is exempted from the process of injunction as prayed for by the supplement act thereto, approved June 3d, 1873.
Wherefore it pray' judgment, &c.

G. H. WILLIAMS,
For Def'd't.

And afterwards to wit, on the eighth day of November, A. D. 1875, appeared in court here, Asahel H. Dillon, jr., one of the defendants

aforesaid, by S. Teakle Wallis and John H. Thomas, esquires, his solicitors, and filed in said cause his answer to said original and amended bill of complaint, as appears by reference to this docket entries in said cause.

(This answer has been lost or mislaid, and although diligent search and careful inquiry has been made for the same, it cannot be found among the records of said court. Test: JAMES R. BREWER, *Clerk.*)

And afterwards, to wit, on the tenth day of April, A. D. 1877, the following petition of removal was filed in said cause, to wit:

56 In the circuit court of Baltimore City.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company
vs.
THE CENTRAL NATIONAL BANK OF BALTIMORE et al.

To the honorable Robert Gilmor, judge of the circuit court of Baltimore City:

The petition of the above-named defendant shows to your honor:

That the complainant in the above cause is a corporation duly incorporated by the State of Connecticut; and that the defendant was a national bank duly created for business in said city, of which its co-defendant is also a citizen; and the matters in said controversy greatly exceed the sum of money prescribed by the said act for the jurisdiction of the United States circuit court.

That the said suit is not yet in a condition for trial, and it is desired to remove the same into said circuit court of the United States in and for the district of Maryland, to be there heard and determined, in
57 pursuance of the provisions of the act of Congress of the United States of the 2nd session of the 43d Congress, chap. 137.

That herewith filed is a bond in the penalty of four hundred dollars, conditioned as prescribed by the third section of said act; and that your petitioner is entitled to have the said cause, by a copy of the record thereof, removed into said circuit court of the United States and entered therein at its next session.

It is prayed, therefore, that this petition and bond may be accepted, and that an order may pass removing said cause in pursuance of the provisions of the act aforesaid.

And as in duty, &c.

G. HAWKINS WILLIAMS,
For Petitioner.

And thereupon, to wit, on the day and year *and year* last aforesaid, the following bond to secure costs, and accompanying the petition for removal aforesaid, was filed in said cause, to wit:

Know all men by these presents, that the Central National Bank of Baltimore and James O'Connor, of Baltimore County and State of Maryland, are held and firmly bound unto the Connecticut Mutual
58 Life Insurance Company, a corporation duly incorporated by the State of Connecticut, in the full sum of four hundred dollars, to the payment of which, well and truly to be made, said bank binds itself, and said James O'Connor binds himself, his heirs, executors, and ad-

ministrators firmly by these presents, sealed with their seals and dated this ninth day of April, A. D. eighteen hundred and seventy-seven.

Whereas, in a suit now pending in the circuit court of Baltimore City, in which said company is complainant, and The Central National Bank and another are defendants, application is about to be made to said court on behalf of said bank to remove the same into the circuit court of the United States in and for the district of Maryland, in pursuance of the provisions of the act of Congress passed at the second session of the 43d Congress, chapter 137:

Now, the condition of the aforegoing obligation is such that if a copy of the record in such suit be entered in such circuit court on the first day of its next session after the date of these presents, and said applicant for such removal shall pay all costs that may be rewarded
59 by the said circuit court of said United States if it shall hold that such suit was wrongfully or improperly removed thereto, and the said applicant for such removal shall also in all other respects comply with all the provisions of such act relating to such removals, then the said obligation is to be void; otherwise to be of full force and virtue in law.

[THE CENTRAL NATION'L BANK OF BALTIMORE CITY.]
(Late) CENTRAL NATIONAL BANK OF BALTIMORE.
(Late) JAMES O'CONNOR, *President.*
JAMES O'CONNOR. [SEAL.]

Test:
W. SCOTT O'CONNOR.

Which said petition and bond being read and considered, the court here passed and filed in said cause the following order, to wit:

In the circuit court of Baltimore City.

Ordered this 10th day of April, A. D. 1877, up' the aforegoing petition, that the same, with the bond therewith filed, be, and the same is hereby, accepted, and the clerk of this court is hereby directed to remove the said cause by transmitting a copy of the record to the
60 circuit court of the United States in and for the district of Maryland, within the time prescribed by law.

ROB'T GILMOR.

Which is transmitted accordingly.
Test:

JAMES R. BREWER, *Clerk.*

STATE OF MARYLAND,
City of Baltimore, set:

I, James R. Brewer, clerk of the circuit court of Baltimore City, do hereby certify that the aforegoing is a full, true, and entire transcript (saving and excepting the answer of Asahel H. Dillon, jr., which has been lost or mislaid, as therein stated) taken from the record and proceedings of the said court in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of the circuit court of Baltimore City aforesaid on this thirteenth day of April, A. D. eighteen hundred and seventy-seven.

[L. S.] JAMES R. BREWER, *Clerk.*

61 Afterwards, to wit, on the 18th June, 1877, the following depo

sitions and exhibits, taken before a commissioner of the circuit court of Baltimore City, were filed, to wit:

Depositions.

In the circuit court of Baltimore City.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company of Hartford, Connecticut,
vs.
THE CENTRAL NATIONAL BANK OF BALTIMORE and Asahel H. Dillon, junior.

Depositions taken in the above-entitled cause by virtue of an order of the circuit court of Baltimore City, therein passed, before the subscriber, William S. Pinkney, a standing commissioner of said court, duly appointed, qualified and sworn, on the seventh day of July, in the year of our Lord eighteen hundred and seventy-five, at noon, at the office of George H. Williams, esquire, in the city of Baltimore and State of Maryland, in the presence of the solicitors of the respective parties.

NATHANIEL F. WILLIAMS, junior, a witness of lawful age, pro-
62 duced on behalf of the complainant, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

First interrogatory. State your residence and occupation.

1. Answer. I reside at number 191 North Howard street. I am in no occupation at present.

Second interrogatory. Were you ever connected with the Central National Bank; and, if so, in what capacity and during what period?

2. Answer. I was discount clerk from March, 1870, to January, 1874, and acting cashier from that time to March the first, 1875.

Third interrogatory. Who was president of said Central National Bank?

3. Answer. James O'Connor.

Fourth interrogatory. Were you acquainted with A. H. Dillon, junior, one of the defendants in this case? And, if so, state if he kept an account in said bank.

4. Answer. I was acquainted with him, and he kept an account in said bank.

63 Fifth interrogatory. Do you know at what time that account was first opened?

5. Answer. I do not.

Sixth interrogatory. Please look at the book now shown you, and state whether that is the bank book in which Mr. Dillon's account was kept up to the time he ceased making deposits in said bank, and state in whose handwriting the heading of said book is.

6. Answer. That is Mr. Dillon's bank book, and the heading is in the handwriting of the paying teller, P. C. Leary.

Seventh interrogatory. Please point out and read to the commissioner the heading of said account.

7. Answer. Central National Bank in account with A. H. Dillon, junior, general agent.

Eighth interrogatory. Please state whether Mr. Dillon at any time kept any account in said bank except the account A. H. Dillon, junior, as general agent.

8. Answer. I do not recollect whether he did or not.

Ninth interrogatory. Did Mrs. Dillon keep any account in said bank?

64 9. Answer. I do not recollect.

Tenth interrogatory. Where are the books of said bank?

10. Answer. They were at the old bank building the last time I saw them.

Eleventh interrogatory. Please state whether you know for what person or company Mr. Dillon was general agent at the time he kept said account in said bank.

11. Answer. I do not know.

Twelfth interrogatory. Where was Mr. Dillon's office at that time?

12. Answer. Opposite the bank.

Thirteenth interrogatory. Could you not and did you not often read the sign at Mr. Dillon's office?

13. Answer. I have seen it there several times but I do not know how often I have read it.

Fourteenth interrogatory. What did that sign state Mr. Dillon was general agent of?

14. Answer. It purported to be the Connecticut Mutual Life Insurance Company.

Fifteenth interrogatory. Did you or not know while Mr. Dillon

65 was keeping his account at the bank that he was in fact a general agent of the Connecticut Mutual Life Insurance Company? Did he not during said period draw large sums from time to time out of his account in the bank as general agent, by cheques drawn to the order of said company?

15. Answer. I did not know that he was the agent of the company; I have seen cheques drawn there, but do not recollect to whose order they were payable.

Sixteenth interrogatory. Do I understand you to say that you did not know that Mr. Dillon was the general agent of the company, as well as you knew the occupation of any other man of business who dealt at your bank?

16. Answer. This sign set him up to be so, but I have no positive reason for stating so.

Seventeenth interrogatory. Do you now say that you have no recollection of the payment by the bank of cheques drawn by Mr. Dillon as general agent in favor of the Connecticut Mutual Life Insurance Company while his account was kept at said bank?

66 17. Answer. I have seen cheques but do not recollect to whose order they were drawn.

(Notice is given to produce the cash book of Central National Bank containing the original entry of the charge of the note for ten thousand dollars of Mr. and Mrs. Dillon to the debit of the account of A. H. Dillon, junior, general agent.)

Eighteenth interrogatory. Please state whether you have any recollection of the amount to the credit of Mr. Dillon's account as general agent, on the first of June, 1874.

18. Answer. I cannot say at that time; I do not recollect.

Nineteenth interrogatory. Please state whether you have any recollection of a note, a copy of which is filed with the answer of defendant and marked Defendant's Exhibit C. N. B., No. 2, and state all you know with reference to said note.

19. Answer. I have a recollection of such a note, and it was for a debt due the bank, by the makers.

Twentieth interrogatory. Please state whether that note represents the original debt or was a renewal.

67 20. Answer. It is a renewal.

Twenty-first interrogatory. Has said note been paid to the bank; if so, when and how?

21. Answer. The note was charged to the account of A. H. Dillon, junior, general agent.

Twenty-second interrogatory. By whom was said charge made, and by whose authority and direction?

22. Answer. It was made by the direction of Mr. O'Connor, the president, and of the counsel of the bank.

Twety-third interrogatory. When was said charge made?

23. Answer. June the first, 1874, the day of its maturity.

Twenty-fourth interrogatory. You are positive that said note was charged on June the first, 1874, to Dillon's account as general agent?

24. Answer. That is my recollection; I would have to see the books to be positive.

Twenty-fifth interrogatory. Did or did not Mr. O'Connor take the advice of counsel before making or directing the charge?

25. Answer. Yes, sir.

6 Twenty-sixth interrogatory. At the time the charge was made, was the amount to the credit of Mr. Dillon sufficient to pay the note?

26. Answer. Yes, sir.

Twenty-seventh interrogatory. What balance, if any, remained to the credit of Mr. Dillon after charging the said note?

27. Answer. One thousand dollars and eighty-six cents.

Twenty-eighth interrogatory. When was Mr. Dillon notified that this note had been charged to his account as general agent?

28. Answer. Some days after the maturity of the note.

Twenty-ninth interrogatory. Do you remember the fact of a cheque for eight thousand dollars in favor of the Connecticut Mutual Life Insurance Company, or in favor of J. L. Greene, secretary, being presented to the bank for payment on the tenth day of June, 1874. If so, state what you remember in regard to said cheque.

29. Answer. There was a cheque for eight thousand dollars presented, but the date of presentation I do not recollect; it was in favor

69 of Mr. Greene, but his initials I have forgotten; payment was refused.

Thirtieth interrogatory. Please state whether Mr. Dillon had been informed that the ten thousand dollars note had been charged to his account as general agent before the presentation of said eight thousand dollars check?

30. Answer. No, sir; he had not been.

Thirty-first interrogatory. Then I understand said note was charged to Mr. Dillon's account, as general agent, at least ten days before he was apprised of that fact?

31. Answer. About that number.

Thirty-second interrogatory. Please state whether, after the presentation of said eight thousands dollar cheque, any other cheques against that account of Mr. Dillon's were paid by the bank.

32. Answer. None.

Thirty-third interrogatory. Please state whether Mr. O'Connor, president of the bank, knew what Mr. Dillon's occupation was.

33. Answer. I never heard him say, and he did not know, so far as I am aware.

Thirty-fourth interrogatory. Was not Mr. O'Connor constantly
70 at the bank during the time Mr. Dillon's account was kept there?

34. Answer. Yes, sir.

Thirty-fifth interrogatory. Was there not frequent and personal intercourse between Mr. Dillon and Mr. O'Connor, and did not Mr. O'Connor frequently visit Mr. Dillon at his office, and receive Mr. Dillon's visits at the bank?

35. Answer. There seemed to be intercourse and visits exchanged.

Thirty-sixth interrogatory. Do you not know that Mr. O'Connor knew as well as one man can know the business of another with whom he is not actually in partnership, that Mr. Dillon was the general agent of the complainant?

(Objected to.)

36. Answer. I do not know whether he did or not.

Thirty-seventh interrogatory. Do you or not know whether Mr. O'Connor knew what was the business or occupation of Mr. George H. Williams?

37. Answer. He knew him to be a lawyer.

Thirty-eight' interrogatory. Please take the bank-book of Mr.
71 Dillon, now handed to you, and state to the commissioner the deposits made to the credit of that account from the first to the twelfth of June, 1874, both inclusive, and the aggregate of said deposits.

38. Answer. The deposits are as follows, entered in the handwriting of the teller, Mr. E. L. Greenway:

June 1st.	Cash		$188 41
" 3d.	"		857 21
" 4th.	"		316 88
" 5th.	"		1,210 56
" 6th.	"		651 48
" "	"		330 00
" 8th.	"		257 80
" 10th.	"		204 71
" 11th.	"		60 93
" 12th.	"		134 86

The aggregate is $4,212.84.

Thirty-ninth interrogatory. You have stated that the ten thousand dollars note was charged up to the account of A. H. Dillon, junior, general agent, on the first of June, 1874, when said note matured. You have further stated that when said note was charged up it left a balance to the credit of Mr. Dillon of one thousand dollars and eighty-six cents, which, added to the deposits, four thousand two hundred
72 and twelve dollars and eighty-four cents, between the first and twelfth inclusive, would make a balance to the credit of Mr. Dillon on the twelfth of five thousand two hundred and thirteen dollars and seventy cents. Please state what the bank did with that balance.

39. Answer. I do not see how that could be.

Fortieth interrogatory. Does not the question correctly state your testimony as to the time when said note was charged up, and as to the balance remaining to the credit of Mr. Dillon when it was charged up?

(Defendant's counsel objects to the witness speaking from recollection as to the balances at particular dates, and offers to produce a transcript of the entries from the ledger.)

40. Answer. That is my recollection as to the time it was charged, and I believe that was the correct amount of the balance.

Forty-first interrogatory. Did Mr. Dillon continue to make deposits after the bank charged the ten thousand dollars note to his account?

41. Answer. I would have to refer to the book for that. Yes, sir; he did.

Forty-second interrogatory. How many deposits did he make
73 after said note was charged?

42. Answer. There appear to be nine.

Cross-examined for defendant:

First cross-interrogatory. In whose handwriting is the registration of the nine deposits?

1. X-answer. In that of Mr. Greenway.

Second cross-interrogatory. Then what actual personal knowledge have you of the nine deposits or any of them, apart from looking at them on the book?

2. X-answer. None, sir.

Third cross-interrogatory. Are you positive about one thousand dollars and eighty-six cents being left after the note was charged, or was not that the balance after the account ceased?

3. X-answer. It was the balance after the account ceased.

WILLIAM W. ORNDORFF, a witness of lawful age, produced on behalf of the complainant, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories
74 to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

First interrogatory. State your residence and occupation.

1. Answer. I reside at the corner of Fulton and Fayette streets. I am secretary of the Catonsville Railroad, and am in the insurance business, and am a member of the city council.

Second interrogatory. Were you ever connected with the general agency of the Connecticut Mutual Life Insurance Company in this city? If so, who was its general agent, how long were you connected with him, and in what capacity?

2. Answer. I was. A. H. Dillon, junior, was the agent, and I was with him as book-keeper and cashier for nearly seven years.

Third interrogatory. Where was the bank account of said Dillon as general agent kept during that period?

3. Answer. Previous to the opening of the Central National Bank, the account was kept with the Chesapeake Bank. After the opening of the Central National Bank it was kept in that bank.

Fourth interrogatory. Please state about what time the account
75 was opened with the Central National Bank.

4. Answer. I could not say without referring to the books, but it was soon after the Central National Bank began business in Baltimore.

Fifth interrogatory. How long did Mr. Dillon continue to keep said account in said bank?

5. Answer. Up to June the twelfth, 1874.

Sixth interrogatory. Please state how Mr. Dillon made his remittances to the company after he opened his account with the Central National Bank of money collected by him as agent for the company, and how often he was in the habit of making such remittances.

6. Answer. Mostly by checks on the Central National Bank, to the order of Jacob L. Greene, secretary of the company. I say "mostly" because occasionally there may have been, in one or two instances, drafts

on New York purchased and forwarded. He would make remittances of five thousand dollars, as the money was collected. I cannot answer definitely. Sometimes, and particularly towards the last, the rule of remitting when five thousand dollars was collected was not observed.
76 That was the instruction of the company, to remit when he had five thousand dollars. When I say towards the last, I mean the last of his agency, which terminated with the third of March last.

Seventh interrogatory. Please state of what the money collected by Mr. Dillon for the company consisted. I mean by that, what he received it for and in what form or forms he received it.

7. Answer. It was premiums for life insurance and was mostly collected in cheques and drafts with some currency.

Eighth interrogatory. Please state how the cheques and drafts were usually drawn, to whose order, and how described.

(Objected to unless cheques are produced.)

8. Answer. They were drawn in various ways. They were drawn sometimes to the order of A. H. Dillon, jr., general agent; sometimes to A. H. Dillon, agent, and again A. H. Dillon, (omitting the jr.,) agent or general agent. They would be drawn in a dozen different ways. Sometimes they were drawn mearly to the order of A. H. Dillon, individually.

Ninth interrogatory. Please state how all such cheques and
77 drafts were endorsed when deposited with the Central National Bank.

9. Answer. They were endorsed as drawn in the body of the cheque or draft, with the endorsement of A. H. Dillon, junior, general agent, under it. The bank required it in that way.

Tenth interrogatory. Please state, if you remember, what amount of money stood to the credit of the account of A. H. Dillon, jr., general agent, at the close of the third of May 1874?

10. Answer. Seven thousand five hundred and twelve dollars and sixty-seven cents.

Eleventh interrogatory. Please state whether Mr. Dillon, in making deposits in the Central National Bank, deposited the net amount of premiums, less his commissions, or whether his commissions were sometimes included in the deposit.

(Objected to as leading.)

11. Answer. The commissions were included in the deposit, where the cheques were given for the whole amounts of the premiums.

ASAHEL H. DILLON, junior, of lawful age, one of the defendants in this cause, appearing before me as a witness on behalf of the complainant, being by me first duly sworn on the Holy Evangely of Al-
78 mighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

First interrogatory. State your residence and occupation.

1. Answer. I reside in Baltimore City. I am an insurance broker.

Second interrogatory. Were you at any time general agent of complainant; if so, for how long?

2. Answer. I was for more than the last ten years, up to March, 1875.

Third interrogatory. Please state where you kept your account as general agent prior to the opening of the Central National Bank, the defendant.

3. Answer. With John S. Gittings and Company. I have not looked at the books and cannot be very accurate about it.

Fourth interrogatory. Please state when and under what circumstances you transferred your account as general agent for the defendant; and if you were requested to do so by any one, please state by whom.

4. Answer. I was requested to do so by Mr. James O'Connor,
79 president of the Central National Bank. I think my account there as general agent was opened on the first day of April, 1871.

Fifth interrogatory. Please state whether Mr. O'Connor knew for what you were general agent at the time he made said request of you.

5. Answer. He knew that I was general agent of the Connecticut Mutual Life Insurance Company of Hartford. I told him so, but I do not suppose he ever saw my power of attorney.

Sixth interrogatory. Please state where the office of your agency was located and how far from the Central National Bank.

6. Answer. It was located at Number 8, South street, and the Central National Bank was Number 9 South street, and my office is directly opposite the building next on the south to the Central National Bank building.

Seventh interrogatory. Could your sign be read by a person at the bank, and what did that sign say?

7. Answer. It could be read. I could have read it from the front window or door of the Central National Bank. The windows of my office were large plate glass, and on the lower sash of the centre
80 one was "The Connecticut Mutual Life Insurance Company of Hartford, Connecticut; A. H. Dillon, jr., general agent." There was also a sign, angular zinc, around the door post, having the same inscription on each side, to be read from up and down the street. The signs were conspicuous. On the top of this sign in some ornamental scroll work was, "Incorporated 1846," and then followed the corporate name of the complainant, and on the hand-rail as you descended the steps was a wooden sign adjoining the other, with the words "A. H. Dillon, junior, general agent."

Eighth interrogatory. Please state whether Mr. O'Connor was or was not a frequent visitor at your office during the time you kept your account at the bank.

8. Answer. At times he was

Ninth interrogatory. Was there or not anything in your office or on the door thereof, in the way of sign or writing or books of any kind, which would give notice to a visitor that it was the office of the general agent of the complainant?

(Objected to as leading.)

9. Answer. There was a sign at the side of the door upon the jamb. In the office there was a conspicuous placard of the company large enough to attract attention and designed for that purpose, and
81 such as is usually displayed at hotels and public places. There were numbers of circulars and pamphlets of the company with its name on it and my name as general agent.

Tenth interrogatory. Please state whether any of the directors or officers of the defendant bank were insured in the complainant; and, if so, who was so insured, and to whom did he pay his premiums, and from whom did he get his receipts; and also state whether your name appeared upon such receipts, and, if so, how?

10. Answer. Yes, sir; Mr. Edward McDowell, one of the directors of the bank, was so insured, paid his premium to me, and received from me the official receipt of the company with the secretary's name printed, and was countersigned in writing by me as general agent.

(Notice is given to produce said receipt.)

Eleventh interrogatory. Please state whether you remember at what time you were notified that the defendant had charged to your account as general agent the ten-thousand-dollar note mentioned in these proceedings, which matured on the first of June, 1874?

11. Answer. It was, I believe, on the fourteenth day of June.

82 I know it was on the day that my cheque as general agent for eight thousand dollars, drawn on the tenth of June, 1874, to the order of J. L. Greene, secretary, was protested for non-payment.

Twelfth interrogatory. Please state what amount of money stood to your credit as general agent at the Central National Bank at the time you ceased to deposit there?

12. Answer. Eleven thousand dollars and eighty-six cents.

Thirteenth interrogatory. Please state whether any part of said balance of eleven thousand dollars and eighty-six cents standing to your credit as general agent consisted of money belonging to yourself or held by you in any other capacity than as the general agent of the complainant?

(Objected to as leading.)

13. Answer. I believe not.

Fourteenth interrogatory. Please state when and how you made your last remittance to the company prior to closing your account with the defendant, and what was the result of such remittance?

14. Answer. I drew a cheque on the tenth day of June, 1874, on the Central National Bank for eight thousand dollars, payable to the order of J. L. Green, secretary, which cheque I remitted to Hartford,

83 Connecticut. I think it was on the morning of the fourteenth of June that Mr. Nathaniel Williams, then acting cashier of said bank, informed me orally, in my office, that the ten-thousand-dollar note before referred to had been charged up to my account as general agent on the first of June by Mr. O'Connor's orders, and that my cheque for eight thousand dollars was not paid. It was protested that same afternoon.

Fifteenth interrogatory. Please state how you accounted to the company for the balance of three thousand dollars and eighty-six cents over and above said eight thousand dollars cheque?

13. Answer. I charged it in my report to the company as being in the Central National Bank to my credit as general agent for the company.

Sixteenth interrogatory. Please state whether you know or not Mr. O'Connor was in Baltimore on the first of June, 1874?

16. Answer. I do not know.

Seventeenth interrogatory. Please state whether you remember any circumstance that occurred, while keeping your account at the bank, to indicate Mr. O'Connor's knowledge that said account was kept by

84 you as general agent of complainant.

(Objected to as leading.)

17. Answer. On one occasion a deposit made to the credit of A. H. Dillon, junior, general agent, was by mistake of the teller placed to the credit of Alice P. Dillon, my wife, who had a' account in that bank. When Mr. O'Connor's attention was called to it by me he went to Mr. Leary, in my presence, in the bank, and told him that that belonged to the account of A. H. Dillon, junior, general agent of the Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, in his usual emphatic way of speaking. On another occasion, I remember, Mr. O'Connor sent for me to state the case of Mr. Jackson, who was agent of the Royal Insurance Company, of Liverpool, at the time. I remember giving him my opinion, which he requested in the case stated by him to

4. X answer. My principal business was general agent of the Connecticut Mutual Life Insurance Company, and attending to its business. Life insurance was my occupation, and I would occasionally take risks for other life companies, and sometimes a little fire insurance business. That is about all the business I know of, and sometimes I had some five or six cases as attorney and was consulted on insurance matters. I cannot say I had any other business, and I attended to what little private businsss I had.

Fifth cross-interrogatory. So far as this business involved deposits and cheques and banking, do you mean to say they went into this
91 general agency account or had you an account in any other bank during the time enquired of?

5. X Answer. I think it went into this general agency account, sir. I do not remember any bank account in any other bank.

Sixth cross-interrogatory. State your exact power as agent for complainant, and if you ever had any power of attorney please produce it.

6. X Answer. The powers of attorney were such as were required by the laws of Maryland to be filed in the superior court, and I think my powers were stated in them. I was empowered to solicit and receive applications for insurance, forward them to the company, collect premiums on policies and renewals. The only powers of attorney I had set forth that I was appointed general agent of the company to admit process as required by law. The losses were usually paid by the company through a cheque, payable to the beneficiary, sent to me, and delivered by me, on the receipt of the policy and a proper receipt, but very rarely in complicated cases; the cheque was made to me and I deposited it and gave my cheque to the beneficiary.

Seventh cross-interrogatory. How many other occupants of the
92 building spoken of were there and how many signs were there on the building, many or few, during the time enquired of?

7. X Answer. I was the first occupant of the building, going there in July, 1870. I think in April, 1871, there was only one other occupant of the building. Afterwards there were others. Mine were the most conspicuous and high-priced offices in the building. The Fire Insurance Company was in the basement and had a conspicuous sign running over the front of their office. When Mr. Jackson went into the back office he had a sign on the right hand of the door and afterwards a round sign on the transom. The Steam Packet Company had a sign on the side of the railings as you come up from the street, and the Cemetery Company one on the other side, Mr. Holloway, the fire inspector, had a small sign.

Eighth cross-interrogatory. After the termination of yourgency for a the complainant, March the fifth, 1875, did complainant continue to occupy the same offices or did it remove its business elsewhere, and why?

8. X Answer. They occupied them for a few days and then removed, because I had rented the offices and not the company. I was
93 the tenant.

Ninth cross-interrogatory. What became of the signs spoken of, and if any remained what was upon it?

9. X Answer. I ordered the painter to remove the signs and he was several days in doing it. I do not know quite how long. The blue sign was removed and everything was erased from the window except the words "Life Insurance" and A. H. Dillon, Jr. The sign on the steps with the words "A. H. Dillon, Jr., general agent," remained for some time, because the painter could not get it off, it being riveted to the iron bannister.

Tenth cross-interrogatory. Are you yet in occupancy of said offices, and if not, give the date of your removal?

10. X Answer. I think it was the first of June last.

Eleventh cross-interrogatory. Was not said sign with A. H. Dillon, Jr., general agent, upon it, remaining upon the steps up to the time your ceasing so to occupy?

11. X Answer. I really forget the date. I know I ordered all those signs to be removed. I am safe in saying that it was there a good while after the others.

94 Twelfth cross-interrogatory. On the day of the maturity of the ten thousand dollars note spoken of, did you take any and what notice at the bank of the note?

12. X Answer. I did not take any.

Thirteenth cross-interrogatory. Had you received the usual bank notice given in such cases?

13. X Answer. I do not remember.

Fourteenth cross-interrogatory. Are you able to say what amount of interest was paid you by defendant on your deposits to your agency account?

14. X Answer. I am not able to say; it came at different times.

Fifteenth cross-interrogatory. Did you make any and what return of this interest to the complainant, and if not, why not?

15. X Answer. I usually appropriated it to the expenses of the agency which I was not allowed by the company; it was a private bonus for which I made the change and put that account in that bank.

Sixteenth cross-interrogatory. Do you mean to say that the en-
95 tire amount so allowed was exclusively applied to what you call the indirect expenses of the agency, or did you not use it as entirely your private money?

16. X Answer. I regarded that my office expenses were large and this would enable me to decrease them. I regarded it as an income coming from the company's matters and I applied it to the expenses of the general agency.

Seventeenth cross-interrogatory. To the extent that the said interest was earned by the deposits of the other money with which complainant had no concern, then to that extent complainant's funds had no connection therewith, is not that so?

17. X Answer. Yes, it is so, because there was such other money.

Eighteenth cross-interrogatory. You have mentioned your requiring an alteration on the books of the bank, of a deposit improperly credited to Mrs. Dillon; give the date as near as you can and state how long it was before you discovered the error and when it was you called Mr. O'Connor's attention to it at the time you allege he made use of the expressions spoken of?

18. X Answer. I do not recollect the date or time but only the fact. It may not have been Mrs. Dillon's account, but I remember his slowly and emphatically using the words of the Connecticut Mutual Life
96 Insurance Company of *of* Hartford, Connecticut. I do not recollect when or how I discovered the error.

Nineteenth cross-interrogatory. On the occasion enquired of when Mr. O'Connor sent to you for your advice as to the claim of the Royal Insurance Company of Liverpool, do you mean to say that O'Connor dissented in opinion from Mr. Matthews, or if they agreed, did you also agree or dissent?

19. X Answer. I judged from his remark that he dissented from Mr. Matthews, he dissented from me.

Again examined for complainant:

Twenty fifth interrogatory. Do you or not know whether Mr. O'Connor was acquainted with Jacob L. Greene, secretary of the Connecticut Mutual Life Insurance Company; and if so, when and where did he become acquainted with him?

25. Answer. I introduced Mr. O'Connor in my office, number 8 South street, to him, introducing one as the president of the Central National Bank, and the other as the secretary of the Connecticut Mutual Insurance Company. This was in 1872 or 1873.

97 Twenty-sixth interrogatory. How long did that interview last, and what conversation, if any, took place.

(Objected to.)

26. Answer. The conversation was a matter of a half or three quarters of an hour, perhaps. I cannot remember the whole conversation; it was a general conversation bringing in the Connecticut Mutual and banking and general business. I remember Mr. O'Connor expressing to Mr. Green his surprise that so young looking a man as he should be the executive officer of so large a corporation as the Connecticut Mutual Life Insurance Company.

(It is agreed that the bank-book of A. H. Dillon, junior, general agent, with the Central National Bank, may be used in the trial of this case without being filed with the commissioner.)

Again cross-examined for defendant:

Twentieth cross-interrogatory. Look at the bank-book, and under date of March the twentieth, 1874, there seems to be an erasure; please explain it.

20. X Answer. I never saw it before; I suppose it was done in the bank. I have no recollection of anything connected with it.

Twenty-first cross-interrogatory. In said bank-book on the deposit side the name of J. G. Field occurs several times; please explain

98 what that means and if it had any and what connection with the business of complainant.

21. X Answer. They were renewal receipts of the Berkshire Life Insurance Company sent through the Central National Bank for collection at Culpepper, Virginia, for premium due thereon. It has no relation to the business of complainant.

Twenty-second cross-interrogatory. Look at the words on the same side of the account under date of July the twenty first, 1873, as to which the same question was asked.

J. C. Thompson	$100 43
W. H. Ketchum	317 75
S. L. Hohn	55 80

22. X Answer. I think they referred to the business of the Phœnix Insurance Company of Hartford; certainly not to the complainant's business. They were sent through defendant for collection in a bank in Mobile.

Twenty-third cross-interrogatory. Are you able to take this bank-book and eviscerate from the deposits the amounts exclusively belonging to the complainant from amounts belonging to other persons?

23. X Answer. I do not think I can do it.

(Notice is given to complainant to produce the reports made by

99 Mr. Dillon to the complainant from the time of opening the bank account to the close of his agency.)

The taking of depositions was then adjourned to the twelfth day of June, in the same year, at eleven in the forenoon, and the same place;

at which last-mentioned time and place the commissioner met pursuant to notice, and I proceeded, in the presence of the solicitors of the respective parties, to take the following depositions, that is to say:

ASAHEL H. DILLON, junior, being now again examined in the following additional interrogatories to him propounded on behalf of the complainant, makes oath, deposeth, and saith as follows, that is to say:

Twenty-seventh interrogatory. Has or not the Central National Bank discontinued its operations in the city of Baltimore? and, if so, state all you know about it.

27. Answer. I know that, by publication in the Sun newspaper, of Baltimore, in the summer of 1874, an advertisement was published stating that the bank had ceased to receive deposits after a cer-
100 tain date. It is the advertisement referred to in these proceedings. I only know that the banking house on South street which they occupied has been vacated, and the desks and counters and furniture have been removed. That, I think, was done this spring. I saw the wagons taking away the furniture.

Twenty-eighth interrogatory. About or after the first day of April, 1871, did or did not Mr. O'Connor request you to solicit deposits for said bank; and, if so, what took place between you, and give the time thereof? (Objected to as leading.)

28. Answer. He requested me to solicit some of the leading agents of insurance companies to make deposits in the Central National Bank, and that the bank would pay them four per cent. interest on said accounts, the same as he did to me on my company's account. I do not remember when this was done precisely, but think it was in 1872.

The taking of depositions was then adjourned to the fifteenth day of June, in the same year, at two in the afternoon, and the same place, at which last-mentioned time and place the commissioner met pursuant to notice, and I proceeded, in the presence of the solicitors of the
101 respective parties, to take the following depositions, that is to say:

WILLIAM W. ORNDOFF, a witness heretofore produced, sworn, and examined on behalf of the complainant, being now again examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

Twelfth interrogatory. Have you examined A. H. Dillon, junior's, bank book, cash book, and cheque books, and bank-deposit tickets, and can you state therefrom what money of the Connecticut Mutual Life-Insurance Company was received by Mr. Dillon from March the first to June the twelfth, 1874, inclusive; and, if so, how much was received in currency or its equivalent, and how much in cheques, and how much thereof was deposited in the Central National Bank, and how it was deposited?

12. Answer. I have made such examination, and I produce and file complainant's Exhibit W. W. O., and the result of my examination is shown thereby. (It is agreed that said exhibit shall be received as evidence in lieu of said cheque book, cash book, and tickets.) The total receipts of all kinds on account of the Connecticut Mutual Life-
102 Insurance Company were forty-five thousand and twenty-one dollars and one cent, of which the receipts in cheques and drafts were thirty-eight thousand three hundred and fifty-six dollars and ninety ——. The total receipts in currency were six thousand six hundred and

sixty-four dollars and eleven cents. The total receipts for March were twelve thousand five hundred and ninety-one dollars and ninety-three cents; April, fifteen thousand four hundred and thirty-five dollars and seventy-seven cents; May, twelve thousand and fifty-three dollars and seven cents; June, four thousand nine hundred and forty dollars and twenty-four cents. The total receipts to June the twelfth, forty-five thousand and twenty-one dollars and one cent. The total amount deposited in currency on account of Connecticut Mutual Life-Insurance Company in Central National Bank from March the first to June the twelfth was five thousand three hundred and fourteen dollars. The total deposits and collections in said bank from March the first to June the twelfth to account of A. H. Dillon, general agent, in cheques and drafts, were thirty-nine thousand four hundred and thirteen dollars and sixty-one cents. Of the cheques deposited, the items amounting to nine hundred and twenty-nine dollars and twenty-three cents and two
103 thousand six hundred and ten dollars and forty-eight cents were other money than that of the Connecticut Mutual Life-Insurance Company. On the sixteenth day of May, 1874, Mr. Dillon paid Mr. Norris out of the twenty-five hundred and eighty-four dollars and fifty cents marked on the statement; Knickerbocker Life-Insurance Company nineteen hundred and six dollars and ninety-five cents, and retained thereout five hundred and ninety-two dollars and sixty-five cents as a premium due the Connecticut Mutual Life-Insurance Company.

NOTE.—It is agreed that by the balance of A. H. Dillon's book, on the thirty-first of May, 1874, he owed at the close of that day seven thousand four hundred and twenty-eight dollars and seventy-four cents to the complainant, and that his cash balance on that day was eight thousand seven hundred and forty-two dollars and fifty-three cents, of which he had cash in the Central National Bank seven thousand five hundred and twelve dollars and sixty-seven cents, and the residue cash in drawer or cheques held over and counted as cash. It is agreed that on the first day of March, 1874, there was a balance due the complainant of seven thousand five hundred and thirty-seven dollars and fifty-one cents.

Cross-examined for defendant:

104 First cross-interrogatory. Look at the fourteen checks now shown you, marked Defendants' Exhibits, Depositions G. H. W., Nos. 1 to 14, inclusive, and state what they are, and state how many of them, if any, were connected with the affairs of complainant, and specify them.

1. X answer. There were only two, I would say, concerned the complainant, one of April the twenty-second, No. 526, for four thousand and eight hundred and eighty-nine dollars to Dunham and Sherman, and No. 543, June the eighth, 1874, for three hundred and sixty-two dollars and forty-nine cents to Dunham and Sherman.

Second cross-interrogatory. State how said two concern the complainant.

2. X answer. They were for premiums due complainant through their general agents in New York. They are complainant's money. The other cheques in no wise concern the complainant.

Third cross-interrogatory. Look at the seventeen cheques now shown you, marked Defendants' Exhibits, Depositions G, H, W, Nos. 15 to 31, inclusive, and say if any of them concern the business of complainant.

3. X answer. Of the said cheques I only find two which concern complainant, No. 534 of May the twenty-sixth, 1874, for two hundred

105 and fifty-three dollars, to Bombaugh and Ransom, and No. 540, of June the fifth, 1874, for thirty-two dollars and fifty-three cents. The others are for Mr. Dillon's other business and personal expenses.

Fourth cross-interrogatory. What other business, if any, did Mr. Dillon, to your knowledge, from time to time, engage in?

4. X answer. He placed fire insurance risks and life insurance risks, as broker, in companies other than the complainant; but the business was limited; very small in comparison.

Fifth cross-interrogatory. As his bookkeeper from the time he opened his account at the Central National Bank, were you always cognizant of what his daily deposits were composed?

5. X answer. Certainly, yes.

Sixth cross-interrogatory. Describe his general agency bank account; was it blended and mixed, or confined only to his business for complainant?

6. X answer. It was mixed, as complainant's Exhibit, Depositions W. W. O. shows.

Seventh cross-interrogatory. What connection had you as his clerk and the renting of the premises with the business of complainant?

7. X answer. None; I was his individual clerk and paid by
106 him, and the renting of the premises was his individual business.

Eighth cross-interrogatory. Are you aware of any and what amount paid by the defendant to Dillon as interest on his deposits? If so, what entry was made of it on his books, and what report, if any, was made of it to complainant?

8. X answer. I never make any entry of it on the books; nor was any made to my knowledge; and no report of it was made to complainant.

Ninth cross-interrogatory. There was a sign spoken of as being on the steps with the words "A. H. Dillon, jr., general agent," which it is alleged remained there from March, when Mr. Dillon was displaced from office, to the time when he vacated the premises, June the first; do you know why the same remained there?

9. X answer. I could not tell why it remained.

Tenth cross-interrogatory. Was it difficult of removal, or otherwise?

10. X answer. I should suppose not; I should suppose it was as easy of removal as the others.

Eleventh cross interrogatory. Do you know anything of a deposit by the Central National Bank, erroneously credited to Alice P. Dil-
107 lon, and which had to be transferred from her account in said bank to the account of A. H. Dillon, junior, general agent.

11. X answer. I cannot call it to mind, but if it is important I will look over the book and ascertain.

NOTE.—It is agreed that the exhibits filed with the answer of the bank, a copy of the note and a copy of the agreement also filed of December the ninth, 1873, shall be taken in lieu of the originals which are now produced, and the signatures proved by Mr. Oendorff, the filing of which originals is hereby waived. Defendants' Exhibit Deposition G. H. W., No. 32, is filed.

Again examined for complainant:

Thirteenth interrogatory. Explain how much of the other cheques not connected with the complainant, shown in Complainant's Exhibit Deposition W. W. O. was paid out by Mr. Dillon?

13. Answer. The first two items, seventy-five dollars and four hundred and fifty five dollars, were paid out for fire insurance, less the commis-

sions ten to fifteen per cent. The next item of thirty-five dollars was a cheque for borrowed money returned. Of the next item of one hundred and forty-six dollars and eighty-four cents, one hundred and
108 eighteen dollars and sixty-one cents was paid to the Security Life Insurance Company for Mr. Towles, and the balance, twenty-seven dollars and twenty-three cents, was complainant's money, and in my resume I have put it down as a cheque payment. The next, one hundred and forty-seven dollars and thirty-nine cents, was for fire insurance, less the commissions as above. The next item of twenty dollars was for a cheque of complainant to Doctor Stewart, and by him endorsed to Mr. Dillon in payment of a premium to complainant, taking the form first of a credit to his account. The next item of fifty dollars was money loaned out of the drawer and paid back by cheque. The next item, twenty-five dollars and ninety-eight cents, is for a premium paid the Berkshire Life Insurance Company.

Again cross-examined for defendant:

Twelfth cross-interrogatory. From April the first, 1871, the date specified by Mr. Dillon when he opened his general agent account with defendant down to June the twelfth, 1874, had he any, and what other bank account than that kept in Central National Bank?

12. X answer. I know of none except those in Chesapeake Bank and with John S. Gittings and Company.

Thirteenth cross-interrogatory. What accounts had he with the defendant?

109 13. X answer. He had one account in the name of A. H. Dillon, junior, general agent, and another in the name of Mrs. Alice P. Dillon.

The taking of depositions was then adjourned to the first day of July in the same year, at three in the afternoon, and the same place; at which last mentioned time and place the commissioner met pursuant to notice, and I proceeded in the presence of the solicitors of the respective parties to take the following depositions, that is to say:

NATHANIEL F. WILLIAMS, junior, a witness heretofore produced, sworn, and examined on behalf of the complainant, being now again examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth and saith as follows, that is to say:

Forty-third interrogatory. State your residence and occupation.

43. Answer. I reside in Baltimore City, and am acting cashier of the Central National Bank.

Forty-fourth interrogatory. Were you cashier of the Central National Bank in June, 1874?

44. Answer. Yes, sir.

Forty-fifth interrogatory. Are you acquainted with A. H. Dillon, junior?

110 45. Answer. I am.

Forty-sixth interrogatory. Had he any dealings with the Central National Bank?

46. Answer. Yes, sir; not as an individual, but as general agent.

Forty-seventh interrogatory. Please state whether or not about the month of June, 1874, the said A. H. Dillon, alone, or jointly with any one else, was indebted to the Central National Bank in any amount; if so, to what amount, and how was said indebtedness shown?

47. Answer. It was by a joint note of A. H. Dillon, junior, and his wife; to the best of my recollection, the amount was ten thousand dollars.

(It is agreed that witness may file a copy of this note with the commissioner.)

Forty-eighth interrogatory. Please state whether any part of that note was paid at maturity by said Dillon; and if in any way, how?

48. Answer. There was no payment made on it that I recollect of.

Forty-ninth interrogatory. Does said bank still hold said note?

49. Answer. Yes, sir.

Fiftieth interrogatory. Look at the paper now shown you and
111 state whether that is a copy of the contract made between Dillon and the bank at the time of discounting the note referred to by the bank?

50. Answer. There was a contract made at the time of discounting such note, and I will file a copy of the original *copy* with the commissioner.

Fifty-first interrogatory. Please state whether any action was taken by the bank after the maturity of said note to secure the payment thereof; and, if so, what.

51. Answer. I do not recollect of any action being taken.

Fifty second interrogatory. At the time said note was matured was there any money standing to the credit of A. H. Dillon, as general agent in said bank; and, if so, what?

52. Answer. Yes, sir; an amount of one thousand dollars and eighty-six cents remaining over as a balance after the note was charged up.

Fifty-third interrogatory. Please state what you mean by "after the note was charged up," and to what note you refer.

53. Answer. Mr. Dillon's note of ten thousand dollars, drawn up jointly by himself and wife, was charged up to the account of A. H. Dil-
112 lon, junior, as general agent, and the balance to his credit as general agent was one thousand dollars and eighty-six cents after said note was charged up.

Fifty-fifth interrogatory. Please state whether said Dillon or his wife kept an account with the bank other than the account of A. H. Dillon, junior, as general agent.

55. Answer. I think there was an account there, but I do not recollect the name in which it stood.

Fifty-six' interrogatory. Will you be good enough to produce and file with the commissioner a copy of any account standing open with the bank in the name of A. H. Dillon, junior, or of Mrs. Dillon, at the time of the maturity of said note, or state if there was such account?

56. Answer. I do not recollect of any such account standing open at that time, but if there is I will produce and file a copy of it.

(The whole testimony of this witness objected to as irrelevant.)

Again cross-examined for defendants:

Fourth cross-interrogatory. Do you know what balance was standing upon the books of the bank to the credit of A. H. Dillon, as gen-
113 eral agent, at the time at which the note you have spoken of matured?

4. X answer. I think there was eleven thousand dollars and eighty-six cents.

Fifth cross-interrogatory. Are you not confounding the amount in bank when the account was closed with the amount in bank at the maturity of the note?

5. X answer. I may be wrong in regard to the dates and amount of that account. I can recollect, though, without referring to the books.

Sixth cross-interrogatory. Please ascertain from the books and furnish

the commissioner with a statement of the amount that was to Dillon's credit on the date of the maturity of the note.

6. X answer. I will.

Seventh cross-interrogatory. When did you go into the employment of the bank?

7. X answer. I think March the eighteenth, 1871; it was at the commencement of the bank.

Eighth cross-interrogatory. When did you become acting cashier?

8. X answer. January, 1873 or 1874, I forget which. January, 1874, sir.

Ninth cross-interrogatory. Do you know anything of the trans-
114 action between Mr. and Mrs. Dillon and the bank in regard to which you have testified, except from seeing the note which was discounted and seeing the books?

9. X answer. That is all the knowledge I have.

Tenth cross-interrogatory. Who made the entry or entries in the books referring to this transaction?

10. X answer. Mr. McCandlish, the book-keeper, made them.

Eleventh cross-interrogatory. Do you personally know, of your own knowledge, when the note of Mr. and Mrs. Dillon was charged up to the account of Mr. Dillon as general agent by the bank?

11. X answer. I think it was charged up on June the eighteenth, 1874.

Twelfth cross-interrogatory. What knowledge have you of its having been made then?

12. X answer. My directions were to charge it at that date.

Thirteenth cross-interrogatory. Were your directions on that day to charge it?

13. X answer. No particular day given that I recollect of. I think it was the date of its maturity. I think I had orders to charge it
115 up; that is my impression.

Fourteenth cross-interrogatory. Do you know whether Mr. O'Connor was in the bank that day?

14. X answer. No, sir; Mr. O'Connor was absent.

Fifteenth cross-interrogatory. How long had he been absent?

15. X answer. I am not quite certain. It may have been a week or ten days.

Sixteenth cross-interrogatory. Then if he was not there, who was to give you the directions to enter it up?

16. X answer. The directions were given prior to his leaving, when that note fell due to charge it up.

Seventeenth cross-interrogatory. Did you notify Mr. Dillon at that time that the note was charged to his general agency account?

17. X answer. I did not, as I recollect.

Eighteenth cross-interrogatory. Why not?

18. X answer. I could not say why not, but I did not notify him, as far as I recollect.

Nineteenth cross-interrogatory: How long after was he notified?
116 19. X answer. I do not recollect the date.

Twentieth cross-interrogatory. State if you did not wait to notify Mr. Dillon until his deposit had become large enough to cover the amount of the note?

20. X answer. The notification was not sent until his deposits were large enough to cover the note; that is my recollection.

Twenty-first cross-interrogatory. State, if you please, whether you ever notified Mr. Dillon that his note had been charged up to his gen-

eral account until a check of eight thousand dollars of his, as general agent, drawn on June the tenth, 1874, upon the bank in favor of Jacob L. Green, secretary, had been presented?

21. X answer. I think he was notified before the check of eight thousand dollars, but will not be certain.

Twenty-second cross interrogatory. Please remember whether you did not go over yourself personally and give him the very notice verbally on the very day that check came in and was refused.

23. X answer. Yes, sir; I took the notice, but what day I do not remember. I recollect notifying him, but on what day I cannot
117 recollect. I have an indistinct recollection that when this check came in I did notify Mr. Dillon, but won't be positive.

Twenty-fourth cross-interrogatory. Did the bank not refuse to pay the check that I have mentioned?

24. X answer. Yes, sir; they did.

Twenty-fifth cross-interrogatory. Did it not also subsequently refuse a similar check drawn by Mr. Dillon, as general agent, in favor of Mr. Green for three thousand or four thousand dollars?

25. X answer. I do not recollect any such check coming in, sir.

Twenty-sixth cross-interrogatory. State, if you please, what would have been the balance to Mr. Dillon's credit as general agent with the bank, if that note of his and Mrs. Dillon's had not been charged up against it.

26. X answer. I think some eleven thousand dollars and eighty-six cents.

Twenty-seventh cross-interrogatory. Was not Mr. Dillon's office nearly opposite to the Central Bank office on South street?

27. X answer. Very nearly so.

Twenty-eighth cross-interrogatory. Were not Mr. Dillon's signs, as general agent of the Connecticut Mutual Life Insurance Com-
118 pany, visible from your windows:

28. X answer. Yes, sir.

Twenty-ninth cross-interrogatory. Did not Mr. O'Connor and all of the officers of the bank know that Mr. Dillon was the general agent of the Connecticut Mutual Life Insurance Company?

29. X answer. I do not know what they all thought about it.

Thirtieth cross-interrogatory. Did you know it yourself?

30. X answer. I saw his signs there; I inferred so from his signs.

Thirty-first cross-interrogatory. How long had Mr. Dillon been keeping his account with you?

31. X answer. I think when the bank first started, about three years.

Thirty-second cross-interrogatory. Had he been regularly all that time issuing checks in the bank, as general agent, in favor of the Connecticut Mutual Life Insurance Company, or its officers, and had not the bank been paying those checks?

32. X answer. I do not recollect whose favor they were drawn in, because I never overlooked the checks.

119 The taking of depositions was then adjourned to the fifteenth day of July in the same year, at three in the afternoon, and the same place; at which last-mentioned time and place the commissioner met pursuant to notice, and I proceeded in the presence of the solicitors of the respective parties to take the following depositions; that is to say:

GEORGE H. WILLIAMS, a witness of lawful age, produced on behalf of the complainant, being by me first duly sworn on the Holy Evangely

of Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth and saith as follows; that is to say:

First interrogatory. Please produce the minutes of the Central National Bank and give therefrom all the entries touching the ten thousand dollar note of A. H. Dillon, junior, and wife?

1. Answer. The book of minutes is in my hands as counsel of the bank, and it appears that on the ninth of December, 1873, at a meeting of the board, a note at six months, dated November the twenty-ninth, made by A. H. Dillon, junior, and Alice P. Dillon, was offered for
120 discount, and it was "resolved, that in consideration of Alice P. Dillon being a stockholder in this bank, and of A. H. Dillon, junior, being a customer of the bank, this note be discounted at six per cent. per annum, provided only that it be agreed in writing between the makers and endorsers of said note and this bank that at the maturity of the note five thousand dollars must be paid, and a new note at six months be given for the remaining five thousand dollars, which at its maturity must be paid in full." "Resolved, that the acting cashier be instructed to carry these instructions into effect, and report in writing at the next meeting of the board." The persons present at this meeting were the president, James O'Connor, E. M. Hardy and E. G. McDowell, of the directors, and the proceedings are signed by Charles H. Pitts, as cashier, who, on December the thirteenth, 1873, at the next meeting of the board, reported the effecting the arrangement with A. H. Dillon, junior, and Alice P. Dillon, regarding the note of ten thousand dollars in accordance with instructions given by the board at last meeting. The original note is in my possession; a copy of it is one of the exhibits filed with the answer, and is a true copy of it.

Second interrogatory. Trace said note through the book?

121 2. Answer. On the sixth of May, 1873, it appears that among other paper discounted on that day by the board was a promissory note made by Alice P. Dillon and A. H. Dillon, jr., in their own favor for twelve thousand dollars, and on the twenty-ninth of October, 1872, there appears to have been another note of which Alice P. Dillon was alone the maker, and A. H. Dillon, jr., the payee, for twelve thousand dollars.

Third interrogatory. Look in April, 1872, and see if there is anything there?

3. Answer. There is not.

Fourth interrogatory. Follow the note down from May the sixth, 1873?

4th. Answer. On October the twenty-eighth, 1873, at a meeting of the board, the note of A. H. Dillon and Alice P. Dillon was authorized to be renewed for ten days for ten thousand dollars.. The note was for twelve thousand dollars, due November the first, and two thousand dollars to be paid in conformity with the wishes of the makers. Nothing appears in the records at the date of the maturity of the note. No further application appears for its renewal.

The taking of depositions was then adjourned to the twenty-first day of July, in the same year, at two in the afternoon and the same place; at which last-mentioned time and place the commissioner' met
122 pursuant to notice, and I proceeded, in the presence of the solicitors of the respective parties, to take the following depositions; that is to say:

A. H. DILLON, junior, a witness heretofore produced, sworn and ex-

amined on behalf of the complainant, being now again examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows; that is to say:

Twenty-ninth interrogatory. By Mrs. A. P. Dillon's bank book, on the page to be copied by the commissioner, do I or not understand that but for the discount of the twelve thousand dollars note there mentioned, Mrs. Dillon's account would have been overdrawn to the amount of twelve thousand dollars?

29. Answer. Yes, that was done to close that account.

Thirtieth interrogatory. Had Mrs. Dillon or not overchequed in said bank by authority, and, if so, by whose authority?

(Objected to as leading.)

30. Answer. I overchequed that account, signing her name by me, by authority of James O'Connor, president of the bank.

Thirty-first interrogatory. Please state how Mrs. Dillon came to
123 give the twelve thousand dollars note in April, 1872?

31. Answer. I do not know whether I gave the note and she endorsed it, or whether she gave it and I endorsed. I only know that Mr. O'Connor told me it was necessary to have the note, that the bank examiner was coming here, and the overdraft was irregular, and he had to have the note.

Thirty-second interrogatory. Please state whether the original note of twelve thousand dollars given to the Central National Bank, and shown in the copy of Mrs. Dillon's bank-book, has or has not been paid; and, if so, when and by whom?

32. Answer. I have forgotten the length of time it was given for, but from time to time other notes were given for it; it was a twelve thousand dollar note down to November the first, 1873, when it was a ten thousand dollars note. A note was given for ten days, and I or Mr. O'Connor both were away when it matured. The last ten thousand dollars note mentioned in this case was an extension of part of that twelve thousand dollars note and of the ten thousands dollar note given for ten days. Two thousand dollars was paid by matters between Mr. O'Connor and myself.

Thirty-third interrogatory. To whom was the two thousand
124 dollars paid which you have just said was paid on account of the twelve thousand dollars note?

33. Answer. To Mr. O'Connor. I settled it with Mr. O'Connor individually.

Thirty-fourth interrogatory, Please state whether at the time of the payment of the two thousand dollars Mrs. Dillon purchased and paid for any stock in the Central National Bank; and, if so, from whom, and for what amount?

34. Answer. About that time I purchased for her, and in her name, ten shares of stock, through Wilson, Colston and Company; Mrs. Dillon had originally ten shares of stock in the bank, which had been sold, and in the settlement of a private transaction between Mr. O'Connor and myself there was a balance in my favor, of which two thousand dollars was applied to reducing the note of twelve thousand dollars to ten thousand, and the rest applied to the purchase of the stock at Mr. O'Connor's suggestion. This was not a bank transaction. I had Mr. O'Connor's money in my hands at the time of the transaction. It was an individual matter between Mr. O'Connor and myself, with which, to my knowledge, the Central National Bank had nothing to do. I drew individual cheques on the bank and Mr. O'Connor marked them "good," and I took them and used them. I had no book for this account.

125 Again cross-examined for defendant:

Twenty-fourth cross-interrogatory. You have said that but for the discount of the twelve thousand dollars note Mrs. Dillon's bank account would have been overchequed; would there have been any checque on the Central National Bank on her account, for the net proceeds of her discount, unless the discount had been granted?

24. X answer. I do not know whether the Central National Bank had anything to do with it or not. It was a personal matter between Mr. O'Connor and myself, and I did just what he told me at the time; he did not come to me for the cheque till some time afterwards.

Twenty-fifth cross-interrogatory. Explain, then, what you mean by Mrs. Dillon's account being overchequed; and, if so, to what extent; and look at Complainant's Exhibit G. H. W., No. 1, and say if it is overchequed.

25. X answer. I know nothing about his exhibit; the bank-book will show it was overchequed. From the bank-book it appears that on the thirteenth of March the account was credited with twenty-one thousand four hundred and thirty-six dollars and seventy-three cents, and there had been chequed out against it up to but not including the
126 fourteenth day of March twenty thousand seven hundred and three dollars and ninety cents, and on the fourteenth day of March a cheque was drawn for forty-five hundred dollars, and on the fifteenth day of March one of twenty-five hundred dollars, and on the eighteenth day of March another of three thousand dollars, and on the sixteenth day of March another of three thousand dollars. Of course that shows a draft of thirteen thousand dollars against seven hundred and thirty-two dollars and eighty-three cents, and a subsequent deposit of one hundred and twenty-five dollars. I recollect the fact of the overdraft, but cannot recollect the exact figures; but it was about twelve thousand dollars.

Twenty-sixth cross-interrogatory. For what were those cheques given, and what connection, if any, had they with this twelve thousand dollars note or loan?

26. X answer. All cheques were given were for money. They were given at the suggestion of Mr. O'Connor himself to me, and at his request; the note was given to close up that account.

Twenty-seventh cross-interrogatory. You were not asked at whose suggestion cheques were given; you were asked for what they
127 were given, and what connection they had with the twelve thousand dollars loan, or overdraft if you prefer the word.

27. X answer. They were given to William Fisher and Sons; I cannot explain it now; the transactions were with Mr. O'Connor, individually. The fact of the matter is that no mention was made of a note until some time after the cheque of March the sixteenth, for three thousand dollars, was given. The Central National Bank never had but one twelve thousand dollars note at one time, and the note of two hundred and thirty-two dollars was given for the interest.

Twenty eighth cross-interrogatory. Look at said bank-book and give your explanation of three discounts purporting to have been given on the twenty-sixth day of April, and if the deposit on the twenty-third day of April be truly registered as to date, explain, if you can, why three discounts should have been entered antedating the arrival of the granting of the same.

28. X answer. Mr. O'Connor never held more than one twelve thousand dollars note of mine at any one time, and I cannot explain those entries

on this bank-book. Talking about a discount, I never applied to the bank for that discount. Mr. O'Connor came to me and got the note.

128 Twenty-ninth cross-interrogatory. Was the note at ten days for ten thousand dollars taken up at its maturity, or then renewed; and, if so, how?

29. X answer. Nothing was done at maturity. My recollection is that a note was given some weeks afterwards which matured June the first, following.

Thirtieth cross-interrogatory. Then what you mean to say in your examination-in-chief is, that the note which matured in June is in substance a combination of the original twelve thousand dollars matter, as between you and O'Connor, and not done by regular bank renewals and extensions?

30. X answer. I do not know what you mean by regular bank renewals and extensions. I was absent from the city on business for Mr. O'Connor, at the maturity of the note on the thirteenth of November, and the ten thousand dollars note given on the twenty-ninth of November, 1873, was a part of the original twelve thousand dollars note given to Mr. O'Connor to close Mrs. Dillon's account in 1872.

(Proof of the incorporation of the complainant is waived).

129 The taking of depositions was then adjourned to the thirty-first day of August, in the same year, at twelve noon, and the same place; at which last mentioned time and place the commissioner' met pursuant to notice, and I proceeded in the presence of the solicitors of the respective parties to take following depositions; that is to say:

SETH REED, a witness of lawful age, produced on behalf of the defendant, being by me first duly sworn upon the Holy Evangely of Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows; that is to say:

First interrogatory. State your residence.

1. Answer. I reside at number 181 North Fremont street.

Second interrogatory. What was your occupation from March, 1871, to March, 1875, and by whom were you employed during said period?

2. Answer. I was book-keeper and had charge of the general ledger; employed by the Central National Bank of Baltimore.

Third interrogatory. What account, if any, of your own know-
130 ledge, was kept with the Central National Bank by Alice P. Dillon, and if you should say there was such account, state when the same was opened and when closed?

3. Answer. There was such account. I cannot give the dates from memory, but only from the record from the ledger. It was opened March the ninth, 1871. I speak from a memorandum made by myself from the ledger about June or July last, at the request of Mr. O'Connor. It was closed on the twenty-ninth of June, 1872, according to the record.

(Objected to unless the ledger is produced, and objected to his testifying from said paper.)

Fourth interrogatory. What entries, if any, were made in said account after the date you have last mentioned, and when were such entries made and what were the same?

4. Answer. On the twenty-eighth of October, 1872, the account is credited with a discount of twelve thousand dollars. The amount was checked out on the same day. On the first of May, 1873, there was a discount of twelve thousand dollars, cheqned out on the same day. That appears to close her account.

Fifth interrogatory. Did one A. H. Dillon, junior, general agent, ever keep an account with the Central National Bank of Baltimore;
131 and, if yea, when was the same opened and when closed?

5. Answer. He did so, and opened the account on the first of April, 1871. The last debit is on the twelfth of June, 1874, but the account is not wholly closed.

Sixth interrogatory. During the continuance of Alice P. Dillon's account, was there ever a deposit placed to her credit which was subsequently placed to the credit of the account of A. H. Dillon, junior, general agent?

6. Answer. Not to my knowledge.

Seventh interrogatory. What was the situation of your desk in the bank as to proximity to the counter of the paying teller?

7. Answer. The paying teller's window divided the two desks; the distance was from two to three feet.

Eighth interrogatory. If the president of the bank in a loud tone of voice said anything to the paying teller, would you have heard it?

8. Answer. Most certainly I would, provided the paying teller had been at his desk and I at mine.

Ninth interrogatory. Look at the answer to the seventeenth in-
132 terrogatory to A. H. Dillon, junior, and state what recollection, if any, you have of said conversation therein referred to, and if the same could have taken place as stated without your knowledge.

9. Answer. I never heard a conversation of the kind, and it could not have taken place behind the counter where Mr. P. C. Leary, the paying teller, and I were without my hearing it.

Tenth interrogatory. Did the Central National Bank or not pay any interest to A. H. Dillon, junior, on the deposits placed to the credit of the account of A. H. Dillon, junior, general agent? And if yea, state if you can what amount was so paid to him and how was the same paid?

10. Answer. They did pay him interest. I cannot state the amount from memory, but can state them from my memorandum from the ledger before referred to. The amount was seven hundred and fifty-one dollars and twenty-two cents. In one instance I know from memory he was paid directly in cash, and they may have all been paid in cash. On the second of January. 1872, A. H. Dillon, junior, general agent, was credited with interest to the thirty-first of December, 1871, one hundred and sixty-two dollars and forty-eight cents. On the same day
133 the entry was reversed and the amount carried to the credit of Alice P. Dillon. The next credit was two hundred and seven dollars and seventy-eight cents, carried to the credit of A. H. Dillon, junior, general agent, on July the third, 1872. On the thirtieth of April, 1873, there was a cash payment of two hundred and twenty-eight dollars and thirty-two cents, interest to January the first, 1873, made to Mr. Dillon. The next was March the twentieth or twenty-first, 1874, one hundred and fifty-two dollars and sixty-four cents interest to January the first, 1874, and was paid in cash, which amounts to seven hundred and fifty-one dollars and twenty-two cents.

Eleventh interrogatory. State if you are able the total amount of the footing of the deposits to the credit of the account of A. H. Dillon, junior, general agent, inclusive of the balances from time to time carried forward.

11. Answer. This I state from my memorandum from the ledger, four hundred and seventy thousand seven hundred and fifty-three dollars and five cents, exclusive of the balances. Inclusive of the balances it

is five hundred and ninety *doland* nine hundred and sixty-nine dollars and twenty-six cents.

134 Twelfth interrogatory. State the number of deposits and credits shown to the cerdit of said account.

12. Answer. Eight hundred and seven.

Thirteenth interrogatory. State what amount, if any, is now standing to the credit of said account.

13. Answer. One thousand dollars and eighty six cents.

Fourteenth interrogatory. State what number of cheques and debits were drawn upon said account, and what number of cheques, if any, were drawn to the order of J. L. Green, secretary.

14. Answer. Four hundred and eleven was the number of cheques and debits. I cannot state as to how many were drawn to the order of Green.

Fifteenth interrogatory. Have you any knowledge of a draft by the Central National Bank of Baltimore on the National Park Bank of New York in favor of A. H. Dillon, junior, dated May the sixteenth, 1874, for the sum of nineteen hundred and six dollars and ninety-five cents?

(Objected to unless draft produced and notice to produce.)

15. Answer. There was such a draft made on the National Park Bank to the order of A. H. Dillon, junior.

135 Sixteenth interrogatory. State how the said A. H. Dillon obtained the said draft, and how was the same paid for?

(Objected to and notice to produce draft and cheque.)

16. Answer. It was paid for by a cheque on the Central National Bank, drawn by A. H. Dillon, junior, general agent.

Seventeenth interrogatory. Was there also a draft drawn in like manner on the seventeenth of April, 1874, for the sum of three hundred and sixty dollars, and, if so, who received it, and how was said draft paid for; and, if by cheque, on what account.

(Same objection and same notice.)

17. Answer. There was one drawn in favor of A. H. Dillon, junior, and paid for by the cheque of A. H. Dillon, junior, general agent, on the Central National Bank.

Eighteenth interrogatory. State what are the sources of your knowledge in regard to the drawing of the two drafts just mentioned, and by whom the entry of said drafts was made upon the bank books?

18. Answer. They were entered by myself to the credit of the National Park Bank. I derived my information from the bank

136 cheque-book and my journal.

Nineteenth interrogatory. Was there ever an account to your knowledge kept by the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, with the Central National Bank of Baltimore, and state fully if they ever had any moneys on deposit with said bank in any manner, or had any business dealings therewith?

19. Answer. There was no account and no money ever on deposit, to my knowledge.

Twentieth interrogatory. Could there have been any such account or dealings between the complainant and the Central National Bank without your knowledge?

20. Answer. I think there could not have been.

Cross-examined for complainant:

First cross-interrogatory. Are you or not somewhat hard of hearing?

1. X answer. A little.

Second cross-interrogatory. Are you not well advanced in years?

Q. X answer. I am well advanced in years; that is a needless question. I am over fifty years old; from fifty to a hundred.

137 Third cross-interrogatory. Do you decline to state your age, and if not, state it.

3. X answer. If I am of legal age to testify, that is enough; I do not think I will answer that question.

Fourth cross-interrogatory. Please give the particulars of the note of twelve thousand dollars discounted on the twenty-eighth of October, 1872, and of the note of like amount discounted May the first, 1873?

4. X answer. I think you would have to go to the discount clerk for that. I speak from the record of the ledger by which such a note appears to have been discounted, but the discount clerk could give more particulars than I can.

Fifth cross-interrogatory. What was Leary's position in the bank, and how far distant was his position from yours?

5. X answer. His paying teller's desk might have been from two to three feet from mine. The receiving teller's desk which he also occupied might have been from six to eight feet distant.

Sixth cross-interrogatory. You have spoken of four payments of interest amounting to seven hundred and fifty-one dollars and twenty-two cents, of which I understood you to say only one appears on Mr.

138 Dillon's bank book as general agent; am I or not correct in that opinion?

6. X answer. I do not know as to that; the one hundred and sixty-two dollars and forty-eight cents might have been put on his bank book and afterwards reversed. He ordered it to be placed to the credit of Alice P. Dillon, and the credit was made on the individual ledger by Mr Post, the individual bookkeeper, I made the entry on my journal and charged the interest on deposits account with one hundred and sixty-two dollars and forty-eight cents. The two hundred and seven dollars and seventy-eight cents was entered on Mr. Dillon's book; the other two items, two hundred and twenty-eight dollars and thirty-two cents, and one hundred and fifty-two dollars and sixty-four cents, were paid him in cash, and I judge would not appear on his book. The one hundred and fifty-two dollars and sixty-four cents, the last item, was first entered to the credit of Mr. Dillon on the individual cash book, but not on the ledger, and the same day was paid him in money, so that there was merely a cross-entry, and I do not think appeared on his book at all.

Seventh cross-interrogatory. You have spoken of the entry of one hundred and sixty-two dollars and forty-eight cents as having

139 been reversed; do you mean it was scratched out, or counter entries made; and, if the latter, state what the counter entries were?

7. X. Answer. I think it was not scratched out. I think Mr. Dillon's account as general agent was debited, and Alice P. Dillon's credited with one hundred and sixty-two dollars and forty-eight cents. I do not think any cheque was given.

Eighth cross-interrogatory. What was the rate of interest allowed, and by whose authority was it allowed, and how and on what was it allowed?

8. X. Answer. I think the rate was four per cent. I suppose it was allowed by the board of directors, but might have been by the president individually. It was allowed on the daily balances to his credit, I suppose. That is the usual way of making it up.

Ninth cross-interrogatory. Was or not the allowance of interest on deposits the rule or the exception of the board?

9. X. Answer. They had some accounts that bore interest and some that did not. I could not say what proportion bore interest.

Tenth cross-interrogatory. Please state what kind of accounts interest was allowed on, and what was the rule as to the allowance.

140 10. X. Answer. I do not think there was any general rule. It was a mere matter of agreement when a depositor opened an account whether he should have interest or not. It was allowed only on the larger accounts, as a matter of course.

Eleventh cross-interrogatory. Please state, to the best of your recollection, on how many accounts interest was allowed, and name any you can now recollect.

11. X. Answer. There might have been fifteen or twenty, possibly more; I could not say. There were, I think, some trustee accounts that were allowed interest on. The Piedmont Bank, I think, was one we allowed interest on; and we allowed interest to the National Park Bank, and the Richmond Banking and Insurance Company, I think, was another, and the Glen Rock National Bank, I think, was another. I think a Mr. Orem was another, and, I think, to McDowell. I cannot recollect any others at this moment.

Twelfth cross-interrogatory. Did you or not allow any interest on the account of Alice P. Dillon?

12. X answer. My impression is that we did. My record shows that we did allow her interest, seventy-eight dollars and eighty-seven

141 cents.

Thirteenth cross-interrogatory. Please give the particulars of that allowance of seventy-eight dollars and eighty-seven cents, and what it covered?

13. X answer. The credit was on the second of January, 1872, interest to December the thirty-first, 1871, seventy-eight dollars and eighty-seven cents. I judge it ran from the opening of the account.

The taking of depositions was then adjourned to the first day of September, in the same year, at eleven in the forenoon, and the same place, at which last mentioned time and place the commissioner met pursuant to notice and I proceeded, in the presence of the solicitors of the respective parties, to take the following depositions, that is to say:

SETH REED, a witness heretofore produced, sworn, and examined on behalf of the defendant, being now further cross-examined on behalf of the complainant, makes oath, deposeth, and saith as follows, that is to say:

Fourteenth cross interrogatory. Please state, if you can, the

142 dates and amounts of the last ten cheques drawn by Alice P. Dillon upon her account with the Central National Bank.

14. X answer. I can only state that by examination of the ledger.

Fifteenth cross-interrogatory. Please look at paper writing now shown you, the copy of Alice P. Dillon's account furnished from the ledger of the bank, and tell me what was the condition of Alice P. Dillon's account on and after the sixteenth of March, 1872, and prior to April the second, 1872; whether the same was overchequed or not; and, if so, to what amount.

15. X answer. This account appears to be overchequed on the sixteenth of March, twelve thousand and sixty-seven dollars and fourteen cents.

Sixteenth cross-interrogatory. Please look at the same paper and state

how long that account remained overdrawn and when and how the same was made good?

16. X answer. On the second of April it had credit for eleven thousand nine hundred and thirty-four dollars. On the nineteenth of April a credit of one hundred and five dollars and sixty-three cents; and on the twenty third of April, one hundred and twenty-five dollars. It was
143 overdrawn for seventeen days, twelve thousand and sixty-seven dollars and fourteen cents; it was overdrawn for seventeen days one hundred and thirty-three dollars and nineteen cents, and twenty-seven dollars and fifty-six cents for four days. The balance is on the credit side after that date.

Seventeenth cross-interrogatory. Who was paying teller of the bank at the time said account was overdrawn?

17. X answer. Mr. Leary.

Eighteenth cross-interrogatory. Did or did not Mr. A. H. Dillon, junior, ever keep an individual account with the Central National Bank?

(Objected to as not cross-examination.

Notice to defendant to produce and file a copy of the individual account of A. H. Dillon, junior, with the Central National Bank.)

18. X answer. There was an account in the ledger with A. H. Dillon, junior, a short account. It was opened October the fifteenth, 1873, and closed on the eleventh of December of the same year.

PETER C. LEARY, a witness of lawful age, produced on behalf of the defendant, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth and saith as
144 follows, that is to say:

First interrogatory. State your age, residence, and occupation.

1. Answer. I am twenty-five years old. I reside at Mount Washington, and am clerk with Baltimore and Ohio Railroad.

Second interrogatory. State what was your occupation from March, 1871, to January, 1874, and by whom were you employed?

2. Answer. I was paying and receiving teller of the Central National Bank, and was employed by said bank. I left the bank at the latter date.

Third interrogatory. Was there or not an account kept with the Central National Bank of Baltimore in the name of Alice P. Dillon; and, if yea, when was the same opened and when closed, if you have any knowledge on the subject?

4. Answer. There was such, and it was opened March the ninth, 1871, and closed May the first, 1873.

Fourth interrogatory. Was there or not an account kept with the Central National Bank in the name of A. H. Dillon, junior, gen-
145 eral agent; and, if yea, when did the same commence, and when was the same closed, if it has been closed?

4. Answer. There was such an account. It was opened April the first, 1871, and closed June the twelfth, 1874.

Fifth interrogatory. Are you able to state upon the closing of said account what balance there was upon the same, and how the same stood?

5. Answer. There was one thousand dollars and eighty-six cents balance to the credit of A. H. Dillon, junior, general agent.

Sixth interrogatory. On or about the seventeenth of April, 1874, did

the Central National Bank of Baltimore issue a draft on the National Park Bank of New York in favor of A. H. Dillon, junior, for the sum of three hundred and sixty dollars? and, if yea, state how you know the same, and how the said draft was paid for.

6. Answer. They did issue such a draft to the order of A. H. Dillon, junior, for three hundred and sixty dollars, but how it was paid for I cannot say; I know the fact from having seen the cheque-book from which the draft was torn.

146 Seventh interrogatory. Have you any knowledge of the issuing of a draft on the sixteenth of May, 1874, by the Central National Bank on the National Park Bank of New York for the sum of nineteen hundred and six dollars and ninety-five cents in favor of A. H. Dillon, junior; and, if yea, what do you know of the same?

7. Answer. Yes, sir. It was issued in the handwriting of the acting cashier, Mr. Williams, and this knowledge I gained from the draft-book.

Eighth interrogatory. Was interest or not allowed to A. H. Dillon, junior, general agent, on his account with the Central National Bank; and, if yea, was any amount of said interest by the order of said Dillon transferred and credited to any other account; and, if so, what account?

8. Answer. There was interest allowed, as I recollect; there was an amount one hundred and sixty-two dollars and forty-eight cents allowed as interest to December the thirty-first, 1871, which, by Mr. Dillon's order,

147 was placed to the credit of Alice P. Dillon, and a corresponding debit made on A. H. Dillon's account. It was credited in the first place to A. H. Dillon, junior, general agent, and afterwards, by his direction, a cross-entry was made and it was credited to Alice P. Dillon.

Ninth interrogatory. Have you any knowledge of the books connected with the business of the Central National Bank, consisting of journals, cash books, general ledgers, individual ledger, discount books, receiving and paying tellers' books, clearing house books, list books, scratchers, blotters, settlement books, and other books and documents of the Central National Bank, and are the same voluminous in quantity, and could the same be easily transferred from one place to another?

9. Answer. Yes, sir; I know there are five heavy chests of them, about four feet in length and two and a half wide and about three feet high, and could not be transported from one place to another without considerable trouble.

Tenth interrogatory. State what access, if any, you had to them since the commencement of this suit, and if you have used the same

148 in refreshing your memory in regard to the matters of which you have testified?

10. Answer. I had access to all the books and did examine them for the purpose of refreshing my memory in regard to this transaction.

Eleventh interrogatory. Are you able to state who were the stockholders in the Central National Bank at the time you went into its employ?

(Objected to and production of the book required.)

11. Answer. I can give the detail: Kirkland, Chase and Company; A. S. Abell; James O. Conner, trustee of Mrs. Taaffe; William Taaffe, F. Taaffe, Jessie Lazear, Lazear Brothers, William J. O. Conner, G. W. Webb and Company, R. Courtnay and Brothers, W. H. Perkins, J. M. Helson, B. M. Hardy; Kelly, Piet and Company; Joseph Plummer, McDowell Robinson and Company, W. H. West, David T. Buzby, F. W.

Bennett, Dix and Steiner, W. T. Walters and Company, J. C. Bridges and Company, J. M. Orem and Sons, John M. Garrett, Johns Hopkins, R. H. King, J. S. Willoch, J. F. Jennings, Thomas Smith, J. Mc-
149 Clerkin, D. Wallis, D. Lee Wilson, David Hostetter, R. Dorsey of Edward, Elizabeth K. O'Conner, and James O'Conner. (It is requested by complainant's solicitor that it be noted that witness in answering this question read from a paper in his hands.) I expected to be asked the question as to who were the stockholders, and I made this list from the stock-book when I examined the books about two weeks ago.

Twelfth interrogatory. Look at the answer to the seventeenth interrogatory to A. H. Dillon, junior, and state if any such conversation as is therein referred to took place in your presence?

12. Answer. No, sir; no such conversation took place.

Thirteenth interrogatory. Have you any knowledge of any deposit placed to the credit of the account of A. H. Dillon, junior, general agent, by the Central National Bank, being afterwards transferred to any other account; and, if so, to what account and by whose orders?

13. Answer. There was a deposit of interest to the credit of
150 A. H. Dillon, junior, general agent, transferred to the credit of Alice P. Dillon, by order of A. H. Dillon, junior, amounting to one hundred and sixty-two dollars and forty eight cents.

Fourteenth interrogatory. Your answer to the last question has been already given in your testimony. Please now state whether or not at any time a deposit of money was made by A. H. Dillon, junior, general agent, with the Central National Bank of Baltimore, which said deposit of money was afterwards found to be erroneous, and placed to the deposit account of Alice P. Dillon. [Counsel for complainant desires it to be noted that this question has been put by Mr. O'Conner personally and not by Mr. Dawson, who has heretofore conducted the examination. Mr. Dawson requests it to be stated that the question was put by Mr. O'Conner with his full approbation.]

14. Answer. There was no such deposit made.

Fifteenth interrogatory. State whether or not any deposit was placed to the credit of Alice P. Dillon, which was afterwards found to be erroneous and transferred to the credit of A. H. Dillon, junior, general agent?

151 15. Answer. No such a deposit was made.

Sixteenth interrogatory. What was the distance between the desk occupied by yourself and that occupied by Mr. Reed as bookkeeper of the Central National Bank?

16. Answer. The distance between Mr. Reed's desk and the paying-teller's desk, which I occupied, was about one and a half feet, and between Mr. Reed's desk and the receiving-teller's desk, which I occupied also, was about three feet.

Seventeenth interrogatory. Would or not Mr. Reed have heard any instructions given to you when you were at your desk by the president of the bank in a loud and emphatic tone of voice?

17. Answer. Most undoubtedly.

Eighteenth interrogatory. Look at the book now shown you and state what the same is, and under the date of June the first, 1874, what the entry "A. H. Dillon, junior, general agent, note due 1st, $10,000," means?

18. Answer. It is the cash-book of the Central National Bank,
152 No. 6, and the entry means that it was note of ten thousand dollars charge' up to the account of A. H. Dillon, junior, general

agent. The entry is in the handwriting of Mr. McCandlish, who was the individual bookkeeper.

Nineteenth interrogatory. Please look at the said book just shown you, and state what was the cash balance of the Central National Bank of Baltimore on the first day of June, 1874.

19. Answer. The balance was one hundred and forty-eight thousand eight hundred and eleven dollars and ninety-nine cents.

Twentieth interrogatory. Please state whether or not in bank bookkeeping the balance you have just referred is not exclusive of foreign balances.

20. Answer. It is, sir.

Twenty-first interrogatory. Look at the same book and state what was the cash balance of the Central National Bank on the eight' of June, 1874.

21. Answer. It was one hundred and eighty-three thousand four hundred and fifteen dollars and fifty-six cents, also exclusive of foreign balances.

153 Twenty-second interrogatory. Look at the same book and say what business transactions the Central National Bank had on the fourteenth of June, 1874?

22. Answer. They had none at all, as the fourteenth was Sunday.

Twenty-third interrogatory. Look at the same book and state what was the cash balance of said bank on the fifteenth of June, 1874.

23. Answer. It is one hundred and sixty thousand seven hundred and fifty-eight dollars and seventy-three cents, exclusive of foreign balances.

Cross-examined for complainant:

First cross-interrogatory. You have spoken of the item of one hundred and sixty-two dollars and forty-eight cents interest changed from the account of A. H. Dillon, junior, general agent, to Alice P. Dillon's account; please state whether the change of entry spoken of by you was made by you with the knowledge and consent of any officer of the bank; and, if so, who was the officer?

1. X answer. The change was not made by me. I do not know that; I cannot state who made it, but I am under the impression that 154 it was made by E. H. Post, then the individual bookkeeper; I learned it by looking over the ledger. I have no recollection of hearing of the transaction at the time. My knowledge of it is solely derived from the books.

Second cross-interrogatory. Can you or not state whether Mr. Post, the bookkeeper spoken of by you, had authority to change a credit from one account to another without the consent of the president or other superior officer?

2. Answer. He had no such authority. He would not have made such an entry without the authority of the president or cashier.

Third cross-interrogatory. Do you or not know whether Mr. O'Conner authorized or consented to such transfer?

3. X answer. I do not.

Fourth cross-interrogatory. You have stated that you had full access to the books of the bank; please state where they are, and where they were when you had access to them.

4. X answer. I cannot tell where they are now. They were at Mr. O'Connor's farm, in Baltimore County, about eight miles from the 155 city, when I had access to them two weeks or more ago.

Fifth cross-interrogatory. Please state how often you have examined the books of bank since January, 1874?

5. X answer. Only once; about August the fifteenth, at the request of Mr. O'Connor, the president of the bank.

Sixth cross-interrogatory. Was or not your examination of said books with a view to become a witness in this case for the bank?

6. X answer. It was.

Seventh cross-interrogatory. Who told you that you would be asked for a list of the stockholders?

7. X answer. I thought so myself in the first place, and Mr. O'Connor suggested it; so I supplied myself from the book.

Eig'th cross-interrogatory. Please state what books of the bank you examined on the fifteenth of August last, and what length of time was consumed in the examination?

8. X answer. I examined the individual ledger, the general ledger,
blotter or scratcher, the stock-book and cash-book, one of each
156 kind, and the draft-book. I consumed *a* about one and a half
or two hours in the examination.

Ninth cross-interrogatory. Who made the contract with A. H. Dillon, junior, for the payment of interest on his balances as general agent, and what was the contract?

9. X answer. I do not know who made it or what it was.

Tenth cross-interrogatory. You have said that you did not hear any such conversation as is testified to by Dillon in his answer to the seventeenth interrogatory; please state whether you ever heard any conversation between him and Mr. O'Connor in reference to any error in his account, and, if so, what was the conversation?

10. X answer. I do not remember any conversation between them in regard to errors in the account.

Eleventh cross-interrogatory. Do you or not mean to say that no such conversation took place?

11. X answer. I have no recollection of any such conversation, and
am certain in my own mind that none such ever took place.

157 Twelfth cross-interrogatory. Did you or not hear my cross-examination of Mr. Reed in reference to the overchequing of Alice P. Dillon's account and its remaining overchequed for some time after March the sixteenth, 1872, and, if so, have you any recollection of the fact of such overchequing?

12. X answer. I heard the cross-examination, but I have no recollection of its being overchequed or remaining overchequed.

Thirteenth cross-interrogatory. Were you or not paying-teller at the time, and did you not pay the cheques by which the account of Alice P. Dillon was overdrawn?

13. X answer. I was paying-teller at the time, but I do not recollect the cheques or whether I paid them; they might have been paid by the cashier, the president, or sometimes the bookkeeper, when I was out; they were more likely to be paid by me as I was seldom out.

Fourteenth cross-interrogatory. Do you or not know whether Mr. O'Connor had knowledge that this account of Alice P. Dillon was overdrawn?

14. X answer. I do not, sir.

Fifteenth cross-interrogatory. I understand you now to say on
158 oath that you cannot recollect the fact that the account of Alice
P. Dillon was overdrawn as stated by Mr. Reed?

15. X answer. Yes; I cannot recollect it.

Sixteenth cross-interrogatory. Look at the cash-book put in evidence under date June the first, 1874, and state whether you have any personal knowledge when such entry of A. H. Dillon, junior, general agent, and so forth made?

16. X answer. I have none at all; I was not an officer of the bank at that time.

Seventeenth cross-interrogatory. Does or not said entry mean that upon the first day of June, 1874, there was charged to the account of A. H. Dillon, junior, general agent, ten thousand dollars, and that the cash of the bank was that day credited with ten thousand dollars?

17. X answer. It does.

Eighteenth cross-interrogatory. Suppose on the first day of June, 1874, there was not ten thousand dollars standing to the credit of A. H. Dillon, junior, general agent, would said entry be a proper entry, and could the balance of one hundred and forty-eight thousand eight
159 hundred and eleven dollars and eighty-nine cents be a correct balance?

18. X answer. No, sir; it could not be, if the ten thousand dollars was charged and the money was not there to meet it; the balance could not be correct on the entry.

Nineteenth cross-interrogatory. You have said that you had full access to the books; will you, at your earliest convenience, examine the same and produce and abstract of said account, showing how much money stood to Mr. Dillon's account, as general agent, on the first of June, 1874?

19. X answer. I cannot promise that, as I cannot spare the time. (Defendant agrees to furnish such abstract.)

Twentieth cross-interrogatory. You have been examined in reference to the amount of cash balance on several days, disclosed by this book; have you any personal knowledge that this balances existed?

20. X answer. I have not, sir, as I was not an officer of the bank at the time.

Again examined for defendant:

Twenty-fourth interrogatory. Please state whether or not you
160 are a professional bookkeeper as distinct from a bank teller.

24. Answer. In a measure I am, though I do not profess to understand the science of bookkeeper thoroughly. I am not an expert.

Twenty-fifth interrogatory (by Mr. O'Connor). Please examine the cash book number 6, of the Central National Bank, as of date June the first, 1874, and state whether or not all the items embraced on both sides of that day's entries are not exclusively composed of deposits on the debtor side of the page and of cheques on the credit side of the page, and state whether or not the said book has any reference whatever to the condition of the accounts of individuals on the Individual Ledger, and state whether or not, on a re-examination of the book, you do not clearly see that whether the account of A. H. Dillon, junior, general agent, was good, in whole or in part, from the note charged up to him on June the first, the cash balance called of one hundred and forty-eight thousand eight hundred and eleven dollars and eighty-nine cents must have
161 been in the hands of the paying teller in cash on that day?

(Complainant's solicitor objects to the question, first, as grossly leading; secondly, because it embraces many matters which have nothing to do with the case, and are therefore irrelevant; thirdly, because the witness states he has no personal knowledge of the transactions disclosed in said book; and fourthly, because the witness says he is not an expert in bank bookkeeping.)

25. Answer. They are so composed. It has reference to the state of individual accounts. I was mistaken; the amount of balance must have been in the hands of the teller in cash.

Again cross-examined for complainant:

Twenty-first cross-interrogatory. Explain your last answer, and say how you were mistaken.

21. X answer. The mistake I made was this: I was under the impression that charging that note to A. H. Dillon's account would reduce the cash, but I find that we started with a balance of one hundred and fifty-seven thousand and thirty-five dollars and seventy-two cents, deposits on that day sixteen thousand eight hundred and eighty-seven dollars and twenty-six cents, making a total of one hundred and
162 seventy-three thousand nine hundred and twenty-two dollars and ninety-eight cents. The checks or debits on that day were twenty-five thousand one hundred and eleven dollars and nine cents, leaving a balance of cash on hand of one hundred and forty-eight thousand eight hundred and eleven dollars and eighty-nine cents, as shown by the book.

Twenty-second cross-interrogatory. If the bank did not, in point of fact, pay out the ten thousand dollars, then would not the balance of cash be increased to that extent on the first of June, 1874?

22. X answer. No, sir; it would not.

Twenty-third cross interrogatory. Please explain how the ten thousand dollars gets out of the custody of the bank.

23. X answer. It is charged up to the account of A. H. Dillon, and the balance of Dillon is reduced to that extent.

Twenty fourth cross-interrogatory. Suppose Dillon has not ten thousand dollars to his credit; what then?

24 X answer. Then it is an over draft of Dillon's account.

Twenty-fifth cross-interrogatory. Please explain how the entry
163 of June the first of ten thousand dollars can by possibility lessen the amount of cash in the bank's hands.

25. X answer. It cannot lesson it at all.

The taking of depositions was then adjourned to the eighth day of September, in the same year, at eleven in the forenoon, and the same place, at which last mentioned time and place the commissioner met pursuant to notice, and I proceeded in the presence of the solicitors of the respective parties to take the following depositions, that is to say:

PETER C. LEARY, a witness heretofore produced, sworn, and examined on behalf of the defendant, being now again examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

Twenty-sixth interrogatory. During the time you were with the Central National Bank, was there, to your knowledge, any account opened with the Connecticut Mutual Life Insurance Company with said
164 bank, or in fact were there any dealings of any kind or nature whatsoever through said bank and said company?

26. Answer. There were no dealings whatever, and no such account kept there.

Again cross-examined for complainant:

Twenty-sixth cross-interrogatory. Look at the cash-book number 6, and point out how and where the entries are made in said book when notes are paid to or at the bank, which are either discounted or deposited for collection.

26. X answer. The collections are put on the deposit side of the cash-book, and are put to the credit side of the different accounts to which they belong. Of the notes that are discounted there is no entry at all

on the cash book, unless they belong to one of the accounts of the bank, and there they are charged up to such account.

Twenty-seventh cross-interrogatory. If the bank receives a sum of money in payment of a note owned or discounted by the bank where does the fact of such payment appear, and where is the same entered?

165 27. X answer. It is received by the teller in the first place when the note is paid, and then it appears on the general ledger.

Twenty-eighth cross-interrogatory. Do you know A. H. Dillon, junior; and, if so, how long have you known him?

28. X answer. I do, and have known him about two and a half years. I guess I knew him first about April, 1871. I knew him when he first opened his account with the Central National Bank.

Twenty-ninth cross-interrogatory. Do you know what Mr. Dillon's occupation was from April, 1871, to June, 1874, and where his place of business was? and, if so, state your knowledge thereof.

29. X answer. In April, 1871, his occupation, to the best of my knowledge, was agent for some insurance companies. I do not know whether for one or half a dozen. In June, 1874, I do not know what his occupation was. I do not know the number of his place of business, but it was on South street, directly opposite the Central National Bank.

Thirtieth cross-interrogatory. In the account which Mr. Dillon kept with your bank as general agent, who generally made the de-

166 posit, Mr. Dillon himself or some one for him; and, if the latter, who was it?

30. X answer. Mr. Dillon very seldom made deposits. Mr. Orndorff or Mr. Dillon's clerk usually made them, and sometimes Mr. Dillon's son. I do not know the name of the clerk.

Thirty-first cross-interrogatory. Did, or not, Mr. Dillon, to your knowledge, in making his said deposits, ever deposit cheques or drafts drawn to the order of A. H. Dillon, junior, general agent of the Connecticut Mutual Life Insurance Company?

(Objected to unless the cheques and drafts are produced, or notice given to produce them.)

31. X answer. I cannot say, sir. I cannot remember the orders to which the cheques he deposited were drawn; it has been too long ago. He may have done so, but I have no recollection of it.

SETH REED, a witness heretofore produced, sworn, and examined on behalf of the defendant, being now cross-examined on the following interrogatories to him propounded on behalf of the complainant, makes oath, deposeth, and saith as follows, that is to say:

167 (NOTE.—Defendant declines to produce the account called for in the eighteenth cross-interrogatory to Mr. Reed, on the ground that Mr. Dillon has already testified about it, and on account of its irrelevancy.)

Nineteenth cross-interrogatory. State the amount of A. H. Dillon, junior's, individual account.

19. X answer. It was twenty-eight thousand three hundred and thirty-seven dollars and fifty cents.

(NOTE.—Defendant's solicitor declines to produce the books whose non-production heretofore has been excepted to by complainant, proffering, however, that the books are open to the inspection of complainant's counsel, or any expert by them designated, as to everything in them connected with Mr. or Mrs. Dillon's accounts with said bank, as general

agent or otherwise. The books have not been produced before the commissioner.)

Defendant's solicitor offers if complainant's solicitor will specify what books he desires to see they will be produced for his inspection to-morrow at eleven o'clock, but not to be put in evidence in the case.

Mr. Carson, of complainant's counsel, calls on the commissioner
168 to state whether or not it was agreed or offered at the previous meetings to have the books of the bank produced here on this day, and whether or not the cross-examination of Mr. Reed was not suspended to allow of the books being produced.

The commissioner states his recollection to be that the said cross-examination was suspended for the purpose of allowing Mr. Carson to examine the books, and that this day was appointed for said examination, but his recollection is that the books were not to be produced here, but were to be submitted to his inspection at whatever place they might then be.

In reply to proffer of defendant's counsel above, complainant's counsel give notice to defendant to produce before the commissioner all books containing any entries with reference to what either of the witnesses Reed and Leary have testified.

Twentieth cross-interrogatory. Please look at Complainant's Exhibit, depositions G. H. W., number 1, at the item on the credit side of said account, "April the second, 1872," $11,934, and state whether that was a deposit in cash or whether that is the proceeds of a note dis-
169 counted, and if a discount, give the particulars thereof.

20. X answer. I could not say whether it was a cash deposit or a discount. There is no question in my mind but that it is a discount, but I could not answer without referring to the books.

Twenty-first cross-interrogatory. Look at Complainant's Exhibit, deposition W. S. P., number 1, at an item of same amount under date of April the twenty-sixth, and say whether that is the same item.

21. X answer. I do not think there is any question but that it is the same.

Twenty-second cross interrogatory. Please look at the same exhibit at the two items in red ink, $11,874 and 22,956, under date of April the twenty-sixth, 1872, and say whether or not they are the same item which appears on the credit side of Exhibit G. H. W., number 1, "April the twenty-third, $12,103.56."

22. X answer. I think it is made up of those two items. (Defendant's Exhibits, deposition G. H. W., numbers 2 and 3, are filed, and the signatures are admitted to be genuine, but the body of the cheque
170 of October the twenty-eighth, 1872, is filled up in the handwriting of N. F. Williams, junior, and employee of the bank.)

Twenty-third cross-interrogatory. In your answer to the sixth cross-interrogatory in reference to the item of interest, one hundred and sixty-two dollars and forty-eight cents, you say, "I made the entry on my journal and charged the interest and deposit account;" please explain your entry in detail from what you made it, and by whose authority you made it.

23. X answer. I made it from Mr. Post's report to me, that there was that amount of interest due at a certain date. The entry on my journal is probably in the customary form, "Interest account debtor to deposit account, for interest due A. H. Dillon, junior, general agent, to 31st of December;" my journal embraces all the transactions of the bank; all the cash transactions of the bank, not in detail. I put all the deposits in one entry: "To deposits received this day;" the details are in the tel-

ler's book. The total of checks paid I obtain from the paying-teller's book in which he records each check. As a matter of course I
171 took it from Mr. Post, who makes up the entry and gives it to me at a certain day.

The taking of depositions was then adjourned to the (30th) thirtieth of September, in the same year, at eleven in the forenoon, and the same place; at which last-mentioned time and place the commissioner met pursuant to notice, and I proceeded in the presence of the solicitor of the respective parties to take the following deposition, that is to say:

SETH REED, a witness heretofore produced, sworn and examined in behalf of the defendant, being now again further examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth and saith as follows, that is to say:

Twenty-first interrogatory. Can you now add to your former testimony the names of any other persons to whom the Central National Bank paid interest on deposit accounts; and, if you can, name them.

21. Answer. I believe there were about twenty. I have not
172 the list with me, but I can name a few of them; there were the Farmers' National Bank of Annapolis, the People's Savings Bank of Lynchburg, and there was the Queen's City Savings Bank of Cumberland, the Second National Bank of Pittsburg, Alleghany National Bank of the same place, Ira B. McVey and Company, and there was W. H. West and quite a number of others whose names I do not now recollect.

Twenty-second interrogatory. Look at the paper now shown you, and marked J. O. C., number I, and state what it is.

22. Answer. It is the account of A. H. Dillon, junior, general agent, has shown on the ledger of the Central National Bank. It begins with a balance to his credit, as shown on the ledger on June the first, 1874, of eight thousand seven hundred and forty-two dollars and twenty-three cents; then follows ten deposits to his credit, total deposits being four thousand two hundred and twelve dollars and eighty-four cents; total debits from June the first to the twelfth inclusive eleven thousand nine hundred and fifty-four dollars and twenty-one cents, leaving one thousand dollars and eighty-six cents to his credit, which is the account as now shown on the ledger.

173 Twenty-third interrogatory. At the date of said account, June first, 1874, had said Dillon any other account in said bank, either in his own name or that of his wife or of any other person?

23. Answer. None; the only account as A. H. Dillon, junior, general agent.

Twenty-fourth interrogatory. Something has been said of an account prior thereto, containing a few entries in the name of A. H. Dillon, junior; are you able to state what said account was or whether there was any bank book issued therefore to said Dillon? Did all customers have such bank books, and if there was none in this instance, why was there none?

(It is agreed that the account reads as follows:)

Dr. individual acc't.

1873.					
Oct.	15th.....	$2,012 50	Oct.	17th.....	$2,500 00
	17th.....	2,500 00		17th.....	2,030
	17th.....	3,030 00		20th.....	2,500

	20th	2,500 00		27th	1,257 50
	29th	1,257 00		15th	2,012 50
Nov.	1st	2,037 50	Nov.	1st	2,037 50
	29th	5,000 00		29th	5,000 00
Dec.	11th	1,000 00	Dec.	11th	1,000 00
		$28,337 50			$28,337 50

174 24. Answer. A portion of it, so far as I know, was for funds furnished him to purchase currency or national bank notes for the use of the Central National Bank, which were wanted for the use of the bank during the pressure of 1873, and were used to pay cheques drawn payable in currency; a great portion of the cheques drawn at that time had to pass through the clearing-house in settlement and, so far as I know, one large amount was sent to Richmond, Virginia. I cannot tell how much was sent without further reference. The account of A. H. Dillon, junior, on individual ledger A, page 122, was opened on October fifteenth, 1873, and closed on the eleventh of December, same year. The credits consisted of eight items, amounting to twenty-eight thousand three hundred and thirty-seven dollars and fifty cents, and there were eight debits amounting to the same sum.

Debits.		Credits.
$3,030	These three items fur-	3,030
2,500	nished by the bank to buy	2,500
2,012 50	currency.	2,012 50
7,542 50		7,542 50

In the above items Mr. Dillon had no interest.

175	1,257 50		1,257 50	
	2,500	Enos & Co.	2,500	Enos & Co.
	2,037 50		2,037 50	
	5,000		5,000	
	10,000		10,000	
	28,337 50		28,337 50	

Check October the eighteenth, 1873, endorsed by H. K. Enos and Company was made good by a deposit of twenty-five hundred dollars by Mr. James O'Connor's individual money, he having authorized it to be drawn by Mr. Dillon, who was then in New York City, H. K. Enos and Company residing in said city. Check of October the twenty-seventh, 1873, for one thousand two hundred and fifty-seven dollars and fifty cents, payable to W. W. Orndorff and by him endorsed over to Wilson, Colston and Company was made good by a deposit of that amount of and by Mr. James O'Connor's individual funds. The debit for five thousand dollars, twenty-ninth of November, 1873, was for the cashier's check issued to Mr. Dillon to buy currency, but not having been used for that purpose was returned and entered to his credit. The credit December the eleventh, 1873, was for a note discounted
176 ten thousand dollars. The debit on the same day for $10,000 and for 2,000, making 12,000, was to take up a matured note of Mr. Dillon's for that sum. The debit for a check of thirty-seven dollars

and fifty cents was to pay the accrued interest on the note for twelve thousand dollars, which matured while Mr. Dillon was absent from the city, it being the accrued interest on said note from the day of its maturity to the eleventh of December, 1873, the day it was paid. The two checks above named amounting to two thousand and thirty seven dollars and fifty cents were made good by a deposit of that sum out of and by the individual money of Mr. James O'Connor. No bank book was issued to my knowledge; it was a general rule to give bank books to all depositors, but none was given in this instance because of the account belonging more specially to the bank and to Mr. Dillon.

Twenty-fifth interrogatory. From the year 1871 and onward to
177 June, 1874, was the business of the Central National Bank large or how otherwise, and can you state what was its average deposits during such years?

25. Answer. The three first years the business was pretty large, but diminished a little from the latter part of 1873. I could not give the average amount, but it was large, at one time, I think, six or seven hundred thousand dollars, I think the footing of the balance sheet at one time was from twelve to fourteen hundred thousand dollars.

Twenty-sixth interrogatory. As a bank accountant state what would be the proper entry for a note held by the bank of one of its customers made payable to it on its face and regularly discounted by the bank on the day of its maturity if not paid by the customer?

26. Answer. The custom is to charge it to said customer's account if there is money there to pay it or any considerable part of it.

Twenty-seventh interrogatory. Would said charge of such a note in any manner effect the cash of the bank?

178 27. Answer. Not at all; It is simply a debit to the customer's account and a credit to bills receivable.

Twenty-eighth interrogatory. You have stated that four hundred and eleven cheques were drawn by Dillon, general agent, on this account; are you able to state how many of the same on their face were made payable to J. L. Green, secretary?

28. Answer. There were four hundred and eleven cheques altogether, and out of them, I suppose, sixty-eight more or less were drawn to the order of Green. I furnish a list of the cheques marked S. R., number I.

Again cross-examined for complainant:

Twenty-fourth cross-interrogatory. How and where did you get the names which you have mentioned this morning as having been paid interest by the bank, and state why you did not give those names on your former examination?

24. X answer. The names given this morning I ascertained from examining the ledger when I was at Mr. O'Connor's a few days ago
179 and since the last examination. I did not recollect them on the former examination.

Twenty-fifth cross-interrogatory. You have said that in Dillon's account as general agent there was a balance due to him on the first of June, 1874, of eight thousand seven hundred and forty-two dollars and twenty-three cents; was or was not his bank-book balanced on that day, and if not, how and from what do you derive that balance?

25 X answer. The book was not balanced on that day. I took the balance as shown by the ledger in the handwriting of Mr. McCandlish.

Twenty-sixth cross-interrogatory. In Dillon's individual account, furnished this morning, the last item is December the eleventh, 1873, ten thousand dollars. State all you know in reference to said item.

26. X answer. The credit is a discounted note; the debit was used to pay a ten thousand dollar note, but the record will show.

180 (NOTE.—It is admitted that the item of ten thousand dollars, December the eleventh, 1873, a credit in Dillon's individual account, was the note filed in this cause and discounted on said December the eleventh by the bank; it is dated November the twenty-ninth, 1873, for ten thousand dollars, payable six months after date and due June the first, 1874; that the discount thereon, three hundred and six dollars and sixty-seven cents and the interest on the overdue note hereafter explained, was twenty six dollars and sixty-seven cents, in all three hundred and thirty-three dollars and thirty-four cents, and was paid to the bank by A. H. Dillon, junior's, cheque as general agent; the ten thousand dollars credit of the same date in A. H. Dillon, junior's, account went to pay an overdue note of the same parties, A. H. Dillon and wife, dated November the first, 1873, at ten days, and due November the eleventh, 1874, and which was not paid at maturity and is the overdue note above mentioned, and remained overdue until November the twenty-ninth when it was paid; the interest charged on the ten

181 days' note was thirty-seven dollars and fifty cents, the item in said account of two thousand and thirty seven dollars and fifty cents was Mr. O'Connor's cheque in favor of and deposited by Mr. Dillon, and the counter entry in said account of two thousand and thirty-seven dollars and fifty cents on the debtor's side was disposed of as follows: thirty-seven dollars and fifty cents paid the interest on the ten thousand dollars note for ten days, and two thousand dollars was applied in reduction of a twelve thousand dollars note of the same parties, A. H. Dillon, junior, and wife, falling due November the second, 1873; the note just spoken of was dated April the thirtieth, 1873, at six months, due November the second, 1873, made by same parties and discounted by the bank May the first, 1873; the interest on this note was three hundred and sixty-eight dollars, and was paid thus: a note was given therefor, dated April the thirtieth, 1873, at six months, due November the second, 1873, and was paid by A. H. Dillon, junior, to the bank before maturity, in cash; the note which preceeded this was for twelve thou-

182 sand dollars, dated October the twenty-eighth, 1872, for twelve thousand dollars payable at six months, due May the first, 1873, Alice P. Dillon, maker, A. H. Dillon, junior, endorser; the interest on this note was three hundred and eighty-three dollars and fifty-two cents, and was paid by another note of A. H. Dillon, junior (Alice P. Dillon not on it), for three hundred and eighty-three dollars and fifty-two cents, dated October the twenty-eighth, 1872, due May the first, 1873, and paid at maturity by A. H. Dillon, junior's, cheque, as general agent; a note which preceeded the last twelve thousand dollars note was a note for twelve thousand dollars, of Alice P. Dillon, endorsed by A. H. Dillon, junior, dated June the 25th, twenty-fifth, 1872, at four months, due October the twenty-eighth, 1872; for the interest on this last note another note was given, made and endorsed as last stated, dated June the twenty-fifth, 1872, at thirty days, due July the twenty-eighth, 1872, and paid by A. H. Dillon, junior's, cheque as general agent. The first note of all was for twelve thousand dollars, Alice P. Dillon, maker, A. H. Dillon, junior, endorser, dated April the twenty-

183 third, 1872, at sixty days, due June the twenty-fifth, 1872; the interest on this note for two hundred and thirty-two dollars was paid by another note of the same parties, dated April the twenty-second, 1872, at sixty days, for two hundred and thirty-two dollars, due June the twenty-fourth, 1872, and paid by A. H. Dillon, junior's, cheque

as general agent. The above facts are admitted but subject to all just exceptions.)

EDWARD G. MCDOWELL, a witness of lawful age produced on behalf of the defendant, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

First interrogatory. During the years 1872, 1873, and 1874 did you hold any and what position in the Central National Bank of Baltimore?

1. Answer. I did; I was director in the Central National Bank of Baltimore from the time it started until it wound up.

184 Second interrogatory. It has been stated that during said time you effected a life insurance with a company of which A. H. Dillon, junior, professed to be agent; is that so? And if so, state the name of the company.

2. Answer. I did not effect my life insurance during that time, but I was already insured in the Connecticut Mutual Life Insurance Company when I became a director of said bank.

Third interrogatory. So far as you had any knowledge of Mr. Dillon and his occupation, please state what they were and what you supposed them to be.

3. Answer. I knew him as agent of the Connecticut Mutual Life Insurance Company and had business with him as such, and also as agent for some fire insurance companies; at least I think they were fire insurance companies. I saw the signs there. I supposed his occupation to be that of agent for insurance companies.

Fourth interrogatory. Did you ever know him to have any
185 business of his own apart from his agencies? Did he dabble in anything else?

4. Answer. I did not know that he was engaged in any business except as agent for insurance companies.

Fifth interrogatory. Did you ever know him to occupy himself with matters relating to himself, apart from these insurance agencies, such as dabbling in stocks or otherwise during said years?

5. Answer. I know by common rumor that he had been operating in stocks and had lost a good deal.

Sixth interrogatory. Had you any knowledge of his keeping an account in the Central National Bank; and if yea, had you any and what particular knowledge as to the character of said account and to whose and what business it related?

6. Answer. I knew as director that he kept an account in the Central National Bank in the name of A. H. Dillon, junior, general agent. My knowledge was that the account related to various business, contained various things; that he chequed on this account to pay his insurance companies and to pay his private bills.

186 Cross-examined for complainant:

First cross-interrogatory. Please state what fire insurance companies you knew A. H. Dillon, junior, to be the agent of.

1. X answer. The Berkshire Fire was the only one I can remember now, sir.

Second cross-interrogatory. Did you ever know him to sign his name as agent or general agent of the Berkshire Fire Insurance Company, just mentioned by you?

2. X answer. No, sir.

Third cross-interrogatory. Do I or not understand you as having said

that during the years 1872, 1873, and 1874 you had policies of insurance in the Connecticut Mutual Life Insurance Company, and that during that time you paid said company the premiums on said policies?

3. X answer. Yes, sir; and got receipts for the premiums paid.

Fourth cross-interrogatory. From whom did you obtain the receipts just spoken of by you, and were they signed in any manner by A. H. Dillon; and, if so, how?

187 4. X answer. Sometimes from Mr. Dillon and sometimes from his clerk. They were signed A. H. Dillon, junior, general agent. I paid the money to Mr. Dillon at his office on South street opposite the bank. I paid the money to whoever I got the receipt from and always paid in cheques.

Fifth cross-interrogatory. State if you can whether your cheques were drawn payable to order, and, if so, to whose order?

5. X answer. To the best of my recollection they were drawn to the order of A. H. Dillon, junior, but I may be mistaken. (Witness is requested to hunt up the cheques, and says he will do so.) I can only find two of the cheques given by me to Mr. Dillon on payment of my premium for life insurance; one dated August the first, 1871, on Central National Bank, for two hundred and thirty-one dollars and sixty six cents, in favor of A. H. Dillon, jr., and endorsed "for deposit in the Central National Bank, A. H. Dillon, jr., A. H. Dillon, jr., gen'l agt.; W. W. Orndorff." The second one is dated July the thirty-first, 1872, on National

188 Farmers' and Planters' Bank, for two hundred and thirty-one dollars and ninety cents, drawn to order of A. H. Dillon, jr., and endorsed same as the first one.

Sixth cross-interrogatory. Have you or not ever known Mr. Dillon to sign his name as general agent in any matter of business not appertaining to the business of the Connecticut Mutual Life Insurance Company? If so, state the same fully.

6. X answer. No, sir.

Seventh cross-interrogatory. Do you or not know whether Mr. Dillon ever deposit' in his account with the Central National Bank as general agent, money, cheques, or drafts received by him in his said business as general agent of the Connecticut Mutual Life Insurance Company?

7. X answer. The knowledge I got as director was from the officers of the bank, and it is that he did deposit such moneys, cheques, and drafts.

Eighth cross-interrogatory. Have you or not any knowledge that Mr. Dillon was in the habit every month of chequeing on his general

189 agent account in the Central National Bank in favor of Jacob L. Green, secretary, or officers of the Connecticut Mutual Life Insurance Company? And, if so, state what that knowledge is and how you derived it.

8. X answer. The knowledge I got as director from the officers of the bank was that he did so cheque.

Ninth cross-interrogatory. Please state all your knowledge touching A. H. Dillon, junior's, relation to or with the Berkshire Insurance Company?

9. X answer. My knowledge derived from his office sign was that he was agent for the Berkshire Insurance Company. That is the only knowledge I can recollect at the present moment, and my present recollection is that I was informed by officers of the bank that he chequed on the general agent account in favor of the Berkshire Company. (Witness here desires to correct his testimony by withdrawing all he has said about Mr. Dillon's connection with the Berkshire Insurance Company, as he finds he has made a mistake.)

Tenth cross interrogatory. In answer to the seventh cross-inter-
190 rogatory you have stated your knowledge and how derived in reference to Mr. Dillon's deposits to his account as general agent of the Central National Bank; please state as near as you can when you first learned that he became such depositor and whether you knew that such deposits were frequent or otherwise, and to what amount they were.

10. X answer. I cannot give any information on the subject.

Eleventh cross-interrogatory. During the years 1872, 1873, and 1874, had you any knowledge that Mr. Dillon deposited in any other bank of Baltimore City the money, cheques, and drafts which he received as general agent of the Connecticut Mutual Life Insurance Company?

11. X answer. I had no knowledge on that subject at all.

Twel'th cross-interrogatory. Did you or not know that at one time during the year 1873 A. H. Dillon, junior, kept an individual account with the Central National Bank?

12. X answer. I did not, sir.

Thirteenth cross-interrogatory. Did you or not know that during
191 part of the years 1871 and 1872 Alice P. Dillon, wife of A. H. Dilion, junior, kept an account in the same bank?

13. X answer. I did not, sir.

Fourteenth cross-interrogatory. Did you or not know that in the spring of 1872 the account of Alice P. Dillon was overchequed about twelve thousand dollars, and that such overchequing was adjusted by said bank's discounting a note for twelve thousand dollars made by A. H. Dillon, junior, and wife?

(Objected to because it assumes as a fact that, the truth of which is denied.)

14. X answer. I did not know of those things. I knew there was a discount granted to Mr. Dillon on the joint note of himself and wife, but I was not present at the meeting of the board when it was done.

Fifteenth cross interrogatory. Have you or not heard that Mr. Dillon was operating in stocks with Mr. O'Connor; and, if so, when did you hear the same?

15. X answer. I have heard it, but I do not know when, but it was during the time I was a director in the bank. I did not hear it in the bank.

Sixteenth cross-interrogatory. In your examination-in-chief I
192 understood you to say that Mr. Dillon's account with the Central National Bank related to various businesses; please specify what insurance companies it related to, and exactly how it so related to them.

16. X answer. I do not remember the names of any except the Connecticut Mutual, tho' I remember there were others. I know that he chequed in favor of other companies, and that is the way I derived the impression that general agent meant general insurance agent, and I always had that impression.

Seventeenth cross-interrogatory. Please explain how it is that you know the parties in favor of whom Mr. Dillon drew cheques, but cannot give any of the particulars as to his deposits, and how far they related to his business with the Connecticut Mutual Life Insurance Company?

17. X answer. Because I am not the bookkeeper of the Central National Bank; I may have known the names, but I do not now remember them.

(NOTE.—Defendant's solicitor offers to place in the hands of the wit-

ness the cheques of A. H. Dillon, junior, already filed, for the
193 purpose of refreshing his memory and enabling him to answer the question; which complainant's solicitor declines.)

Eighteenth cross-interrogatory. Please explain how it is that you have such particular knowledge of Mr. Dillon's cheques, and of the parties in whose favor they are drawn?

18. X answer. Directors in the bank are frequently in the habit of looking over cancelled cheques that have been presented or come through the clearing-house.

Nineteenth cross-interrogatory. You have stated in answer to sixteenth cross-interrogatory how it was that you came to the conclusion that Mr. Dillon was a general insurance agent. Did you ever examine into his accounts so as to inform yourself how much money he received or paid out on account of the Connecticut Mutual Life Insurance Company; and if so, what was the result?

19. X answer. I never did.

Again examined for defendant:

Seventh interrogatory. From your knowledge as director, hereinbefore spoken of, are you to be understood as stating that his deposits
194 in the bank to his account as general agent consisted only of the Connecticut Mutual Life Insurance Company's funds? and, if not, please explain of what they consisted.

7. Answer. I am not to be so understood. My impression was that the deposits consisted of the receipts of his office from whatever source they came.

Eighth interrogatory. What knowledge had the Central National Bank that you were insured in the Connecticut Mutual Insurance Company?

8. Answer. None at all.

The taking of depositions was then adjourned to the fourth day of October, in the same year, at twelve noon, and at the same place; at which last mentioned time and place the commissioner met pursuant to notice, and I proceeded, in the presence of the solicitors of the respective parties, to take the following depositions, that is to say:

JOHN B. MORRIS, a witness of lawful age, produced on behalf of the defendant, being by me first duly sworn on the Holy Evangely of
195 Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

First interrogatory. State your residence and occupation.

1. Answer. I reside in Baltimore City.

Second interrogatory. Please state if you are the owner of the building in South street lately occupied by A. H. Dillon, junior. If yea, did you rent the same to him? and, if so, was it on his own behalf or that of any other person?

2. Answer. It was on his own behalf. I am the owner.

Third interrogatory. Was the renting by writing or otherwise?

3. Answer. By writing. (Two leases are exhibited, but the filing is waived, of the two offices on the principal floor of number 8, South street, one dated in June, 1869, and the other in July, 1870, signed by A. H. Dillon, junior.)

Fourth interrogatory. In such renting had you any, and what, knowledge of any insurance companies in connection therewith?

4. Answer. None whatever.

196 Fifth interrogatory. Are you able to say how he paid his said rent? and if you shall say he paid it by cheque, on what bank was it, and how signed?

5. Answer. He sometimes chequed on the Chesapeake Bank and on John S. Gittings, and on Central National Bank, and sometimes he gave notes. The cheque shown me and endorsed by me is signed as general agent, but I never noticed it before. I never recognized the Connecticut Mutual Life Insurance Company, but it would have been better for me if I had, as they might have retained the officers.

(NOTE.—It is admitted that rent was paid April the first, 1874, by a cheque on the Central National Bank, signed A. H. Dillon, junior, general agent.)

Cross-examined for complainant:

First cross-interrogatory. Did you or not observe whether Mr. Dillon had any signs up, and, if so, what were they?

1. X answer. He had a sign up of Connecticut Life Insurance of Hartford, Conn., and another with Connecticut in full. Those are the only signs I saw.

197 SETH REED, a witness heretofore produced, sworn, and examined on behalf of defendant, being now again further examined on the following additional cross-interrogatories to him propounded on behalf of the complainant, makes oath, deposeth, and saith as follows, that is to say:

Twenty seventh cross-interrogatory. Who are H. K. Enos and Company, of New York, and what is their business, and for what purpose was the cheque for twenty-five hundred dollars given?

27. X answer. So far as I know, they were stock brokers. I know only by heresay; I could not say positively what the check was given for. It is some time since the transaction took place, and I could not state from memory.

Twenty-eighth cross-interrogatory. Had it or not anything to do with stock operations in New York, in which Mr. O'Connor and Mr. Dillon were concerned?

28. X answer. That I could not say.

Twenty-ninth cross-interrogatory. Do you or not know for what the check of twelve hundred and fifty-seven dollars and fifty cents
198 was used? If so, state what knowledge you have.

29. X answer. My belief is, it was for the purchase of ten shares of Central National Bank stock.

Thirtieth cross-interrogatory. There are five cheques charged on A. H. Dillon, junior's, individual account, of which two at the last meeting were explained, and you have this morning explained the other three. Please, now, state where those cheques are and when you last saw them.

30. X answer. I could not say when I last saw them; my memorandum is taken from the books. I do not know where they are, but presume some of them may be with the books of the bank. They might all be there.

(Defendant's solicitor offers to produce the cheques to complainant's solicitor, which proffer is accepted.)

Again examined for defendant:

Twenty-ninth interrogatory. Did the Central National Bank ever speculate or deal in stocks in any way?

29. Answer. The books do not show any *any* speculation in stocks.

Again cross examined for complainant:

199 Thirty-first cross-interrogatory. Did Mr. O'Connor speculate in stocks to your knowledge? and, if so, had Mr. Dillon any connection with the same to your knowledge?

31. X answer. All I know about Mr. O'Connor's speculating in stocks was from heresay while I was in the bank; since I have left the bank I heard him make some remark about speculation in Western Maryland Telegraph stock, but when it took place I do not know; it was recently and may have been during this last month. I think it was. Mr. Dillon had no connection with them to my knowledge.

PARKS FISHER, a witness of lawful age produced on behalf of the defendant, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth and saith as follows, that is to say:

First interrogatory. State your residence and occupation.

1. Answer. I am a stock broker and member of the firm of William Fisher and Sons, and reside in Baltimore City.

200 Second interrogatory. *Second interrogatory.* Do you know A. H. Dillon, junior?

2. Answer. Yes, sir.

Third interrogatory. From April, 1871, to June, 1874, was said Dillon engaged in any, and what, stock operations through your firm?

3. Answer. From 1872, I think between 1873 and 1874, he was; but not, I think, in 1871. He was a fairly moderate operator.

Fourth interrogatory. Were the same on his own account or had the complainant any and what connection therewith?

4. Answer. I did not know the complainant at all.

Fifth interrogatory. Were such operations to the extent that they required cheques upon banks by him? State upon what banks the cheques were given and how they were signed.

5. Answer. Nearly everything was done by notes, and when checks were given they were on the Central National Bank, to the best of my knowledge, but I cannot tell how they were signed, but I think A. H. Dillon, junior, but I am not sure.

201 Sixth interrogatory. Did Mr. Dillon ever give to your firm any promissory notes; and, if so, how were the same paid?

6. Answer. He did give us two, and my recollection is there were paid in bank notes.

Seventh interrogatory. Did your firm keep your bank account with the Central National Bank?

7. Answer. Yes, sir.

Eighth interrogatory. Was it large or otherwise, and was it kept there at the solicitation of anybody or by your own wish?

8. Answer. It was quite a large account and was kept there by our own wish and not at the solicitation of any one.

Cross-examined for complainant:

First cross-interrogatory. You have spoken of Mr. Dillon's stock operation: were they on his own account exclusively, or were other parties interested in them or any of them; and, if so, who was so interested?

1. X answer. I only knew him.

202 Second cross-interrogatory. In what year were those operations greatest, 1872, 1873 or 1874?

2. X answer. As I said before, I think they were from 1872 and onward in 1873. I think they were probably larger in 1872.

Third cross-interrogatory. Do you recollect a large loss made by Mr.

Dillon in or prior to the spring of 1872, a loss of about twelve thousand dollars; and, if so, was said loss paid and how was it paid?

3. X answer. I remember he made a loss, but cannot fix the date, nor do I know the extent of it, nor do I recollect how it was paid, whether by checks or notes.

Fourth cross-interrogatory. In your operations with Mr. Dillon did you ever receive checks on the Central National Bank, signed Alice P. Dillon, per A. H. Dillon, junior?

4. X answer. I can not be positive, but I think I have.

Again examined for defendant:

Ninth interrogatory. Can you recollect about the amount of
203 your monthly deposits in the Central National Bank?

9. X answer. From two to three millions of dollars.

Again cross-examined for complainant:

Fifth cross-interrogatory. Did or did not the Central National Bank allow you interest on your deposits?

5. X answer. It did not.

J. HARMANUS FISHER, a witness of lawful age produced on behalf of the defendant, being by me first duly sworn on the Holy Evangely Almighty God, being examined on the following interrogatories to him propounded on that behalf, makes oath, deposeth and saith as follows, that is to say:

First interrogatory. State your residence and occupation.

1. Answer. I am a stock-broker in Baltimore City.

Second interrogatory. Do you know A. H. Dillon, junior?

2. Answer. I am acquainted with him.

Third interrogatory. From April, 1871, to June, 1874, was said
204 Dillon engaged in any, and what, stock operations through your firm?

3. Answer. From February the sixth, 1872, to and after June the fourth, 1873, he was engaged in stock operations through the firm of William Fisher and Sons, of which firm I was then a member. Said stock operations were of a speculative character, and as far as I remember were in Erie Railroad and Pacific Steamship stock. He was above the average operator in the number of his transactions.

Fourth interrogatory. Were the same on his own account or had the complainant any, and what, connection therewith?

4. Answer. They were on his own individual account.

Fifth interrogatory. Were such operations to the extent that they required cheques upon banks by him? State upon what bank the cheques were given and how they were signed.

5. A. My remembrance is not very distinct on that point, but such as it is the cheques received for him were on the Central National
205 Bank of Baltimore, bearing the signature of A. H. Dillon, junior, and I do not think we ever received from him a cheque signed as agent. Had we received such I feel sure it would have impressed me.

Sixth interrogatory. Did Mr. Dillon ever give to your firm any promissory notes; and if so, how were the same paid?

6. Answer. He did give us promissory notes, two in number. My remembrance of the amount is something less than twenty-five hundred dollars. I remember the payment, but have no recollection as to the mode of payment.

Seventh interrogatory. Did your firm keep your bank account with the Central National Bank?

7. Answer. My firm kept an account with the Central National Bank of Baltimore during the time in which occurred the transaction with Dillon.

Eighth interrogatory. Was it large or otherwise, and was it kept there at the solicitation of anybody or by your own wish?

206 8. Answer. It was large, and was kept there at the solicitation of our firm only.

Ninth interrogatory. Do you ever remember to have received checks from Dillon under the signature of Alice P. Dillon on the Central National Bank?

9. Answer. I do not.

Cross-examined for complainant:

First cross-interrogatory. Did any one, and if so who, speak to you about keeping an account with the Central National Bank?

1. X answer. My personal friend John A. Nichols suggested to me at one time that it might be of advantage to me to open an account with the Central National Bank.

Second cross-interrogatory. What was Mr. Nichols' business at the time he so spoke to you?

2. X answer. He was agent of the Knickerbocker Life Insurance Company of New York.

Third cross-interrogatory. Did he or not keep an account in said bank?

3. X answer. I think he did not.

Fourth cross-interrogatory. Did or did not said bank allow you interest on your said account?

207 4. X answer. It did not.

Fifth cross-interrogatory. In which of the years 1872, 1873, and 1874 were Mr. Dillon's stock operations the largest?

5. X answer. I am unable to answer for want of date on hand.

Sixth cross-interrogatory. Were there any stock transactions of moment between Mr. Dillon and your house after June the fourth, 1873; and, if so, how long did they continue?

6. X answer. The absence of the books of the firm at present prevents me from answering the question.

Seventh cross-interrogatory. From what, and why, then, do you fix the date of June the fourth, 1873?

7. X answer. A memorandum in my hand shows that A. H. Dillon, junior, on June the fourth, 1873, opened with William Fisher and Sons an account, which at his request was termed A. H. Dillon. November 2.

Eighth cross-interrogatory. Do you know whether Mr. O'Connor had any, and what, connection with the stock operations of Mr. Dillon?

208 8. X answer. I have no knowledge on the subject.

Ninth cross-interrogatory. You have spoken of Mr. Dillon having opened an account; do you mean a bank account; and, if not, what sort of an account was it?

9. X answer. I mean a speculation stock account, on which margins in the form of money in convertible securities were deposited.

Tenth cross-interrogatory. Please state when the account of June the fourth, 1873, was closed; and if you cannot answer the question, explain why you cannot.

10. X answer. I cannot answer without first making reference to the books of William Fisher and Sons.

The taking of depositions was then adjourned to the sixth day of October, in the same year, at eleven in the forenoon, and the same place; at which last mentioned time and place a commissioner met pursuant to notice, and I proceeded in the presence of the solicitors of the respective parties to take the following depositions, that is to say:

209 WALTER S. WILKINSON, a witness of lawful age, produced on behalf of the defendant, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth and saith as follows, that is to say:

First interrogatory. State your residence and occupation.

1. Answer. I am a notary public and insurance agent.

Second interrogatory. Were you at any time connected with the Connecticut Mutual Life Insurance Company as an agent or broker; and, if yea, when did the same commence, and are you still such agent?

2. Answer. In the capacity of broker I have done business with the company for several years, but have been its agent since the eighth of May, 1875.

Third interrogatory. Look at the papers now shown you and say what the same are (W. S. W., number 1). (Papers objected to.)

3. Answer. I recognize these papers as the two advertisements.

210 The one headed "Fire, Life, and Marine," I recognize as an advertisement from the Baltimore Bulletin, and the one headed "Insurance" is a copy of an advertisement inserted in a number of Baltimore papers. The slip headed Baltimore Bulletin, October the second, 1875, is cut from the Baltimore Bulletin of that date. Their publication was authorized by the firm of which I am a member, although the first is authorized and paid for by the Hanover Fire Insurance Company and signed by our firm; the other is paid for by our firm.

Fourth interrogatory. Where did A. H. Dillon, junior, after being removed from the agency of the Connecticut Mutual Life Insurance Company, conduct business, and what signs, if any, were upon his place of business?

4. Answer. To the best of my recollection he remained in the office (I think number 8 South street) for some weeks, and the sign which was on the centre window, to the best of my recollection, had been Connecticut Mutual Life Insurance Company, A. H. Dillon, jr., general agent, and was altered by the erasure of the portion, "Connecticut Mutual," leaving the words "Life Insurance," A. H. Dillon, junior. Mr. Dillon

211 removed from there to the corner of Second street and Post-office avenue, upstairs, where he has remained ever since, so far as my knowledge goes. There were two signs on the sides of the steps, which I think contained only the words A. H. Dillon, jr., general agent, and there was a large blue sign with gold letters, but I do know that I read all of it; it was there for a long time, and had on it Connecticut Mutual Life Insurance Company, Hartford, Connecticut.

Fifth interrogatory. Do you not know in fact that the sign on the banister continued there as long as Dillon occupied the premises?

5. Answer. I do not know when it was removed.

Sixth interrogatory. In or about the month of July, 1873, what agreement, if any, was there between yourself and Dillon in regard to securing the agency of the Royal Fire Insurance Company of Liverpool, and was said application made, and what knowledge thereof did the officers of the Central National Bank have, and from whom was it required.

212 (Objected to as irrelevant.)

6. Answer. I take it for granted that the time mentioned was correct, though I do not remember that distinctly, but it was near that time; there was no written agreement between Dillon and myself for any purpose whatever, but we had a verbal understanding, and we endeavored to obtain the agency of the Royal Fire Insurance Company and made application for it to Mr. E. T. Bedoff. Mr. Dillon and myself had several conversations on the subject with Mr. O'Connor, the president of the Central National Bank, and he said he would further our efforts as much as was in his power. I am sure that Mr. Pitts also was aware of it, and I think he was an officer of the bank at that time, but I do not remember any particular conversation with him about that. I think the time was about July, though it may have been a month either way.

Cross-examined by complainant:

First cross-interrogatory. Do you or not know whether the relations between Mr. O'Connor and Mr. Dillon in the summer of 1873
213 were intimate or otherwise; and, if so, state all you know in that connection?

1. X answer. I had occasion to see Mr. Dillon in his room, the president's room in the bank, and joined in friendly conversation all around. I am not a judge of intimacy.

Second cross-interrogatory. Prior to June the first, 1874, and from April the first, 1871, how often have you seen Mr. Dillon with Mr. O'Connor either at the Central National Bank or in other places?

2. X answer. I cannot give the number of times, but very seldom at other places, but quite often at the bank. I have seen Mr. O'Connor at Dillon's office, but not more than two or three times, I think.

(Complainant's Exhibit, deposition G. R. P., filed and admitted without further verification and eight cheques, Complainant's Exhibits, depositions numbers 1, 2, 3, 4, 5, 6, 7, and 8 are filed.

(Complainant's solicitor admits that he has had access to the books of the bank, and thus far has made such examination of them as he desired.)

214 JAMES A. STEWART, a witness of lawful age, produced on behalf of the defendant, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth and saith, as follows, that is to say:

First interrogatory. Do you know James O'Connor, A. H. Dillon, junior, and Jacob L. Green, secretary of the Connecticut Life Insurance Company?

1. Answer. I do.

Second interrogatory. Were you ever present at any introduction of Mr. O'Connor to Mr. Green; if so, by whom was he introduced and in what manner. By what manner I mean as private individuals usually are or by any official designations?

2. Answer. Mr. Dillon introduced them, one as president of the Central National Bank of Baltimore, and the other as the secretary of the Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

Third interrogatory. How long did said interview last, and
215 what was the character of the conversation as well as you remember?

3. Answer. In the neighborhood of thirty minutes in duration, and the conversation took a very wide scope. I remember that banking and bankers and the general financial condition were extensively discussed, and I remember being very much entertained and instructed by some of the conversation; the conversation was chiefly maintained by Mr. O'Connor, and after he went out it was remarked by some one, perhaps myself, that he had never heard Mr. O'Connor talk so well as on that occasion.

Fourth interrogatory. Did the fact of Mr. Dillon being the agent of Mr. Green's company, and the nature, and character, and extent of his agency at all enter into such conversation, so far as you remember?

4. Answer. Not that I particularly remember.

Cross-examined for complainant:

First cross-interrogatory. When and where did this interview take place?

216 1. X answer. In the back office of Mr. Dillon's agency. I cannot recollect the date, but it was at my usual time of going there to make my examination—ten o'clock p. m.

Second cross-interrogatory. Do you or not know whether at the date of this interview Mr. Dillon and Mr. O'Connor were well acquainted or not?

2. X answer. I presume they were.

The taking of depositions was then adjourned to the twenty-ninth day of April, in the year eighteen hundred seventy-six, at eleven in the forenoon, and the same place; at which last-mentioned time and place the commissioner met pursuant to notice, and I proceeded, in the presence of the solicitors of the respective parties, to take the following depositions, that is to say:

JAMES O'CONNOR, a witness of lawful age, produced on behalf of the defendant, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogations to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

217 First interrogatory. State your residence and occupation.

1. Answer. I reside in Baltimore County; I am a private capitalist.

Second interrogatory. What connection, if any, had you with Central National Bank, defendant in this case, when did it begin, and where did it end?

2. Answer. I was president of the Central National Bank of Baltimore, commencing from its organization and remained so until it closed its business and ceased business operations, that is to say, commencing from March the first, 1871, until the first day of March, 1875, and I still act, in so far that I may be legally authorized to do, in attending to the matters in litigation.

Third interrogatory. Did you know A. H. Dillon, junior, codefendant in this case, during the period covered by your answer to second interrogatory; and, if yea, what was his then business, so far as known to you?

3. Answer. I did know A. H. Dillon, junior; and his business
218 was that of agent of the Connecticut Mutual Life-Insurance Company, and agent for other fire and life insurance; also as agent for D. B. Norris, of Washington City, also for Treasurer Columbus Delano, and he acted as agent and attorney-at-law for cases of certain

individual parties who employed him. There may have been other agencies which I do not now specially recollect.

Fourth interrogatory. Where was his place of business; and specify what, if any, signs were upon it which you remember?

4. Answer. Mr. Dillon's place of business was at No. 8 South street, in the city of Baltimore; and on account of the peculiar arrangement of the building, it having a basement which ran below the street, you had to ascend by what I would term a first floor, by a series of steps, or it may properly be called the second floor of the building. As you ascended the flight of steps to reach Mr. Dillon's office there was a large wooden sign fastened on the side of the iron railing as you ascended; this sign contained the words, "A. H. Dillon, jr., general agent,"
219 and nothing more. To the best of my recollection the plate glass window of his office contained several inscriptions. I can only say from memory what I think they contained, never having specially examined them. I believe a portion of the glass contained an inscription in gilt letters, stating, "Connecticut Mutual Life-Insurance Company. A. H. Dillon, jr., general agent." Another portion of the glass, I believe, contained an inscription of "life and fire insurance."

Fifth interrogatory. Did said Dillon keep any account with said bank, and if so, under what name?

5. Answer. Mr. Dillon opened an account with the Central National Bank of Baltimore, in April, 1871, in the name of A. H. Dillon, junior, general agent.

Sixth interrogatory. At whose instance and request, if that of any one, did he open such account?

6. Answer. At his own instance and at no person's request within my knowledge.

Seventh interrogatory. It has been alleged in this case that
220 the same was opened by him at your instance and request; is that true, or how otherwise?

7. Answer. It is totally untrue.

Eighth interrogatory. What connection with or interest in said account had the complainant in this case, so far as known to you, as president of the bank, up to the time of the institution of this suit?

8. Answer. Complainant in this suit, the Connecticut Mutual Life Insurance Company, had no connection whatever in any shape or form with this account, nor was it understood, or implied, from the commencement of the account, that they had any money on deposit in said bank or had any account with said bank. I was aware that Mr. Dillon, as already stated, was the agent of the Connecticut Mutual Life Insurance Company, and during the keeping of the account of A. H. Dillon, junior, general agent as above stated, I was aware that in common with all other moneys derived from all over sources, Mr. Dillion did deposit in
221 his said account money received by him for premiums as agent of the Connecticut Mutual Life Insurance Company. His balances were always subject to his cheque, regardless of whom he might think proper to cheque in favor of, and we so understood and treated his account. There never was in any shape any intimation to the bank that any moneys deposited by A. H. Dillon, junior, general agent, were in any shape, manner or form trust funds, belonging to the Connecticut Mutual Life Insurance Company or any other party. The bank never heard or received any such intimation until about the fifteenth or twentieth of June, 1874.

Ninth interrogatory. In whose favor and for what purposes, so far as known to you, did said A. H. Dillon, junior, in fact cheque on said account?

9. Answer. Mr. Dillon's cheques, signed A. H. Dillon, junior, general agent, were to my personal knowledge issued and paid to a very large amount and constituting a very large number of cheques in favor of, among others, the following: The Associated Fireman's Insurance
222 Company of Baltimore, check No. 517, (witness now refers to the cheques already filed in the cause); National Fire Insurance Company of Baltimore, check No. 507; Maryland Life Insurance Company, check No. 516; Delano's tax check 531; D. B. Norris, cheque 532; No. 523, draft from W. J. B., which I believe to be W. J. Barney, of Dubuque, Iowa; Proud and Campbell, who are the agents of the Royal Insurance Company, cheque No. 54; Miss Irene Orendorff, No. 515; Henry R. Wilson, general agent, to pay premium on policy No. 38937, James Towels, Security Life Insurance Company of New York, No. 511; James M. Anderson, esquire, collector (meaning collector of city taxes of the city of Baltimore,) No. 530; George T. Holliday, No. 529; Lewis Stowe, No. 524; John G. Kestler, No. 528; Thomas Shields, No. 509; John G. Kestler, No. 513; F. L. Lawrence, No. 520; Charles Rupp, No. 539; S. and J. Parey, No. 538; draft on New York, No. 540; John G. Kestler, No. 537; Central National Bank, No. 522; Bombaugh and Ransom, No. 534; A. H. Dillon, junior, No. 541; J. B. Morris, junior, No. 512. I also know of his having paid his individual note by cheque, signed A. H. Dillon, junior,
223 general agent, and I know of his having paid the interest on a ten thousand dollars note, which matured June the first, 1874, and which is now the subject matter of this litigation, by his cheque signed A. H. Dillon, junior, general agent, said cheque for six months' interest on ten thousand dollars at six per cent. per year. The amount of said cheque was three hundred and thirty-three dollars and thirty-four cents, being composed of three hundred and six dollars and sixty-seven cents, interest as above stated, and twenty-six dollars and sixty-seven cents, interest at six per cent. up to the time of the issue of the ten thousand dollars note. I believe said cheque was dated December the eleven, 1873. I have gone all over the books of the bank and examined the account of A. H. Dillon, junior, general agent, and I find the cheques referred to and given in evidence are those which are necessarily yet in possession of the bank since the last balance of Mr. Dillon's bank-book. All the cheques up to and inclusive of the last balancing of the bank-book were can-
224 celled and handed over to him, and are in his possession. I find a total of cheques debited to account on the ledger of the bank, and the total of cheques paid on debits were four hundred and eleven during the whole period of the account, from the beginning to the close. Of this amount I believe about sixty-eight cheques were drawn payable to the order of Jacob L. Green, esquire, secretary. I mean by secretary that he was secretary of the Connecticut Mutual Life Insurance Company. I find the total number of deposits from the beginning to the close of A. H. Dillon, junior, general agent's account are eight hundred and seven items; I find the total amount of deposits to the credit of A. H. Dillon, junior, general agent, to be the sum of four hundred and seventy thousand seven hundred and fifty-three dollars and five cents. I may add, this embraces all collections made, as well as cash deposits, most of said collections belonging to the Berkshire Life Insurance Company, or others, having no connection, so far as I am aware, with the Connecticut Mutual Life Insurance Company.

225 Tenth interrogatory. Did the said bank allow any interest to said Dillon upon said account? If so, by whose orders was it allowed,

and was the same allowed to him on his own account, or had complainant any and what interest therein to your knowledge?

10. Answer. The Central National Bank of Baltimore, by its directors, authorized me, as president of said bank, to allow, and said bank did allow, to A. H. Dillon, junior, interest on the account as kept A. H. Dillon, junior, general agent, at the rate of four per cent. per year upon his current balance. The Central National Bank paid A. H. Dillon, junior, said agreed rate of interest, amounting, according the books of the bank, to seven hundred and fifty-one dollars and twenty-two cents. The Connecticut Mutual Life Insurance Company had nothing whatever to do with it, the bank never having had any banking business in any shape or form with said company.

(Answer objected to, unless Mr. O'Connor will produce in the cause or show counsel personally the minute of the board of directors spoken of in the answer.)

Eleventh interrogatory. Did you at any time ever have any in-
226 terview with said Jacob L. Green, or any other officer of complainant; and if so, when and where? and if you had any such interview, please state whether at such interview, or at any other time, such person or persons ever intimated to you that they had any and what connection with your bank in a banking account, or any and what interest in any account kept in your bank in the name of any other person; and if so, please state such intimations fully.

(Objected to as leading, and because it only calls for a part of the conversation.)

11. Answer. I never met Mr. Jacob L. Green but once. The exact time at which it happened I cannot state. I was in the Central National Bank of Baltimore in the morning of the day, and Mr. Dillon came into the bank and requested me, as a personal favor and on account of courtesy, to go across the street to his office with him, as he wished me to be introduced personally to Mr. Jacob L. Green. I went with him and was introduced, and I believe, in Mr. Dillon's style, he said, "Mr. Green, permit me to introduce to you my friend, Mr. James O'Connor, president of
227 the Central National Bank," and that he added, "Mr. President, permit me to introduce to you my friend, Mr. Jacob L. Green, secretary of the Connecticut Mutual Life Insurance Company." We interchanged the ordinary civilities and courtesies, and I remember expressing my astonishment at Mr. Green being so youthful looking a gentleman. We then spoke in general conversation. We had a general conversation embracing the location and peculiarities of the city of Baltimore, as compared to her more northern sisters. I specially spoke about some steamship companies being owned by Yankee capitalists. I think I also added several of the large banks were largely owned outside of the State. I may have referred to Mr. Enoch Pratt as an example of northern people. I think Mr. Green spoke very freely regarding his views of Mr. Winston, of New York City. The conversation was purely social and general. Mr. Green did not in any shape or manner intimate that his company or himself had any money on deposit, or any business whatever with the bank of which I was president. There was no
228 conversation with either, from Mr. Green to me, or from me to Mr. Green, that I have any recollection of, having any reference whatever to himself or his company, or any person having money on deposit in the bank of which I was president. I may add that Mr. Green personally, or Mr. Green as secretary, or any officer of the Connecticut Mutual Life Insurance Company was never inside the doors of the Central National Bank at any time within my knowledge. I have

no doubt that I invited him to visit me, and offered to extend to him all the personal courtesies in my power; but he never availed himself of it."

Twelfth interrogatory. After said Dillon ceased to be an agent of complainant, did he continue to occupy said place of business; and, if yea, was there any and what alteration or removal of the signs upon his office?

12. Answer. Mr. Dillon did occupy the office number 8 South street, Baltimore, for some months in the year 1875 after his discharge
229 from the agency of complainant, and he retained the large sign containing the words "A. H. Dillon, jr., general agent," until he vacated that office, which, I believe, was about the first of June, 1875.

Thirteenth interrogatory. In answer to seventeenth interrogatory in this case (which is here read to witness), Dillon has made the statements therein; be good enough to state if the said statements are correct, or how otherwise.

13. Answer. My answer is, there never was a deposit made to the credit of A. H. Dillon, junior, general agent, which was by mistake of the teller placed to the credit of Alice P. Dillon, his wife, and that I never had any such conversation with Mr. Leary as Dillon alleges. Mr. Dillon is entirely in error. I answer that in Mr. Dillon's statement that I sent for him to state the case of Mr. Jackson, who was agent of the Royal Insuranc' Company of Liverpool at the time, he is also entirely in error. He was in the president's room and spoke of it, and undertook to give what he considered his views. I have no particular recollection what his (Dillon's) opinion and views were on the Jack-
230 son matter; but I have decided knowledge that Mr. Dillon's opinion or views on that or any other case, either at that time or subsequent thereto, would not have been of the slightest value or importance to me. The reason of this statement is that he claimed to be or to have been a lawyer, and in my opinion he knew nothing whatever about law. If, however—which I do not recollect—he did state that, in his opinion, the bank must regard the account of John James Jackson, agent, as his purely individual account, it would appear that the account of A. H. Dillon, junior, general agent, would necessarily be his purely individual account. I wish to add that Mr. Jackson held a very full and broad power of attorney from the Royal Insurance Company, and the cases are dissimilar, and have no relevance to each other as far as I know.

Fourteenth interrogatory. Your attention is specially called to so much of said answer as states his denial that the bank would have a right to charge up to his account as general agent a personal note of his, which the bank then held; be good enough to state anything you have to state in regard to such denial.

231 (Objected to as leading, and because the witness has given his answer to the previous interrogatory, which covers the question.)

14. Answer. I have no recollection of his having made any such statement or suggestion, but if he did make any such suggestion I have no doubt that when he states that I asserted the right of the Central National Bank to do so, he is correct.

The taking of depositions was then adjourned to the fourth day of May in the same year at one in the afternoon and the same place, at which last-mentioned time and place the commissioner met pursuant to notice, and I proceeded in the presence of the solicitors of the respective parties to take the following deposition; that is to say:

THOMAS SHIELDS, a witness of lawful age, produced on behalf of the defendant, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

232 First interrogatory. State your residence and occupation.

1. Answer. I reside at No. 45 North Howard street; I am a liquor dealer.

Second interrogatory. Are you now the owner of a house at the corner of Madison avenue and Dolphin street in this city? If yea, state from whom you obtained the same, at what price, and all the particulars relating to the same.

2. Answer. I am the owner of a house at that corner, which I obtained from Mr. and Mrs. Dillon. It was paid for in government bonds, and I cannot tell the price of those bonds at that time, but it was between eleven and twelve thousand dollars. The bonds were loaned to Mr. Dillon, and he gave me the house as security for them, and finally I purchased the house. The bonds were given to Mr. Dillon, and in the course of eight or ten days he said he could not pay me back the money, and gave me a deed of the property, in which deed both he and Mrs. Dillon joined.

Third interrogatory. At the time of lending said bonds, did you
233 stipulate for any and what collateral as security?

3. Answer. For none.

Fourth interrogatory. At the time that he gave you the deed was the deed then given as collateral?

4. Answer. No, sir; the deed was given to me as purchaser of the property.

Fifth interrogatory. Was the deed forthwith then recorded; and if not, why not?

5. Answer. It was not, but I cannot answer why, because often a deed is given and not recorded at once.

Sixth interrogatory. Was there any reason in this instance why the deed was not recorded at once?

6. Answer. There was not.

Seventh interrogatory. It appears that the deed was not recorded until a few days of the year. Do you mean to say that it is your habit or custom to keep deeds unrecorded for such a length of time as that?

7. Answer. In that instance it was.

Eighth interrogatory. Did you take the same house willingly or from necessity?

234 8. Answer. I took it willingly.

Ninth interrogatory. Do you yet hold it as an investment, and do you regularly get rent therefore, and who occupies the same?

9. Answer. I hold it as an investment. Mr. Dillon occupies it, and I get my rent regularly when called for.

Tenth interrogatory. At the time you took the conveyance of said house, was there any encumbrance on it, and what?

10. Answer. I cannot answer; my memory does not serve me; there was some encumbrance, but I do not know what.

Eleventh interrogatory. Who was Hannah S. Dillon, and are you aware that said property had been professedly assigned to her by deed bearing date prior to yours and duly recorded?

11. Answer. I do not know who she was. I am aware that it had been so conveyed to her, not the whole property, but a specified amount.

Twelfth interrogatory. Then please explain, so far as known to you, on what terms it was so conveyed to her?

235 12. Answer. I do not know.

Thirteenth interrogatory. Did you know that at the time you took your conveyance, or was it a subsequent discovery?

13. Answer. No; I knew it at the time I took it.

Fourteenth interrogatory. Then explain how you willing' took a conveyance of property the title to which at the time you took it was in another, and not in the grantors to you?

14. Answer. There was a certain amount in the other, and I took the balance.

Fifteenth interrogatory. What was said house and lot then fairly worth in fee-simple, or subject to the ground rent of two hundred and fourteen dollars and fifty cents then upon it?

15. Answer. I suppose the house was then worth thirteen or fourteen thousand dollars, subject to the ground rent.

Sixteenth interrogatory. Are you under any promise or agreement to resell, or any manner to restore to Mr. and Mrs. Dillon, or either of them, the said house, upon the repayment to you of any sum of money or other consideration?

16. Answer. No, sir.

236 Seventeenth interrogatory. Who paid the city taxes on said property for the years 1872, 1873, and 1874?

17. Answer. That question I will answer in this way: The agreement between Mr. Dillon and me was that he should pay all expenses, taxes, water rent, and so forth, and should give me a certain amount of rent.

Eighteenth interrogatory. Please state what certain amount of rent, as above explained, was agreed on to be paid by Mr. Dillon to yourself?

18. Answer. I cannot in the absence of my books. I cannot carry it in my head.

Nineteenth interrogatory. Please state, to the best of your recollection and belief, the date at which you handed to Mr. Dillon the United States bonds you have referred to?

19. Answer. I cannot do it in the absence of my books. My memory does not serve me that length of time.

237 Twentieth interrogatory. Please state if the United States bonds you have referred to were registered bonds or coupon bonds, and whether they were six or five per cent. bonds?

20. Answer. They were coupon bonds at five twenty per cent.

Twenty-first interrogatory. Please state the number of bonds you handed him and the denominations.

21. Answer. They were ten one thousand dollar bonds.

Twenty-second interrogatory. Please state whether or not this transaction took place in your office, or where else.

22. Answer. It was on South street, opposite the Central National Bank, on the street. I went into the Safe Deposit Company and got the bonds and came out and handed them to Mr. Dillon.

Twenty-third interrogatory. Please state whether or not any person was present at the handing of the bonds to Mr. Dillon except yourself and Mr. Dillon.

23. I cannot answer, for I do not remember.

Twenty-fourth interrogatory. Please state whether or not Mrs. Alice P. Dillon was present.

238 24. Answer. She was not.

Twenty fifth interrogatory. Be kind enough to state whether or

not Mr. Dillon gave to you at the time of your handing him the United States bonds above described any memorandum in writing, or agreement or receipt therefor, and if so, state so far as you can what was then agreed upon or stated as between yourself and Mr. Dillon.

25. Answer. There was none.

Twenty-sixth interrogatory. Be kind enough to state whether or not in the years 1872, 1873, 1874, 1875, and 1876 the property described as the northwest corner of Madison avenue and Dolphin street was insured under policies of fire insurance; and, if so, in whose name.

26. Answer. I can answer that question in this way: It is insured in the Equitable Insurance Company in my name, and was transferred to me by Mr. Dillon, but whether in 1872, 1873, or 1874, I cannot remember.

Twenty-seventh interrogatory. Be kind enough to state how long you have know' A. H. Dillon, junior.

239 27. Answer. I suppose about ten years; maybe longer.

Twenty-eighth interrogatory. Are you personally acquainted with Alice P. Dillon?

28. Answer. I have met her in company.

Twenty-ninth interrogatory. Do you know what her name was before her marriage?

29. Answer. No, sir.

Thirtieth interrogatory. Please state if you have had any business transactions with A. H. Dillon, junior, in connection with Western lands, and if so, when and to what extent.

30. Answer. I had a connection with Mr. Dillon in regard to Western lands, in which he acted as agent, not personally for himself.

Thirty-first interrogatory. For whom was he agent?

31. Answer. For me.

Thirty-second interrogatory. Please state whether or not in said transactions you were also connected with W. J. Barney.

240 32. Answer. William J. Barney resides in Chicago, and acts for me in Chicago in regard to the sale of the lands.

Thirty-third interrogatory. Are you to be understood as testifying here that the Western lands to which you refer were all purchased with your money, and that Dillon acted only as your agent in the matter?

33. Answer. I decline to answer that.

Thirty-fourth interrogatory. Please state whether or not you have direct knowledge of A. H. Dillon, junior, investing considerable sums of money in the purchase of Western lands in connection with the Mr. W. J. Barney referred to?

34. Answer. At the time I bought the land from W. J. Barney, Mr. Dillon and Barney were talking about the purchase of land in Iowa, but whether Dillon bought it or not, I do not know.

Thirty-fifth interrogatory. Am I to understand that the above is as full an answer as you can give to the question?

35. Answer. That is the only answer.

Thirty-sixth interrogatory. Do you know where A. H. Dillon, junior, is at present?

241 36. Answer. I do not know.

Thirty-seventh interrogatory. In referring to your statement in regard to the agreed sum you were to receive from Mr. Dillon can you from your books ascertain the amounts that you may have received since the year 1872?

37. Answer. Yes, sir.

Thirty-eighth interrogatory. Be kind enough to have a statement of the same made out and sent to the commissioner.

38. Answer. I will.

Thirty-ninth interrogatory. Will your books show the exact numbers of the ten one thousand dollars five-twenty United States bonds that you have testified to handing to Mr. Dillon?

39. Answer. Yes, sir.

Fortieth interrogatory. Will you please furnish a statement of those numbers to the commissioner?

40. Answer. Yes, sir.

Forty-first interrogatory. Will your books show any entry or entries made on them at the time of the handing of said bonds to Dillon?

41. Answer. I will ask my book-keeper and let you know.

242 Forty-second interrogatory. If they do furnish any such record will you be kind enough to furnish it to the commissioner?

42. Answer. Of course, sir.

Cross-examined for complainant:

First cross-interrogatory. Have you ever paid any money to Hannah S. Dillon?

1. X answer. No, sir.

Second cross-interrogatory. When did Mr. Dillon pay you his last rent?

2. X answer. I cannot answer now, but within the last two months, I think in April. I will furnish the date.

Third cross-interrogatory. How much did he pay you?

3. X answer. I do not know. I said before I could not answer that. I will furnish that from my books.

Fourth cross-interrogatory. I understand you that Mr. Dillon got the ten thousand dollars in bonds about eight or ten days before the second of March, 1872, the date of the deed.

243 4. X answer. I approximate it was that, but I do not say positively.

Fifth cross-interrogatory. Please state to the best of your recollection how much you deducted off the purchase money for Hannah S. Dillon's annuity.

5. X answer. I cannot say from recollection, or unless I went to the deed in the record office.

Sixth cross-interrogatory. Your deed in the record office states that you paid Dillon and wife twelve thousand dollars, and bought the property subject to a ground rent of two hundred and twelve dollars and fifty cents, and that at that time Hannah S. Dillon's annuity was on the property for two hundred and sixty-four dollars a year, payable during her life; did you pay said twelve thousand dollars, and can you now state what deduction was made for Hannah S. Dillon's annuity?

6. X answer. There was no deduction made. I bought the property with the annuity on it. As to the gold interest, and so on, I cannot tell you. I paid the ten thousand dollars of five-twenty gold bonds

244 above referred to, and they represent the consideration.

Seventh cross-interrogatory. I understand you that you took no security from Mr. Dillon when you loaned him the said bonds?

7. X answer. No, sir; I did not want any.

Eighth cross-interrogatory. Who first suggested the idea of the deed of the house from Mr. Dillon and wife to you? Did you demand the deed as security for the money loaned, or did Dillon volunteer it?

8. X answer. No, sir; I lent him the bonds, and they were not returned in a given time, and I asked for security, and this security was given.

Ninth cross-interrogatory. Can you, from memory or from your books, furnish a statement of when the bonds loaned and for what length of time?

9. X answer. There was no special number of days, but it was for a few days.

Tenth cross-interrogatory. Have you any recollection of any understanding as to the number of days?

10. X answer. I have not.

245 Eleventh cross-interrogatory. Has Mr. Dillon, from the year 1872 to now, returned you any vouchers showing that he has paid the annuity of Hannah S. Dillon on this property, and if so, have you such vouchers now; and also the vouchers for the ground-rent and taxes on said property, and if so, have you such vouchers?

11. X answer. No, sir.

NOTE.—It is admitted that Mr. W. H. Bosley will swear A. H. Dillon, junior, kept an account with John S. Gittings and Company in the name of A. H. Dillon, junior, agent, which was closed in August, 1869, and that there was a dissolution of the firm of John S. Gittings and Company (composed of John S. Gittings and Benjamin H. Williams) in March, 1869, and it is further admitted that said Dillon opened an account with the Chesapeake Bank as A. H. Dillon, junior, agent, in March, 1869, and was closed in August, 1871, and it is admitted that Samuel Kirk, general book-keeper of the Chesapeake Bank, will swear that it is his impression that he signed cheques as A. H. Dillon,

246 junior, general agent. It is further admitted that the banking business of John S. Gittings and Company was, after the dissolution in March, 1869, carried on in the same manner by John S. Gittings.

The taking of depositions was then adjourned to the fifth day of May, in the same year, at five in the afternoon and the same place, at which last mentioned time and place the commissioner met, pursuant to notice, and I proceeded, in the presence of the solictors of the respective parties, to take the following depositions, that is to say:

JAMES O'CONNOR, a witness heretofore produced, sworn, and examined in behalf of the defendant, being now again examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth and saith as follows that is to say:

Fifteenth interrogatory. Explain, if known to you, why Dillon kept his bank-account', mixed as they were, under the name of agent or general agent, and not in his own name.

15. Answer. The reasons within my knowledge show that prior

247 to his opening accounts in Baltimore he had been a resident of Iowa, and the records which I now produce of an Iowa court show a large number of judgements against him unsatisfied, and hence his not keeping his money accounts in his individual name, but with the title of agent or general agent attached to it. I calculate the amount of said unsatisfied judgements, principal and interest, to exceed the sum of seventeen thousand dollars, and I derived my information from P. J. Quigley, clerk of the court, who wrote to me, in addition to the records now made part of my evidence (said records is Defendant's Exhibit Depositions J. O'C., No. 2.) I have also knowledge, derived from Mr. Dillon, that the property corner of Madison avenue and Dolphin street, in city of Baltimore, Maryland, and occupied, during the years 1872, 1873 and 1874 by himself and family as a residence, was not in his name, but was in the name of his wife, Alice P. Dillon.

(Question and answer objected to as not being relevant to the issue in this cause and as being hearsay, and the exhibit filed is objected to as not being admissible evidence.)

248 I wish to add that the above is in addition to the facts already stated by me of his general agency for numerous parties.

Sixteenth interrogatory. State the history of the ten thousand dollars note mentioned in evidence in this cause.

16. Answer. If I am interrogated as to this precise ten thousand dollars note now in litigation I can state it fully, and if you wish *from me* to ask how it originated I can also state it; I wish to enquire before answering.

Seventeenth interrogatory. I wish you not only to answer as to the ten thousand dollars note in question in this case, but as to the whole transaction from its incipiency, whether a renewal or otherwise.

17. Answer. The matter originated in the month of March, 1872. I refer. to the individual ledger of the Central National Bank, and refreshed my memory by looking at page 123, account headed Mrs. A. P. Dillon. It occurred on March the fourteenth, 1872. I was seated in the president's room of the Central National Bank of Baltimore,

249 on that day, attending to its business, when A. H. Dillon, junior, came into the room and was very much excited; he closed the door so as to have no interruption, and informed me that he had an immediate and pressing necessity for a loan of a considerable amount; that his brokers, Messrs. William Fisher & Sons, of Baltimore, had then notified him that a large sum of margins must be made good, or they would be forced to and would close his account, and if they did so it would be, as he termed it, ruinous; he thought the stock market would change, and that if he was enabled to make good his margins the result would be different. He then stated the matter was most pressing, that they had sent him peremptory messages, and that he had no time to arrange any details. I stated to him in reply that the bank could not recognize any such reasons, and I desired to know what security he could give. He then stated to me that he was possessed of a considerable amount of Western lands; to which I replied that I did not consider any

250 such security would justify the bank in making him a loan. He then stated that the amount demanded by the Fishers he thought he could reduce, and if they were paid a portion of it that day the market might change the next day and the next day, even if he had to pay another portion to them in case the market did not change, that he thought it would be again postponed to a third day by another partial payment, and if on the third day or any succeding day the market should not have changed and he should have to pay, that the total amount under any circumstances would not exceed the sum of twelve thousand dollars. I then stated to him that I declined making him the asked-for loan unless it was secured. He then proposed an' offered to give his wife, Alice P. Dillon, as security; that he would draw the cheques in the name of Alice P. Dillon for whatever amount might be required up to and not exceeding twelve thousand dollars, and should it not be made good within a few days he would execute a note, with Alice P. Dillon as security, in a satisfactory shape. He then assured me in the strongest terms that the property cor. of Dolphin

251 street and Madison avenue, in Baltimore City, was worth, with its contents of household goods, at least fifteen to twenty thousand dollars. He also urged that he kept a valuable account with the bank, and, as he had never asked before for any loan, that he thought he was entitled to it. I was still very adverse to granting the loan, and

not until he burst into tears and implored me to save him did I consent. I told him then to cheque for as small an amount as he could possibly arrange for with the Messrs. Fisher that day, and that at the meeting of directors on the day following I would report to them fully the facts and my action. The bank did pay Alice P. Dillon's cheque, signed by A. H. Dillon, junior, attorney, on March the fourteenth, 1872, for forty-five hundred dollars, and also on March the (15th) fifteenth, 1872, twenty-five hundred dollars, and on March the sixteenth two cheques of three thousand dollars each, making in all thirteen thousand dollars, of which thirteen thousand dollars Mrs. Alice P. Dillon had on de-
252 posit. Dillon did not repay the money, and the stock market did not fluctuate in his favor, he being a "bear" in the market, and the market being "bullish." Mr. Dillon then gave the Central National Bank the note of Alice P. Dillon, signed A. H. Dillon, junior, attorney, having ten days to run, endorsed by himself, for the sum of twelve thousand dollars, which note was regularly discounted by the bank at six per cent., and the proceeds entered up, on page 123 of the individual ledger, Alice P. Dillon's account on April the second, 1872, eleven thousand nine hundred and thirty-four dollars. The date of said note is . This note of twelve thousand dollars matured and was not paid; and a note of twelve thousand dollars was discounted, dated April the twenty-third, 1872, at sixty days, due June the twenty-fifth, 1872, and for the interest on this discounted note of twelve thousand dollars an interest note of two hundred and thirty-two dollars, dated April the twenty-second, 1872, at sixty days, due June the twenty-fourth, 1872, was given. The note of twelve thousand dollars and the note of two hundred and thirty-two dollars were both signed by
253 Alice P. Dillon, by A. H. Dillon, junior, attorney, and endorsed by A. H. Dillon, junior. The note of twelve thousand dollars, and its coadjutor note of two hundred and thirty two dollars, produced a net credit of twelve thousand one hundred and three dollars and fifty-six cents, entered under date of April the twenty-third, 1872, on page 123 of the individual ledger. The interest note of two hundred and thirty-two dollars matured June the twenty-fourth, 1872, and was paid to the bank in full by the cheque of A. H. Dillon, junior, signed as general agent. The note of twelve thousand dollars, due June the twenty-fifth, 1872, was not paid, but a note for twelve thousand was given, dated June the twenty-fifth, 1872, at four months, and due October the twenty-eighth, 1872. This twelve thousand dollars note was the note of Alice P. Dillon, endorsed by A. H. Dillon, junior, and a note was given for the interest on the twelve thousand dollars note spoken of, and was dated June the twenty-fifth, 1872, at thirty days, for the sum of two hundred and fifty-two dollars, drawn and endorsed by the same parties.

At the maturity of the thirty days' note for two hundred and fifty-
254 two dollars, July the twenty-eighth, 1872, it was paid in full to the bank by the cheque of A. H. Dillon, junior, general agent. On October the twenty-eighth, 1872, at the maturity of the note of twelve thousand dollars, it was not paid, but a note for twelve thousand dollars was executed, Alice P. Dillon maker, A. H. Dillon, junior, endorser, at six months, maturing May the first, 1873, and for the interest on the same, at six per cent. per year, a note was given for three hundred and eighty-three dollars and fifty-two cents, at six months (which said note for three hundred and eighty-three dollars and fifty-two cents embraced the interest on the twelve thousand dollars, as well as the interest on the interest note, and which said interest note also matured on May the first, 1873). Exhibit G. H. W., No. 1, at the bottom below the balanc

ing, forty-five thousand seven hundred and four dollars and ninety-two cents, shows how these last two discounts appear upon the individual ledger in Alice P. Dillon's account, page 123. On the first of May, 1873, Dillon paid in full the interest note of three hundred and eighty-three dollars and fifty-two cents, then due to the bank, and paid it by his cheque, signed A. H. Dillon, junior, general agent. He did not pay the note
255 for twelve thousand dollars, due May the first, 1873, and gave a note for twelve thousand dollars at six months, dated April the eighth, 1873, signed by Alice P. Dillon and A. H. Dillon, junior, and endorsed by Alice P. Dillon and A. H. Dillon, junior, which note matured November the second, 1873. This note was signed Alice P. Dillon, in her own handwriting, and also endorsed Alice P. Dillon, in her own handwriting, as well as by A. H. Dillon, junior, in his own handwriting, both as drawer and endorser. The bank insisted that Mrs. Alice P. Dillon should sign her name in her own handwriting, one of the directors of the bank having stated that considerable litigation had arisen about married women's legal liability. The matter having been referred to the council of the bank, George H. Williams, this note was drawn and executed in strict conformity with his instructions. The interest accruing on the six months' note, dated April the third, 1873, for twelve thousand dollars, amounted to three hundred and sixty-eight dollars, the net amount of the discount being eleven thousand six hundred and thirty-two dollars; for this three hundred and sixty-eight dol-
256 lars another note was given for three hundred and sixty-eight dollars, dated April the third, 1873, for six months, due November the second, 1873, and was paid before maturity, July the twenty-fifth, 1873, by Mr. Dillon, in bank notes at the bank. The entry of the principal note of twelve thousand dollars, dated April the third, 1873, is there, being the last item on Exhibit G. H. W. No. 1. On November the first, 1873, two thousand dollars was paid on account, a new note for ten thousand dollars given to take up the note for twelve thousand dollars; said note was dated November the first, 1873, at ten days, and due November the eleventh and fourteenth. Discount on said ten days' note, being thirty-seven dollars and fifty cents, was paid by Dillon to the bank in cash. The two thousand dollars reduction paid on the note and the thirty-seven dollars and fifty cents alluded to, making two thousand and thirty-seven dollars and fifty cents paid in cash to the bank, was by the cheque of James O'Connor (deponent), dated November the first, 1873, and given by him to A. H. Dillon, junior. O'Connor's cheque thus given to Dillon was placed to his credit on the books of the bank in the name of A. H. Dillon, junior, individual ledger A,
257 page 122, and A. H. Dillon, junior, gave to the Central National Bank his cheque for two thousand and thirty-seven dollars and fifty cents, being in payment of the reduction of two thousand dollars on the original note, and thirty-seven dollars and fifty cents. The entry of the discount of the ten days' note for ten thousand dollars, which produced nine thousand nine hundred and sixty-two dollars and fifty cents, does not appear in the account of Mrs. Alice P. Dillon or in the account of A. H. Dillon, junior, it being placed on the discount ledger under the head of temporary discounts; the note only having ten days to run and the interest being paid in money, is, I believe, the reason for its so appearing on the discount ledger. When the ten thousand dollars note, due November the eleventh and fourteenth, 1873, matured, it was not paid. On December the eleventh, 1873, a note of ten thousand dollars at six months, dated November the twenty-ninth, 1873, and falling due June first, 1874, was made. This note was signed by

Alice P. Dillon in her own handwriting, and by A. H. Dillon, junior, in his own handwriting, as drawers and likewise as endorsers. The
258 discount on that note was three hundred and six dollars and sixty-nine cents; the interest on the over-due note was twenty-six dollars and sixty-seven cents, making in all three hundred and thirty-three dollars and thirty-four cents, which said sum was paid to the bank by Dillon giving his cheque on the bank, signed "A. H. Dillon, junior, general agent." This was the note which, in my opinion, forms the basis of this litigation. This note, before being discounted, was the subject of special action by the board of directors of the Central National Bank of Baltimore on December the ninth, 1873, a copy of which I will file and make part of my testimony, and also on December the thirteenth, 1873, a copy of which I will file and make part of my testimony. This discount appears on folio 122 of the individual ledger in the account of A. H. Dillon, junior, and is the last item in Dillon's individual account, already offered in evidence.

The taking of depositions was then adjourned to the sixth day of May, in the same year, at eleven in the forenoon, and the same place, at which last-mentioned time and place the commissioner met, and I proceeded, in the presence of the solicitors of the respective parties,
259 to take the following depositions, that is to say:

WILLIAM A. WYSONG, a witness of lawful age, produced on behalf of the defendant, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

First interrogatory. State your residence and occupation.

1. Answer. I reside at No. 269 Saint Paul street; I am secretary and treasurer of the Safe Deposit and Trust Company of Baltimore.

Second interrogatory. State what was your position or employment in March, 1872.

2. Answer. I was secretary and treasurer then.

Third interrogatory. State whether or not A. H. Dillon, junior, rented a box in said Safe Deposit Company in March of 1872, and if you answer yea, state who, in addition to himself, if any one, had access to said box in accordance with the rules and regulations of your company?

3. Answer. He did. Alice P. Dillon was the only other person
260 who had access to the box.

Fourth interrogatory. State whether or not Thomas Shields rented a box in said Safe Deposit Company in March, 1872? and if you answer yea, please state who in addition to himself, if any one, had access to said box in accordance with the rules and regulations of your company.

4. Answer. He had, and his clerk, C. Neuffer, was the only other person who had access to it.

Fifth interrogatory. How many keys is the company in the habit of issuing to the rentor of a box therein?

5. Answer. Two for the safe box, and one for the tin box on the inside.

Sixth interrogatory. State from your own personal knowledge, if you have any, whether or not during the month of March, 1872, Thomas Shields had taken out of his box in the Safe Deposit Company any United States bonds? If you answer yea, state to the best of your knowledge the amount thereof.

6. Answer. No; that is impossible. I never know what any person takes in or out.

261 Seventh interrogatory. State from your own personal knowledge, if you have any, whether or not during the month of March, 1872, whether A. H. Dillon, junior, had taken out of his box in the Safe Deposit Company any United States bonds. If you answer yea, state to the best of your knowledge the amount thereof.

7. Answer. My answer is the same as above.

WILLIAM W. ORNDORFF, a witness heretofore produced, sworn, and examined on behalf of the complainant, being now produced as a witness on behalf of the defendant, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth and saith as follows, that is to say:

First interrogatory. What recollection, if any, have you of being a witness to a deed from A. H. Dillon, junior, and Alice P. Dillon to Thomas Shields, and when, and where, and under what circumstances was the same executed, and at whose request, and what time did you attest the same?

262 1. Answer. I recollect witnessing such a deed, but cannot speak with any certainty as to the date, without seeing the deed. I do not now remember as to the date. I do not think that Mr. Dillon entered into a full explanation to me, but only asked me to witness a deed, and I think it was executed in Mr. Dillon's office; that is my recollection. He merely asked me to witness the paper, and I did so at Mr. Dillon's request. I do not recollect the date when I witnessed it. I cannot say that I knew the consideration. I have no recollection of reading the deed through or hearing it read.

Second interrogatory. You have already testified that you were clerk of A. H. Dillon, junior, and were so in the years 1872 and 1873, and a portion of 1874. Will you please state whether or not you kept all the books of said A. H. Dillon, junior, or whether or not the said A. H. Dillon, junior, had a book or books or memorandum which he kept himself?

2. Answer. I kept all the books connected with his business, but he kept a private account and private bank account at one time. That I had nothing to do with. I have seen Mr. Dillon keep a private account.

265 Third interrogatory. Please state all the knowledge you have regarding said Dillon's transactions in Western lands during said years, either of his own or in partnership, or connection with Thomas Shields and William J. Barney, or either of them, during those years, and state from whence you derived the information and knowledge, if any you have?

3. Answer. I was aware of the fact that Mr. Dillon had transactions with Mr. Barney and Mr. Shields in Western lands, but I have very little knowledge as to the value or extent of the transactions, Mr. Dillon keeping the books himself.

Fourth interrogatory. Please state whether you have knowledge of Dillon's keeping a box in the Safe Deposit Company in March, 1872, and of his having in it or in his possession certain United States bonds?

4. Answer. I was aware of the fact that he had a box in the Safe Deposit Company, because the rent of the box was charged in the office expense account, but I cannot say that I have any knowledge of

264 the contents of said box. I cannot state with certainty; I cannot answer it.

Fifth interrogatory. Please state if you know of Hannah S. Dillon, and state all the knowledge you have, derived from Dillon or otherwise, regarding certain United States bonds kept or alleged to be kept by said Dillon in the Safe Deposit Company of Baltimore?

5. Answer. I know Hannah S. Dillon to be the mother of A. H. Dillon, junior. Mr. Dillon had some United States bonds, but what amount I cannot now state, and which I believe, from information derived from him, belong to or were purchased for Mrs. Hannah S. Dillon.

Sixth interrogatory. Please state all your knowledge regarding a certain piece of property at the corner of Dolphin street and Madison avenue, occupied during those years by A. H. Dillon, junior, as a residence, and to whom said property and furniture therein belonged in March, 1872, and all your knowledge, whether personal or derived from Dillon?

6. Answer. I believe it to have been purchased by Mr. Dillon
265 at public sale, but the date of purchase I cannot remember. I do not know to whom the property and furniture belonged. I do not know that I ever read the deed after it was purchased by Mr. Dillon, to know whether the deed was in Mr. or Mrs. Dillon's name.

Seventh interrogatory. State what was the value of said property and furniture March the fourteenth, 1872, and if you are familiar with it?

7. Answer. That I do not recollect.

Eighth interrogatory. Please state whether or not, to the best of your knowledge, A. H. Dillon, junior, is in Baltimore City, or if you know where he is?

8. Answer. I cannot answer that; I do not know whether he is in the city of Baltimore. I do not know where he is. I have not seen him for several weeks.

Ninth interrogatory. Please state whether or not Mrs. Alice P. Dillon was present at the office of A. H. Dillon, junior, at the time you have testified to as having witnessed the signatures to the deed referred to in favor of Thomas Shields?

9. Answer. I am not certain in my mind as to that, having
266 witnessed his signature to other papers, sometimes signed at the office and at other times from recollection of her handwriting, when they would be sent down from the house by an errand boy.

Tenth interrogatory. Please state whether or not I am correct in understanding that you do not know but what you merely signed the deed at Mr. Dillon's request, and whether or not Alice P. Dillon's signature was attached at all to it when you attested it?

10. Answer. My impression is that her signature was attached to it, and that in witnessing that deed I witnessed both signatures. My impression is that Mr. Dillon sent for Mrs. Dillon to come down, and that the deed was executed at the office. I have witnessed deeds for Western lands with her signature on them when she was not present.

Eleventh interrogatory. You have stated in your testimony that Mr. Dillon kept a private account, over which you had no control or supervision; please state with what bank said account was kept, if you know.

11. Answer. It was with the Central National Bank.

267 Twelfth interrogatory. In whose name was the said account kept?

12. answer. In the name of Alice P. Dillon.

Thirteenth interrogatory. Is that the only one you know of?

13. Answer. I think so. I know of no other.

Fourteenth interrogatory. State whether or not Thomas Shields, A.

H. Dillon, junior, and William J. Barney were or not partners in the transactions in the purchase of Western lands?

14. Answer. There were transactions between Mr. Shields and Mr. Dillon and Mr. Barney, but I cannot say that there any articles of copartnership or agreement.

Fifteenth interrogatory. Please, from all the knowledge and information you have, whether or not Thomas Shields, A. H. Dillon, junior, and William J. Barney were or were not jointly interested in the purchase of Western lands?

15. Answer. I do not believe so, for I think Mr. Barney was the agent of those gentlemen in the purchase of the lands, and I know of no agreement or articles of partnership. Mr. Shields had also private transactions, owning tax titles in his own name. By
268 "those gentlemen" I mean Mr. Dillon and Mr. Shields.

Sixteenth interrogatory. State whether or not in the years 1872, 1873, and part of 1874 you did not have thorough opportunities to know the value of the property at the corner of Madison avenue and Dolphin street, and its contents of household furniture in March, 1872, and explain why it is you can give no opinion as to its approximate value.

16. Answer. I cannot see how I had any such opportunities. It was not my business to enquire what Mr. Dillon was paying for his property.

Seventeenth interrogatory. Please state what you believe that property to be worth at this date.

17. Answer. Well, in the present depreciated condition of property, I do not know that I can value it. Taking the memorandum of—now shown me—of the deed from Dillon and wife to Thomas Shields of the second of March, 1872, consideration being twelve thousand dollars, subject to a ground rent of two hundred and twelve dollars and fifty cents, and subject to a deed executed by Dillon and wife to Han-
269 nah S. Dillon for the payment of two hundred and sixty-four dollars a year during her natural life, I should *that* that twelve thousand dollars was the full value of the property.

Cross-examined for complainant:

First cross-interrogatory. What do you know of the sale of Dillon's house to Thomas Shields? State your knowledge fully.

1. X answer. I really know nothing except witnessing the paper. I know nothing of the details, as there were no explanation made to me about it.

Second cross-interrogatory. Do you know whether Shields paid for the same in money, or how otherwise; and, if so, what?

2. X answer. I do not know anything about it, either from Dillon or Shields.

Third cross-interrogatory. Do you know anything about the delivery by Shields to Dillon of ten thousand dollars in United States bonds? and, if so, state all you know about it.

3. X Answer. No; I know nothing about any transaction of that kind, either from Shields or Dillon.

270 The taking of depositions was then adjourned to the ninth day of May in the same year, at two in the afternoon, and the same place, at which last mentioned time and place the commissioner met pursuant to notice, and I proceeded in the presence of the solicitors of the respective parties to take the following depositions, that is to say:

JAMES O'CONNOR, a witness heretofore produced, sworn, and exam-

ined in behalf of the defendant, being now again examined on the following interrogatories to him propounded in that behalf, makes oath, deposeth, and saith as follows, that is to say:

17. Answer continued. This ten thousand dollar note, dated November the twenty-ninth, 1873, and maturing June the first, 1874, was offered for discount and discounted by Central National Bank of Baltimore on Tuesday, December the ninth, 1873. I append, as part of my testimony, a copy of the official action of the board of directors of said bank, and also a copy of the official action of the board of directors, held on December the thirteenth, 1873. (They are defendant's Exhibits, depositions W. S. P. Nos. 1 and 2.)

271 This ten thousand dollars note being thus discounted by the bank, my next knowledge regarding it or in reference to it occurred in April, 1874. Mr. Dillon called at my residence, on Monument street, in the city of Baltimore, and stated to me that he wished me to use my influence as the president of the bank in arranging that when the note became due, on the first day of June, 1874, he would arrange to pay to the bank a less sum of money than the five thousand dollars cash which had been stipulated to be paid when it matured on June the first, 1874. I replied that I would have nothing whatever to do with it; that the action of the board of directors and the a'reement executed by the acting cashier of the bank was absolute; that I would not interfere, and the money must be paid. His reply was, "I will not be able to pay it." My answer was, "I will have nothing to do with it." Shortly after this, and during the latter part of April, 1874, in consequence of the above stated conversation held between myself and Mr. Dillon, I caused the records of the courts to be examined, and then ascertained that a deed had been placed on record alleged to be executed by A. H. Dil-

272 lo , junior, and Alice P. Dillon, to Thomas Shelds, transferring the property of the said Dillons, situated at the cor. of Madison avenue and Dolphin street; and that said alleged deed had been lodged for record on February the twelfth, 1873, the consideration being twelve thousand dollars, subject to a ground rent of two hundred and twelve dollars and fifty cents, and subject to a deed or conveyance securing an annuity of two hundred and sixty-four dollars annually. I at once advised the directors of the bank, and also advised George H. Williams, the counsel of the bank. On May the sixteenth, 1874, the board of directors took official action, a copy of which I append and make part of my testimony. (Defendant's Exhibit, Depositions W. S. P., No. 3.) In the latter part of May, 1874, I think, somewhere from the twentieth to the twenty-fifth of May, 1874, Mr. Dillon, at close or three o'clock in the afternoon, came into my room in the Central National Bank of Baltimore, and drawing up a chair and seating himself close by where I was seated, said, "Mr. President, I have called to see what can be done regarding the ten thousand dollars note now nearly due;" and he then proposed that he should give his cheque for the sum of two

273 thousand dollars (I mean his cheque signed A. H. Dillon, junior, general agent, on the Central National Bank of Baltimore), and that he would get Mrs. Alice P. Dillon to transfer ten shares of stock of the Central National Bank, of Baltimore, then standing in her name, and that he would give a new note and renew for the difference. His estimate was two thousand dollars cash, thirteen hundred dollars value of the stock, making a reduction of thirty-three hundred dollars, and to give a new note for sixty-seven hundred dollars, the difference between the sums. I stated to him that I had already told him he must pay

five thousand dollars in cash on the first day of June, 1874, and if he did, then his note would be renewed for five thousand dollars for six months, at six per cent. per year; that such was the agreement and that I would not alter it in any shape, or form; I arose from my seat, stated I was going to dinner, left him, and have no recollection whatever of having had any conversation of any nature or kind with Mr. Dillon from that time until this present moment. During the month of May, 1874, in repeated conversations with the directors of the bank and the counsel of the bank regarding this note, I deemed
274 it proper, with their knowledge and consent, to take the original note and the original contract under seal and lay them before the honorable John J. Knox, United States Comptroller of the Currency at Washington City, he being by law the chief officer in control of national banks. After having shown the note and agreement to the honorable the Comptroller, and laid before him all the facts of the case, he instructed me (objected to) that if, on the first day of June, 1874, Dillon did not pay the five thousand dollars in cash and issue a new note for five thousand dollars at six months, in accordance with the agreement under seal, to charge up to Dillon's account the note, it being made payable at the Central National Bank of Baltimore precisely as if Dillon had issued a cheque for it. On the first day of June, 1874, Mr. Dillon did not pay the five thousand dollars in cash and give a new note for five thousand dollars at six months, and on that date, by my orders as president of the bank, also by written order of the counsel of the bank, and with the full knowledge and by direct order of the board of directors of the bank, the note of ten thousand dollars, due June the
275 first, 1874, was on that day duly charged to his account. The entry of same is found on page 77 of individual ledger; the title of the account is "A. H. Dillon, junior, general agent," both of the last words being abbreviated. The last entry of the said account is dated June the twelfth, 1874, on the debit side, and on the credit side also June the twelfth, 1874. On that date (June the twelfth, 1874) there was a balance of one thousand dollars and eighty-six cents standing to the credit of said Dillon, and it stands so as of this date.

Eighteenth interrogatory. State if the Central National Bank is now in existence or not. If you shall say that it is not, state when and how and under what circumstances it went out of existence.

18. Answer. The Central National Bank of Baltimore, at a meeting of its stockholders duly convened and held at its banking-house on the fifteenth day of July, 1874, by vote of nineteen hundred and eighty shares out of the number of two thousand (which was the total number of shares of the bank), resolved, by a vote of over two-thirds, that is to say, nineteen hundred and eighty votes, being largely in excess
276 of two-thirds of two thousand votes, to avail themselves of section 42 of the national banking act, and to dissolve. The law was fully complied with, full copies of which I have obtained under seal of the department from the honorable the Comptroller of United States Currency, and the bank went on and paid all its depositors in full as rapidly as they could be induced to have their books balanced and withdraw their money. A notification in the newspapers was made in addition to that required by law, notifying depositors to withdraw their funds. At the time named (the fifteenth of July, 1874), there were no suits instituted against the Central National Bank of Baltimore. I stated to the stockholders on the fifteenth of July, 1874, that the bank was prepared to pay all its depositors in full, and was able to pay its stockholders in full and a premium, and that it was a record to which

nothing could be desired to be added. At the date specified in the official certificate of the honorable the Comptroller, the bank paid to the Treasurer of the United States in United States legal tender notes the entire amount of the outstanding circulation of the bank, and
277 according to law the United States bonds then on deposit with the United States Treasurer to secure the circulation of the Central National Bank of Baltimore were duly handed over to the acting cashier, who went on to Washington City for the purpose. The acting cashier was N. F. Williams, junior. The bonds of the bank, as well as all the other assets and moneys of the bank were used for the purpose of paying off the liabilities and indebtedness of the institution, its noteholders, depositors, and shareholders. The bank's lease of its building, rented from Madame Bonaparte, expired on the first day of March, 1875, when its doors were closed, its remaining clerks discharged, and subsequent to that date its counters were taken down, sold, and are in use so far as I know in Washington City. Its signs were taken down on the first day of March, 1875. The former clerks of the bank are now employed, and have been for a long time past, in the following avocations: One teller has been, and is now, in the employ of the Baltimore and Ohio Railroad Company; another clerk is in the Bank of Nevada, California; an officer of the bank is in the employ of T. Robert Jenkins and Company. Another clerk is in the employ of the Johns Hop-
278 kins' estate; an employee of the bank is engaged in a flour house in this city; one of the book-keepers, so far as I know, is in West Virginia; another one is residing in Baltimore, but without special employment. For myself, I have received no salary or compensation since March the first, 1875. A special authority was issued by the board of directors authorizing the president and acting cashier to act for and to do all legal acts that might become necessary in the liquidation of all the business of said bank; this was executed on February the first, 1875, and under its authority, or supposed authority, I have deemed it my duty to protect the interest of the bank or of its late stockholders in this suit. In the original organization certificate of the bank, the Central National Bank of Baltimore, in common with all other national banks, has a clause making the stockholders liable, in addition to their subscription or holding of stock, to an equal amount of the stock so held by them; and in said original articles of association there is an express provision that at any time the president and directors shall deem it advisable for the interest of the stockholders and of the creditors they shall, by a vote of not less than two-thirds of the
279 stockholders, dissolve. The question is asked me if the bank is dissolved; my answer is it is dissolved in my opinion, and was so dissolved on the fifteenth day of July, 1874, but as his honor, Chief Judge Brown, of the city court of Baltimore, is of opinion, and has decided, that it is not dissolved, I can only say that it is a matter entirely for legal adjudication. I have been the president of the Fourth National Bank of Pittsburg, Pennsylvania, as also of the Central National Bank of Baltimore, and hence my duties have made me acquainted with the national banking law and familiar with their organization. National banks have been chartered without *my* privilege of circulation; others chartered with the privilege of circulation; and those that have had the privilege of circulation have in many instances voluntarily retired their circulation and withdrawn their bonds from the United States Treasury, *giving* on regularly, receiving deposits, discounting paper, making loans, and carrying on their regular banking business, totally irrespective of the fact of their having retired their

circulation and withdrawn their United States bonds, which are
280 pledged specifically for circulation. There have been quite a number of millions of dollars, within a short period even, of notes retired and bonds withdrawn. The fact of a bank depositing with the Treasurer of the United States the full amount of its outstanding circulation in United States legal tender notes and withdrawing its United States bonds deposited with the Treasurer of the United States, as security for said circulation, has nothing whatever to do with the question of whether said bank is still going on to transact business or has thought proper to go into voluntary liquidation. The only thing is that if a bank does go into voluntary liquidation she may, within a stated time, according to law, deposit with the Treasurer of the United States the amount of her outstanding circulation. When I applied to the Treasury Department for the charter of the Central National Bank of Baltimore it was peremptorily refused me. The then comptroller, H. R. Burbburd, stated that for years previous he had declined granting any new authorizations for Baltimore. The law was then limited to three hundred million dollars of national banks, and he considered the authorizations granted, as also embracing their privileges of in-
281 crease, were up to that amount. At the second interview he sent for the records of the department (all objected to), and an examination of them showed the amount at that time actually taken up to be about two hundred and ninety-nine millions seven hundred thousand dollars. I then urged that he could grant an authorization to me for a bank with a small capital; the minimum for a city of the size of Baltimore being two hundred thousand dollars. Upon a full explanation, and owing to the fact of my having been the president of the Fourth National Bank of Pittsburg, he agreed to issue an authorization to the amount of two hundred thousand dollars, but without the privilege of circulation. I urged upon him the necessity of the bank having circulation, and finally after that, in some subsequent interview on the subject, he stated the only way I could obtain it was to buy it, that is to say, he could not issue any circulation which would increase the amount then issued to all the national banks, but that some of the banks, either involuntary liquidation or otherwise, in retiring their circulation, or its being so retired, he could then issue a corresponding amount to
282 the Central National Bank of Baltimore. The mode of buying it was by purchasing the notes of the banks that were in voluntary liquidation, or by arranging with whoever had control of them to see that they were retired, the United States legal tender notes for them paid by the proper party to the United States Treasury, and then and not till then, and only in such amounts as was actually done, could circulation be issued to the Central National Bank of Baltimore. I purchased the necessary circulation and privileges thereof in New York City, and paid for the same the sum of six per cent., amounting on one hundred and eight' thousand dollars to ten thousand eight hundred dollars. Then circulation to the amount of one hundred and eighty thousand dollars was issued and delivered to the Central National Bank of Baltimore in accordance with the above. The authorities in Washington were well aware of what I had paid for the privilege of one hundred and eighty thousand dollars circulation. At the meeting of the stockholders of the bank on the fifteenth of July, 1874, before referred to, I stated to them that the laws regarding national banks' circulation were
283 then unchanged, and that I desired authority to make every effort to sell the privilege which we had of one hundred and eighty thousand dollars, and which had cost the bank the sum of ten thousand

eight hundred dollars. I was also authorized to act and obtained from the Comptroller of the Currency authority, that if I could sell the same in another city, which I had then in view, namely, New York City, on the law being fully complied with, and the new bank being started in New York City, and everything being regular and in accordance with law that he would permit in our retiring one hundred and eighty thousand dollars of Central National Bank circulation, an issue would be made of a corresponding amount to the parties entitled thereto. Owing to circumstances no such arrangement was ever carried out, and Congress, I think, in the winter of 1875, passed what is termed or know' as the free banking law. This of course made a loss to the Central National Bank of the sum of ten thousand eight hundred dollars, and stopped all efforts made in regard to selling the right of circulation. I have stated this so fully, as an erroneous impression appears to have
284 been had regarding what might be termed transferring the bank to New York.

Nineteenth interrogatory. Please explain the account of eight items in the name of A. H. Dillon, junior, with the Central National Bank, spoken of in the evidence in this cause.

19. Answer. This account, a copy of which has been fi'ed by the bookkeeper of the bank, consists of eight debits and eight credits and balances. The item No. 1 of debits, 3,030 dollars; No. 2, 2,300 dollars; No. 3, 2,012 $\frac{50}{100}$ dollars, as well as the corresponding credits; item No. 1, 3,030 dollars; No. 2, 2,500 dollars; and No. 3, 2,012 $\frac{50}{100}$ dollars, Mr. Dillon had no interest whatever in; at the request of the bank he purchased in the market from brokers bank notes and paid a premium upon them during the time in 1873, when none of the banks of the city of Baltimore were, according to a resolution of the clearing-house, paying or settling, except by the use of certificates; the bank in the purchase of these bank notes had no interest whatever, did not purchase them for its own use, but by express orders of and for the express
285 purpose of furnishing them to pay to a United States Government contractor, who had a large amount of men in his employ or under his control, and the premium paid on said bank notes was repaid to the bank by him. The fourth item on the debit side, twelve hundred and fifty-seven dollars and fifty cents, is a cheque of October the twenty-seventh, 1873, for twelve hundred and fifty-seven dollars and fifty cents, payable to W. W. Orndorff, and by him endorsed over to Wilson, Colston and Company, said cheque being paid to them in payment for ten shares of the stock of the Central National Bank, of Baltimore, said stock standing in the name of Alice P. Dillon. The fourth credit item of twelve hundred and fifty-seven dollars and fifty cents to balance the above debit item of twelve hundred and fifty-seven dollars and fifty cents, consisted ef a deposit of that amount of and being Mr. James O'Connor's individual funds. This account was made good by my individual cheque deposited by Mr. Dillon. The fifth debit item, twenty-five hundred dollars, was a cheque signed by A. H. Dillon, junior, dated October the eighteenth, 1873, endorsed by H. K. Enos
286 and Company, of New York City, and the fifth credit of the account being for the exact sum of twenty-five hundred dollars, was made good by Mr. James O'Connor's individual money, he having authorized it to be drawn. The next or sixth debit item, two thousand and thirty-seven dollars and fifty cents, is for two thousand dollars, which was paid to the Central National Bank, was a reduction from a twelve thousand dollars to a ten thousands dollars note as already fully set forth, and thirty-seven dollars and fifty cents interest; the sixth item of credit,

two thousand and thirty-seven dollars and fifty cents, was made good by Mr. James O'Connor's individual cheque, placed to the credit of said Dillon. The seventh item, for five thousand dollars, on the twenty-ninth of November, 1873, was for the cashier's cheque issued to Mr. Dillon to buy currency, but not having been used for that purpose, was returned, and a corresponding amount, constituting the seventh item, five thousand dollars, was put to his credit. The eighth item of the account is a cheque for ten thousand dollars to take up the ten thousand dollars note and a corresponding credit of ten thousand dollars to balance the account. I wish to state that in all banking business where books are properly kept there must
287 always be a corresponding debit and a credit as regards particularly the question of discounts; there are quite a number of modes adopted in banks as regards the bookkeeping method regarding discounts. One mode is to regularly enter it upon a discount book and extend the net proceeds to the credit of the depositor; from thence it goes on the individual ledger to his credit; and as he is credited, "loans and discounts" are charged on the general ledger; this, to be exactly regular, must have the name of the party to whose credit it is to be extended as the last endorser on the paper; then it cannot be chequed from except by said last endorser. In many instances parties endorse paper and say above the endorsement, "Credit the drawer," thereby instructing the bank not to place it to the credit of the endorser, and not to necessitate the endorser to give cheques for it. In other instances discounts are made to persons who do not keep an account with the bank, and who simply wish to obtain the exact amount of the discounts; in such cases it is customary to enter them on the discount book, and from thence on the discount ledger under the head of
288 temporary discounts, the cashier giving his official cheque on the bank for the net proceeds, and the proper entries being made through all the books; there are other entries become necessary when the party merely sells a note to the bank, and obtains the proceeds in cash; in reference to the different entries with regard to the numerous renewals of this note and the mode in which they were entered, all that I know of it is that they were entered by some of these different methods, the bookkeepers using their own proper judgement and experiance therein. I wish to correct the above statement regarding the details of one of the items. The bookkeeper's statement, from which I have testified, embraced three items as currency having been purchased for. I find this moment, by a critical examination of the cheques, that but two items currency was purchased for; the item for twenty-five hundred dollars stated, as item No. 2 was a cheque not for the purchase of currency, as I believed and so stated from the bookkeeper's statement, but was a cheque signed by A. H. Dillon, junior, dated October the seventeenth, 1873, for the sum of twenty-five hundred dollars, made
289 payable to the order of H. K. Enos and Company, of New York City, and the corresponding credit of said item No. 2, twenty-five hundred dollars, was made good by a deposit of that sum by a cheque of Mr. James O'Connor's, paid from his individual funds.

Twentieth interrogatory. Did A. H. Dillon, junior, at any time close his general agency account, or nearly so; and, if so, state, if known to you, why the same was done, when it was done, and under what circumstances?

20. Answer. In the account of "A. H. Dillon, junior, general agent," on folio 75, there is a debit on February the seventeenth, 1874, of thirteen thousand five hundred dollars, and on February the twenty-fourth,

ner whatever in any shape to be liable for any losses, and as I fully considered it then and do consider it now a purely contingent, voluntary offer on my part only to be paid in case of profit, I believe that he is in my debt to the amount named under the circumstances or fact stated, and that the stock of Mrs. Alice P. Dillon justly belongs to me.

Twenty-fourth interrogatory. Did the Central National Bank of
296 Baltimore at any time have any and what stock operations with A. H. Dillon, junior?

(Objected to.)

24. Answer. The Central National Bank of Baltimore never had any stock operations with A. H. Dillon, junior, in any shape, manner, or form, nor was ever interested directly or indirectly in any stock operations of any kind whatever with said Dillon or with any other person or persons at any time.

Twenty-fifth interrogatory. When was the first intimation the Central National Bank at any time ever had of a claim of interest by the complainant in the deposit account of A. H. Dillon, junior, general agent, and what business intercourse at any time ever took place between complainant and said bank?

25. Answer. The first intimation the Central National Bank ever had of such a claim was on the nineteenth day of June, 1874, when the bank received a letter dated Hartford, June the sixteenth, 1874, the original of which I herewith append and make part of my testimony (defendant's Exhibit, depositions W. S. P., No. 4). A reply to said letter was made by the bank on June the nineteenth, 1874, a copy of which is here-
with appended and made part of my testimony (defendant's
297 Exhibits, depositions W. S. P., No. 5). This is the only business intercourse, if such it can be called, between the bank and complainant.

Twenty-sixth interrogatory. Please state fully what knowledge you have of A. H. Dillon, junior's, reliability, and state how your knowledge was acquired.

26. Answer. I do not believe A. H. Dillon to be a truthful, reliable, or honest man. I have my reasons for my belief, as above stated, and will give some of them. He has not stated truthfully his personal transaction made directly with me; he assured me as president of the bank, every time the note was renewed up to and inclusive of the making of the note of the twenty-ninth of November, 1873, that the property at the corner of Madison avenue and Dolphin street was still in the name of Alice P. Dillon; he never has advised me or intimated in any manner that it had ever been or was transferred to Thomas Shields; he entirely concealed from me in my interviews with him in April and May, 1874, the fact of the deed having been made out in the name of Thomas Shields; I learned it in April, 1874, as I have
already stated, from an examination of the records, but he never
298 alluded to it or advised me of it. I have learned that very many statements he made to me, he either concealed this truth or distorted it. I believe he mis'tated facts and maliciously induced or aided in this suit being instituted, which is now in progress of litigation. I have ascertained from a perfectly reliable source that on the occasion referred to, on which he unauthorizedly undertook to bring a large amount of money belonging to me from New York to Baltimore (I believe in the winter of 1873 and 1874) that instead of coming at once to me and handing me the money then in his possession, he delayed so doing without my knowledge and used his time by seeking advice to enable him by some means or other, if it were possible so to do, to take possession of

my money for himself. I believe the amount was about eight or nine thousand dollars, and was in bank-notes. He was advised by those whom he consulted not to retain or seek to hold my money, and on the evening of the day on which he should have paid it over he called at my house and paid it over to me. In his interview with me, neither by word or expression did he ever intimate to me that he had been
299 employed as above stated. He stated to me as a fact that he was entitled to being termed or called "Colonel Dillon," and assured me as a fact that he held a commission as colonel from the governor of Iowa; owing to this I termed him "General Dillon," and he became more or less known by this title to parties in New York, Washington, and in Baltimore. I telegraphed his excellency, the governor of Iowa, lately to ascertain if this was the fact; he answered me through his private secretary by telegram that A. H. Dillon, junior, had never been commissioned or appointed by their State, or the executive thereof. There are many other facts, unnecessary for me to detail, which in my opinion justify*ing* me in my belief of Dillon's untruthfulness and unreliability.

Twenty-seventh interrogatory. Mr. Dillon's answer to the thirty-first interrogatory to him being now read to you, what have you to say in regard thereto?

27. Answer. I never stated to Mr. Dillon or any other person that it was necessary to have the note, that the bank examiner was coming here and that the overdraft was irregular and I had to have the
300 note. I stated to Mr. Dillon that he not having paid in the money to make the overdraft good it was necessary to have the note, and that I must have it because if the bank examiner came here at that moment it would necessarily show an overdraft, and that in the bank's statement I wished to have no such entry as an overdraft. I did not say to him or any other person at any time that the overdraft was irregular.

Twenty-eighth interrogatory. Mr. Dillon's answer to the thirty-third interrogatory to him being now read to you, what have you to say about that?

28. Answer. It is untrue; the books of the bank and the detailed testimony in evidence clearly shows that Dillon paid the two thousand to the bank as a reduction from twelve thousand to ten thousand dollars, and that he did not pay it to me individually.

Twenty-ninth interrogatory. Mr. Dillon's answer to the thirty-fourth interrogatory to him being now read to you, what have you to say about that?

29. Answer. His answer is utterly untruthful as well as evasive. The history of the ten shares of stock I have already fully stated
301 and also of the two thousand dollars. To show conclusively Dillon has sworn to what he knew to be untrue is the fact that he says, "I had Mr. O'Connor's money in my hands at the time of this transaction," when it is in evidence by the books of the bank that Mr. O'Connor gave him (Dillon) cheques for the cost of the stock, twelve hundred and fifty-seven dollars and fifty cents, and for the two thousand and thirty-seven dollars and fifty cents.

Thirtieth interrogatory. Mr. Dillon's answer to the twenty-seventh cross-interrogatory to him being now read to you, what have you to say about that?

30. Answer. I answer that Dillon's statement regarding his giving cheques to William Fisher and Sons, which said cheques as already formerly stated comprised the original loan or overdraft, were made with

me individually is utterly untrue; the transaction was made with the bank, and all the details I have set forth in my testimony.

Thirty-first interrogatory. Mr. Dillon's answer to the twenty-eighth cross-interrogatory to him being now read to you, what have you to say about that?

302 31. Answer. I answer it is utterly untrue. I never held the note for twelve thousand dollars of A. H. Dillon, junior, and Alice P. Dillon, or his or her note for any amount or sum of money at any time. Mr. Dillon applied to the Central National Bank as I have already detailed and as the books of the bank show, and the whole transaction has been fully set forth in my testimony.

Thirty-second interrogatory. State any other matter, fact or thing that may throw any light on this transaction.

32. Answer. On December the ninth, 1873, at the discounting of this ten thousand dollars note, which is now in litigation, there was no other account open on the books of the Central National Bank of Baltimore, except the account of A. H. Dillon, junior, general agent; I mean any account in the name of any person named Dillon. I state that during the many renewals of the loan from its origin up to the issuing of the note now in dispute, the position of Dillon and of his account as general agent, and of the property in his wife's name, was a matter fully discussed and enquired into by the board of directors of said bank. I stated to them freely and fully all

303 that I knew in the matter, and it was in consideration as already testified to by me, and as set forth in the sealed article of agreement executed by the bank and Dillon and his wife; that on account of his keeping a valuable account with the bank and being a depositor, and the further fact of his wife having owned and then having sold and then having again became possessed of stock in the bank, as well as of the fact of her being the owner of the property corner of Madison avenue and Dolphin street, in Baltimore City; that the loan was made, was continued by renewals, and that the bank felt perfectly secure in having so made it. One or more of the directors of the bank had stated at the board meetings from time to time, when the matter came up, that although his account was a valuable one and the balance large, yet at the same time as they were subject to his cheque at any moment they could not be considered as offering a perfect security for a time loan, as under no circumstances whatever could a note be charged up until it had matured, and should such a course become necessary, his actual balance might not be sufficient to indemnify or pay the

304 bank. I cannot specify the name of each director or what each one said, but I have given the substance of what was said as the note came up for renewal from time to time. I always, up to November the twenty-ninth, 1873, urged on the board of directors, in answer I may say to the remarks as above stated, that I regarded the loan as perfectly secure, because in addition the property on the corner of Madison avenue and Dolphin street was worth, as I was advised, including the household furniture, from fifteen thousand to twenty thousand dollars. I wish to state that my reasons for specially consulting the counsel of the bank and for my laying the matter before the honorable the Comptroller of the Currency in the month of May, 1874, were from learning the transfer of the property from A. H. Dillon, junior, and Alice P. Dillon, to Thomas Shields, recorded in February, 1873, which convinced me that Dillon was acting in bad faith; and the point and only point I felt anxious to have their opinion on was that the note was signed "A. H. Dillon, junior," whilst the account was kept "A. H.

Dillon, junior, general agent." I have already stated that the
305 advice and instruction given to me by the counsel of the bank, and what the honorable the Comptroller told me, and I add the honorable the Comptroller of the Currency advised me that in his opinion A. H. Dillon, junior, "general agent," was a description ad personam, and if the note was not paid as per agreement, to charge it up. I will furnish and make part of deposition a statement of the balance of A. H. Dillon, junior's, general agent account, on March the fourteenth, fifteenth, and sixteenth, those being the dates at which the original loan or overdraft was made. I wish to state I knew of A. H. Dillon, junior, general agent, giving his cheque on the Central National Bank of Baltimore on May the sixteenth, 1874, and for said cheque the bank gave to him its draft on the National Park Bank of New York City, No. 2438, dated May the sixteenth, 1874, to the order of A. H. Dillon, junior, for nineteen hundred and six dollars and ninety-five cents, and of a draft No. 2397, dated April the seventeenth, 1874, being issued to him payable to the order of A. H. Dillon, junior, the bank's draft being also on the National Park Bank of New York City for three hundred and sixty dollars. I know that in March, 1872,
306 of A. H. Dillon, junior, having in his possession certain United States bonds which he stated to me he had obtained out of the Safe Deposit Company of Baltimore, and I will furnish and append a descriptive list of said bonds, with their numbers, issue, and value, as the said bonds were handed by Dillon in my presence to William Fisher and Sons in their banking house.

The taking of depositions was the' adjourned to the seventh day of June, in the same year, at twelve noon and the same place, at which last mentioned time and place the commissioner met pursuant to notice, and I proceeded, in the presence of the solicitors of the respective parties, to take the following depositions; that is to say:

JAMES O'CONNOR, a witness heretofore produced, sworn, and examined on behalf of the defendant, being now again cross-examined on the following cross-interrogatories to him propounded on behalf of the complainant, makes oath, deposeth, and saith as follows; that is to say:

First cross-interrogatory. Please state as near as you can when your operations in the Pacific Mail stock began, through whom and
307 through what broker, and in what name they were conducted, and what time they closed.

1. X answer. I had transactions in Pacific Mail stock with several brokers, and I will furnish dates and names of all transactions in which the name of Mr. Dillon in any manner was connected and append it as part of my testimony; I cannot give a correct or accurate statement from memory.

Second cross-interrogatory. Were not the Pacific Mail operations conducted through William Fisher and Sons, of Baltimore; and if so, state in whose name they were so conducted.

2. X answer. The operations in Pacific Mail stock that I had through Messrs. William Fisher and Sons, of Baltimore, were made in my own name in some transactions and in the name of A. H. Dillon, junior, acting for me. Those in Dillon's name were those to which I have so fully referred as giving him as a gratuity one fourth interest.

Third cross-interrogatory. Can you state in or about how much money was put in Fishers' hands for margins in the Pacific Mail operations in which Dillon was interested, as stated by you?

308 3. X answer. I cannot state from memory, but will obtain from Messrs. William Fisher and Sons an exact account of the margins.

Fourth cross-interrogatory. Was the money furnished by you for Pacific Mail operations paid by you to William Fisher and Sons or did you give it to Dillon and did he pay it to William Fisher and Sons?

4. X answer. To the best of my recollection the money on margins for Pacific Mail stock operations with William Fisher and Sons, made in the name of James O'Connor, was paid by me in person to the Messrs. Fisher. The money paid to them as margins on Pacific Mail operations, made in the name of Dillon for my account, was either paid by my cheque in favor of Dillon and handed by them to the Messrs. Fisher or by my cheque in favor of Dillon to make the transaction, but the exact details of it I will obtain from the Messrs. Fisher and file a copy thereof.

Fifth cross-interrogatory. Which were the greater, the operations in Pacific Mail with Messrs. Fisher in your name or those in Dillon's, and how much greater?

5. X answer. From memory, I say to the best of my knowledge
309 the number of shares were greater in my own name than in that of Dillon's, but possibly the amount of margins or money deposited was required to be larger in the name of Dillon than in my own name, but I will furnish both accounts and they will show the whole transaction; I will obtain them from Messrs. Fisher and Sons.

Sixth cross-interrogatory. Do I understand by your last answer that the operations in your name and in Dillon's name went on at the same time and were concurrent?

6. X answer. No.

Seventh cross interrogatory. Please explain then which operations in Pacific Mail were first in time?

7. X answer. To the best of my recollection those in the name of James O'Connor were first in point of time, than those in the name of A. H. Dillon, junior, and then those in the name of James O'Connor again; the accounts, however, will show the dates and all the details.

Eighth cross-interrogatory. Have you or not any recollection that at the close of the operations in Pacific Mail, in Dillon's name, Fisher and Sons either gave a cheque in Dillon's favor or paid over to him a
310 large sum of money which was subsequently paid over to you; and if so, state from your memory about how much that sum was?

8. X answer. I have a recollection of the transaction of which you enquire. Messrs. William Fisher and Sons gave a draft on Hallgarten and Company, of New York, being for the *the* sum of twenty-eight thousand dollars, payable to the order of A. H. Dillon, junior, which draft Dillon brought immediately to me, endorsed it, and handed it to me. This twenty-eight thousand dollars was a return of eighteen thousand dollars cash, margins advanced by me on sales of Pacific Mail short made in the name of A. H. Dillon, junior, acting for me, and the ten thousand dollars was the profit and is the same matter in which I have already testified to as having give one-fourth part of it to Dillon, and two thousand dollars of the twenty-five hundred dollars thus given him went towards the reduction of the note for twelve thousand dollars down to ten thousand dollars. I think the draft was given in the fall of 1873, but will get the exact date and furnish it.

Ninth cross-interrogatory. You have said that James O'Connor had operations in Pacific Mail before and after the Dillon operations;
311 through what brokers were they had, was Dillon to have one-fourth interest in them, and were they profitable or not, and to what extent.

9. X answer. Some of the transactions you enquire of were made through William Fisher and Sons, of Baltimore, in my own name. Mr. Dillon had no connection with them or their results. Others were made through Scott, Strong and Company, of New York, and he had no connection with them or their result. I do not remember whether or not there may or not have been a small lot of Pacific Mail bought or sold in New York in Dillon's name for my account, in which, of it had been successful, I would have given him one-fourth.

Tenth cross-interrogatory. Prior to the Pacific Mail operations had you any other stock operations through Fisher and Sons; if so, when, in what stock, and was Dillon connected with such operations?

10. X answer. Mr. Dillon had no connection with them whatever.

Eleventh cross-interrogatory. Were you or not aware, in the month of March, 1872, and prior thereto, that Dillon was speculating largely in Erie stock; and, if so, how did you derive such information, and did you derive such information prior to the fourteenth of March, 1872?

312 11. X answer. I was aware on the fourteenth of March, 1872, and for a short time previous to that, probably in a few weeks—I cannot state the date exactly—that Mr. Dillon was speculating on his own individual account in Erie stock. As to the question of "largely," that is a relative term. I should consider it "large" for a man like him. Broker would term it "not largely." I derived my information from Mr. Dillon, and also was aware of the fact through Messrs. William Fisher and Sons.

Twelfth cross-interrogatory. Did Dillon or not advise or consult with or talk over with you his said operations in Erie stock prior to March the fourteenth, 1872?

12. X answer. He did.

Thirteenth cross-interrogatory. Please state what advice you gave him.

13. X answer. I was a seller short of Erie at that time, and when it commenced to move against me I urgently advised A. H. Dillon, junior, to go out and have nothing to do with stock speculations, as he had not, in my opinion, sufficient money to enable him to stand putting up margins which might be very large, and he was liable to be sold out at any moment. My position was of a totally different character,

113 as I had the money to make my margins good; and while my advice to him was to have nothing to do with it under the circumstances at that time, but to go out of it, it did not apply to me, being differently situated.

Fourteenth cross-interrogatory. Were you aware prior to the fourteenth of March, 1872, what number of shares of Erie Dillon was sellin short?

14. X answer. The only mode of arriving at that correctly is to obtain a copy of William Fisher and Sons' account with Dillon in Erie. I, however, state from memory that it probably commenced by a few hundred shares, and I think Dillon told me that it may have run up to fifteen hundred to two thousand shares; this, however, is mere recollection after several years have passed. This information I derived from Dillon shortly before and during the month of March, 1872.

Fifteenth cross-interrogatory. You have spoken of your having sold Erie short in the early part of March, 1872, and prior thereto; please state as near as you can whether your operations in Erie were large or not, and about what time they began and when they closed?

15. X answer. My operations in Erie Railroad stock were large,

314 and that one you refer to commenced prior to March, 1872, and were closed in March, 1872. I was first a large seller and then bought in, and then again a large seller and then bought in; then a large buyer, and then closed. The result of the total operation, I regret to say, was unprofitable to me.

Sixteenth cross-interrogatory. I understand you, then, that there were no stock operations between you and Dillon prior to those in Pacific Mail of which you said you would furnish the date; is this so?

16. X answer. It is.

Seventeenth cross-interrogatory. Please explain why you used the name of Dillon, and not your own, in the Pacific Mail operation.

17. X answer. My reasons were simply these: My operations in Erie had been of sufficient magnitude to furnish a topic of gossip and misstatement of persons in the city of Baltimore, and holding the position I did, as president of the Central National Bank, I thought it proper to use Mr. Dillon's in the manner in which I have stated.

Eighteenth cross-interrogatory. Do you mean by your answer to the sixteenth interrogatory, which is the history of the ten thou-
315 sand dollars note, to intimate or say that you were not fully aware that Mr. Dillon was liable to incur heavy losses in his Erie stock operations prior to your interview with him of the fourteenth of March?

18. X answer. I knew at the time of Mr. Dillon being a short seller to a certain extent of Erie stock, and, as already stated, the market had been going against him, and I had urged him prior to the fourteenth of March to go out of it.

Nineteenth cross-interrogatory. Look at the minute of proceedings of the directors of the bank of the fifteenth of March, 1872, and state whether they show that you reported the facts regarding the twelve thousand dollars over-chequing of Alice P. Dillon on said bank?

19. X answer. The minute-book of the bank is now before me and shows there was no meeting of the board of directors of the bank on March the fifteenth. The discount book of the bank will show the loan, which you can see if you wish. The first full meeting of the board after the fifteenth was held on the nineteenth of March, and the proceedings of the nineteenth of March had no reference whatever to the
316 twelve thousand dollars loan.

Twentieth cross-interrogatory. Look at the minute-book of the proceedings of the directors, and state when by said book it appears that you reported to the board the fact of this over-chequing for twelve thousand dollars?

20. X answer. I do not see any entry on the minute-book of my having made such a report. I was authorized, as president of the bank, to make call loans, discount paper, and I had every day an informal meeting of the discount committee, and then from time to time the regular meetings of the board, of which latter the minute-book of the bank is a record.

Twenty-first cross interrogatory. Please state how many meetings the board of directors had in March and April, 1872?

21. X answer. I give you the exact dates from the minute-book, March the first, March the second, March the fourth, March the fifth, March the sixth, seventh, twelfth, nineteenth, twenty-seventh, April the eleventh, thirteenth, twenty-third, and thirtieth.

Twenty-second cross-interrogatory. Please state what stock Mrs. Alice P. Dillon had in the Central National Bank, and what time she held the same and when she sold it?

317 22. X answer. The stock-book of the Central National Bank

show that on March the seventh, 1872, John C. Bridges transferred to Alice P. Dillon ten shares and she then became the holder of them; that on April the twenty-third, 1872, Alice P. Dillon transferred and sold the same to James O'Connor ten shares, and on October the twenty-eighth, 1873, W. Morris Orem transferred to Mrs. Alice P. Dillon ten shares, which is standing in her name, as already fully stated in my testimony.

Twenty-third cross-interrogatory. Please state whether the stock transferred by Mrs. Dillon to you on the twenty-third of April, 1872, was not in part reduction of the over-chequing of thirteen thousand dollars, the history of which is given in your answer to the seventeenth interrogatory?

23. X answer. I do not recollect to what purpose the money I paid for the stock was specially appropriated. I bought it at the full market price and paid the money.

Twenty-fourth cross-interrogatory. Please examine your books and papers and state how you paid for these ten shares of stock on the twenty-third of April, 1872, and to whom you so paid it?

318 24. X answer. I paid for it by my individual cheque on the Central National Bank of Baltimore, and I have no doubt that I handed the cheque to A. H. Dillon, junior, who signed himself as attorney of Alice P. Dillon, and alleged that he was fully authorized to act in her behalf. I bought it as I would any other stock and paid for it.

Twenty-fifth cross-interrogatory. Then I understand you to say that when Alice P. Dillon gave the bank her note endorsed by A. H. Dillon, junior, of April the twenty-third, 1872, at sixty days, and when they also gave the bank a note for the interest thereon, two hundred and sixty-two dollars, dated April the twenty-third, 1872, at sixty days, drawn as aforesaid, you did not insist on the proceeds of this stock just spoken of by you being applied on account of said twelve thousand dollars note or the interest thereon?

25. X answer. My reply is, you ask me regarding my personal purchase of ten shares of stock from Mrs. Alice P. Dillon, which I answered I do not recollect so many years back what was said or done specificially with the proceeds, but I have no doubt, since you call my attention

319 tion to it, that as president of the Central National Bank, I did see that it was properly appropriated to the reduction of the indebtedness of said Alice P. Dillon and A. H. Dillon, junior.

Twenty-sixth cross-interrogatory. Do I understand you to say that the proceeds of such stock was appropriated in the reduction of this indebtedness?

26. X answer. I have already stated that I do not recollect what specific appropriation was made of the specific money I paid for said stock, and I repeat that I have no doubt whatever as president of said bank I saw that whatever was proper to be done at the time was done.

Twenty-seventh cross-interrogatory. Please look at Exhibit G. H. W., No. 1, being Mrs. Alice P. Dillon's bank account with the Central National Bank, and explain how consistently would said account and the balancing there of it was possible for the proceeds of this stock to have been applied to the reduction of the twelve thousand dollars, or the interest thereon?

27. X answer. The exhibit now handed to me, taken from the books of the bank, shows that on the morning of April the twenty-

320 third, 1873, at the time the note of twelve thousand dollars was given and entered up on Mr. Alice P. Dillon's account, she had a balance to her credit of seven hundred and thirty-two dollars and eighty-

three cents, and from this fact I am satisfied that the proceeds of the stock I purchased were not required and did not go towards reducing the loan.

Twenty-eighth cross-interrogatory. Will you please examine your books and say what amount of money A. H. Dillon, junior, general agent, had to his credit in said account with your bank on the fourteenth of March, 1872, April the second, 1872, April the twenty-third, 1872, June the twenty-fifth, 1872, October the twenty-eighth, 1872, April the third, 1873, November the first, 1873, November the fourteenth, 1873, November the twenty-ninth, 1873, and December eleventh, 1873?

28. X answer. I will, with pleasure, furnish you the information taken from the ledger of the bank and append a schedule.

The taking of depositions was then adjourned to the twelfth day of June, in the same year, at eleven in the forenoon, and the same
321 place; at which last mentioned time and place the commissioner met pursuant to notice, and I proceeded in the presence of the solicitors of the respective parties to take the following depositions, that is to say:

JAMES O'CONNOR, being now further cross-examined on the following additional cross-interrogatories to him propounded on behalf of the complainant, makes oath, deposeth and saith as follows, that is to say:

NOTE.—According to various calls made at the last meeting of this commission I produce and file eight schedules, marked, respectively, Complainant's Exhibits, Depositions J. O. C., Nos. 1, 2, 3, 4, 5, 6, 7, and 8. I also file three other papers in reference to the stockholders of the bank, marked Complainant's Exhibits, Depositions J. O. C., Nos. 9, 10, and 11.

Twenty-ninth cross-interrogatory. I understand you by your previous answers to say that the stock speculations in Pacific Mail Company shows, by the accounts of William Fisher and Sons, now filed as Complainant's Exhibits, Depositions J. O. C., Nos. 5, 6, 7, and 8, were your individual transactions, with which Mr. Dillon had nothing to do, nor were they connected with the other operations in Pacific Mail in which you and Dillon were interested?

322 29. X answer. You understand me correctly in that those accounts now exhibited were of my own. As regards Dillon, I have already fully set forth how, in full detail, I used him to act for me in the matter of Pacific Mail which resulted in a profit of ten thousand dollars.

Thirtieth cross-interrogatory. The date of Hallgartin's draft you have furnished this morning, namely, September the twenty-second, 1873, was or not this the date when the transactions in Pacific Mail were closed with William Fisher and Sons, in which you and Dillon were interested?

30. X answer. This is the date, and this is the transaction of which I have so fully given all the details, eighteen thousand dollars margins belonging to me and ten thousand dollars profits.

Thirty-first cross-interrogatory. Did the speculations in Western Union Telegraph stock begin before or after the twenty-second of September, 1873, in which Mr. Dillon was interested?

31. X answer. As to Dillon being interested in any of those transactions, I have already fully stated that he put no money in them in any shape or form; that I paid all his expenses incurred in travelling,
323 and that I voluntarily intended to give him, in case I made a profit, one-fourth part of said profit. The transactions in Western Union Telegraph to which you allude were made subsequent to the Hallgarten draft of September the twenty-second, 1873, and, I regret to say, when closed, made a heavy loss.

Thirty-second cross interrogatory. State, as near as you can, when they closed.

32. X answer. They closed in the latter part of 1873, say the months of November or December, to the best of my knowledge and recollection.

Thirty-third cross-interrogatory. Were these transactions in Western Union Telegraph, or not, closed at the time you paid Dillon the twenty-five hundred dollars?

33. X answer. No.

Thirty-fourth cross-interrogatory. The cheque for Mrs. Dillon's stock, twelve hundred and fifty-seven dollars and fifty cents, was dated October the twenty-seventh, and the stock was transferred on the twenty-eighth of October, 1873, and your cheque for the two thousand and thirty-seven dollars and a half was dated November the first, 1873; was or was not, then, your settlement with Dillon in reference to the Pacific Mail

324 stock operations closed on the first of November, 1873?

34. X answer. I have already stated that he was entitled to twenty-five hundred dollars, and as your question shows he received three thousand two hundred and ninety-five dollars, and I have added in my testimony that if these transactions were to be considered continuous he would owe me the whole of that money, and that under other circumstances he would owe me seven hundred and ninety-five dollars, as the Western Union Telegraph operations had resulted in a loss, and were not closed until the latter part of November, or in December, 1873.

Thirty-fifth cross-interrogatory. Did you take any obligation from A. H. Dillon, junior, or his wife, for the said sum of seven hundred and ninety-five dollars?

35. X answer. I never took any obligation from Mr. Dillon or his wife regarding the transaction whatever.

Thirty-sixth cross-interrogatory. You have said that the Hollgarten draft was drawn by Fisher in favor of Dillon, and that Dillon endorsed it to you. State what became of it.

325 36. X answer. I duly deposited it in the bank to my credit for twenty-eight thousand dollars.

Thirty-seventh cross-interrogatory. Please state where the operations in Western Union Telegraph stock took place; through what broker; what amount of margins were put up, and what amount of shares were bought or sold.

37. X answer. The transactions you refer to were made through H. K. Enos and Company, of New York. As to the amount of margins put up and the amount of shares bought or sold, I could not state them from recollection. There was a large amount of money put up, and there were several thousand shares.

Thirty-eighth cross-interrogatory. In whose name were the operations in New York conducted?

38. X answer. A. H. Dillon, junior's name, and I went on in person to New York and informed Mr. Enos they were mine.

Thirty-ninth cross-interrogatory. In Dillon's individual account, spoken of by you, there are one or two cheques drawn to the order of H. K. Enos and Company. Is this the same firm just spoken of by you as being stock brokers in New York?

326 39. X answer. Yes.

Fortieth cross-interrogatory. When the Western Union operations were closed, did or did not Dillon have in his possession any

money of yours; and if so, how much; and did he or not pay the same over to you?

40. X answer. I have already referred to the fact of his having, without my knowledge or authority, withdrawn from H. K. Enos and Company money belonging to me, amounting to some eight thousand five hundred to nine thousand dollars, or thereabouts, and his having undertaken to bring it to this city in bank notes, and I have also fully stated the information I received of his intention and wish to illegally retain and keep said money belonging to me, and of his being advised by judicious counsellors that he could not do so, and that he paid it over to me at my private residence, Monument street, in the city of Baltimore, about the hour of nine o'clock in the evening.

Forty-first cross-interrogatory. In whose name was the account of the money deposited with H. K. Enos and Company deposited?

41. X answer. The account with H. K. Enos and Company, as
327 I have already stated, was in the name of A. H. Dillon, junior, and I have stated that I had advised H. K. Enos and Company that the money was mine.

Forty-second cross-interrogatory. How long had you been acquainted with A. H. Dillon, junior, prior to March, 1871?

42. X answer. A very short time, I think, and a very slight acquaintance, if you might term it so. I was first introduced to him at Doctor James A. Stuart's residence, and to the best of my recollection it was not very long prior to my organizing the Central National Bank.

Forty-third cross-interrogatory. Did you or not know, prior to March the first, 1871, that A. H. Dillon, junior, general agent, kept a bank account in the Chesapeake Bank of Baltimore?

43. X answer. I do not recollect that I either knew or cared where he kept his account or that he kept any. To the best of my recollection, after having met him at Doctor Stewart's private residence, I knew very little about him or thought of him until the Central National Bank was organized and in operation, as I was exceedingly and busily en-
328 gaged in the organization and starting of said bank.

Forty fourth cross-interrogatory. It appears from the testimony in this cause that Mrs. Alice P. Dillon opened an account with the Central National Bank on the ninth of March, 1871, the bank having begun business on the first of March, 1871, and it further appears from the testimony that Mrs. Dillon was allowed interest on that account; please state when and by whom the arrangement for interest was made and whether the same was with your knowledge?

44. X answer. The allowance of interest was made with my knowledge, at four per cent. per year on current balances; as to the exact date when the arrangement was made, I cannot state, but it was probably at or about the time the account was opened. The conversation was had with A. H. Dillon, junior, and so far as I know I held the conversation as president of the bank, with Mr. Dillon representing his wife and on her behalf.

Forty-fifth cross-interrogatory. Did or did not Mr. Dillon draw the cheques on this account of Alice P. Dillon, signing his name per A. H. Dillon, junior?

329 45. X answer. The account itself and cheques will show, but so far as I know they were signed "Alice P. Dillon, by A. H. Dillon, junior," or Alice Dillon, by A. H. Dillon, junior, agent, or both.

Forty-sixth cross interrogatory. Did you or not solicit Mr. Dillon to open this account?

46. X answer. I did not. He called at the bank and asked a very

great number of questions and appeared to be particularly pleased with the adoption of a rule of the bank that discounts were granted daily. He also appeared interested in the fact that the bank would pay interest on current balances, and appeared greatly interested in the fact of a new national bank being started in Baltimore City, and one so convenient to his place of business. He voluntarily expressed a great many good wishes for the success of the institution and he followed it up by opening the accounts, as already stated in evidence.

Forty-seventh cross-interrogatory. Were you aware between the ninth of March, 1871, and the first of April, 1871, that A. H. Dillon, junior, kept any other bank account than the account of Alice P. Dillon in your bank, and if so where did he keep it?

47. X answer. I was aware probably at that time, March the
330 ninth, 1871, and certainly prior to April the first, 1871, that he had an account with the Chesapeake Bank and this transfer of Alice P. Dillon's account was made from the Chesapeake Bank to the Central National Bank, and this large account of A. H. Dillon, junior, was in the Chesapeake Bank up to the time that he opened his account in the Central National Bank and for some short time afterwards—that is, he transferred it by degrees.

Forty-eighth cross-interrogatory. How and from whom you became aware of the facts stated in your last answer?

48. X answer. I obtained them from A. H. Dillon, junior.

Forty-ninth cross-interrogatory. Before A. H. Dillon, junior, moved to your bank what you call his large account, did you or not request him to move said account to your bank, and did you or not offer him four per cent. interest on current balances?

49. X answer. I offered him four per cent. interest on the A. H. Dillon, junior, account, and we had the same conversation in substance in regard to it we had regarding the Alice P. Dillon account. I did not request him, in the meaning of the term in which you ask, nor any other person, to open accounts with the bank of which I was president, and when
331 persons called at the bank it was my duty to show to them the advantages the bank offered for keeping accounts, but as to soliciting business, it is a thing I avoided.

Fiftieth cross-interrogatory. Did you or not tell him if he would bring the large account there you would allow him four per cent. interest on the current balance?

50. X answer. I have already stated in the first part of my last answer that I did.

Fifty-first cross-interrogatory. Did or did not Dillon tell you in what name he kept the large account in the Chesapeake Bank before moving the same to your bank?

51. X answer. I have no recollection of his stating the exact form in which he kept his account in the Chesapeake Bank, nor do I know now how it was specifically kept, as I never examined the books of the Chesapeake Bank.

Fifty-second cross-interrogatory. I understand you, then, that while you did not formally request him to open an account in your bank you talked to him in the month of March, 1871, about opening accounts in your bank, and the advantages to be derived from opening such accounts; is that so or not?

52. X answer. I have already stated all that I know, in full detail.

332 Fifty-third cross-interrogatory. You have stated that Mr. Dil-

lon was agent for D. B. Norris, of Washington City; please state in what that agency consisted.

53. X answer. All I know about it is what Dillon told me. He told me that he was acting as agent for Norris, of Washington City, and from his business relations drew a draft of some twenty-five hundred dollars, connected with the Knickerbocker Life Insurance Company of New York City, which draft and transaction passed through his account with the Central National Bank. That is the only transaction in my personal knowledge connected with the agency for Norris.

Fifty-fourth cross-interrogatory. Please state whether you knew of Dillon's agency for Columbus Delano, and how you knew the same.

54. X answer. The information was derived from Dillon and corroborated by the fact now in evidence that one of his cheques shows that he paid Delano's taxes and from his assertion of the great friendship existing between the honorable Columbus Delano and himself.

Fifty-fifth cross-interrogatory. Please state any life or fire in-
333 surance company that you know of that A. H. Dillon, junior, professed to act as agent or general agent for from March, 1871, to June, 1874.

55. X answer. The cheques already filed with the testimony show the names of the companies, and I am informed by Mr. Breese, the agent of the New York Mutual Life Insurance Company, that his company had quite a number of business transactions in life insurance with Dillon.

Fifty-sixth cross interrogatory. I do not speak of cases in which A. H. Dillon, junior, acted as broker for fire or life insurance, but I ask you from your knowledge to state whether Mr. Dillon ever professed to or or did act as agent for any other fire or life insurance company except the Connecticut Mutual Life Insurance Company.

56. X answer. Not that I know of.

Fifty-seventh cross-interrogatory. Did or did not A. H. Dillon, junior, general agent, in his account with your bank almost daily deposit cheques and drafts which purported to be payment for premiums due the Connecticut Mutual Life Insurance Company?

57. X answer. Mr. Orndorff, the clerk of Mr. Dillon, was the
334 party who made the deposit as a rule. My recollection of the deposit is that they were composed in some instances of bank notes, of cheques on Baltimore banks drawn to the order of A. H. Dillon, junior, A. H. Dillon, junior, agent, and in some instances A. H. Dillon, junior, general agent, and of drafts from Virginia and the District of Columbia on New York or Philadelphia drawn in the way above stated; that in all the cheques and drafts that required endorsement for deposit they were endorsed A. H. Dillon, junior, agent, per W. W. Orndorff. The name of the Connecticut Mutual Life Insurance Company very rarely, if ever, appeared in said deposits.

Fifty-eighth cross-interrogatory. During the years 1871, 1872, and 1873, how often, to best of your knowledge, did the name of Connecticut Mutual Life Insurance Company appear by those cheques or drafts to your knowledge?

58. X answer. I cannot answer any such a question. It may never have occurred and it may have occurred half a dozen or a dozen times or oftener. It is a question impossible to answer. The receiving teller of the Central National Bank could probably give you information on this matter.

Fifty-ninth cross-interrogatory. Was it or not Mr. Orndorff's
335 habit in making the said deposits as stated above by you, when

a cheque was deposited drawn to the order of A. H. Dillon, junior, agent, to endorse it not only A. H. Dillon, junior, agent, but also A. H. Dillon, junior, general agent, per Orndorff?

59. X answer. It was.

Sixtieth cross-interrogatory. Beginning with April the first, 1871, did or not A. H. Dillon, junior, general agent, pay over money to the Connecticut Mutual Life Insurance Company? If so, how did he pay it—how often per month, and in what mode did he pay it?

60. X answer. The accounts of A. H. Dillon, junior, with the Connecticut Mutual Life Insurance Company being now on file in this case, I respectfully refer to them for my answer.

Sixty first cross-interrogatory. I want your knowledge in the premises: State whether Dillon was not in the habit, once or twice a month, of drawing cheques for large amounts in favor of Jacob L. Green, secretary, and how these cheques were paid.

61. X answer. He was in such habit, but I decline to say whether once or twice a week, when exhibits are on file which show the
336 whole matter. They were paid regularly through the clearing-house to whatever bank held them.

(NOTE.—Defendant's solicitor agrees that all the accounts between Dillon and the Connecticut Mutual Life Insurance Company have been filed in this case.)

Sixty-second cross-interrogatory. Do I, then, understand you to say that from the endorsements on said cheques drawn by Dillon in favor of Jacob L. Green, secretary, during the years 1871, 1872, and 1873, and paid by your bank, you have no knowledge that these cheques were deposited in a bank at Hartford, Connecticut, and were then transmitted to Baltimore through a bank or banking-house in New York, and that these facts appeared on the backs of the cheques?

62. X answer. You have asked me nothing about the endorsements on said cheques, nor have I stated anything regarding the endorsements on said cheques, and therefore you could not understand me to say anything regarding them. To save an additional question, I state that I have no doubt the endorsements of those cheques contained Jacob L. Green, secretary's name and the name of the the bank or bankers who forwarded them, properly endorsed thereon, to a
337 bank or banks in the city of Baltimore, and that said cheques further contained the endorsements of the bank or banks in Baltimore which collected them through the clearing-house of Baltimore in the daily exchanges of the associated banks of Baltimore, and further that said cheques contained the clearing-house mark, showing what special bank in Baltimore collected them. All these exchanges and clearing-house transactions were made at the National Union Bank of Baltimore, under the management of R. Mickle, esquire, manager of the clearing-house of the associated banks of Baltimore, the Central National Bank of Baltimore being a full member of the associated banks of Baltimore and its clearing-house from its beginning to its end.

Sixty-third cross-interrogatory. I want an answer specifically to this question: Does or does not your knowledge of the endorsements made on any of these cheques during the years 1871, 1872, and 1873, enable you to say whether any of them came through a bank in Hartford, Connecticut?

63. X answer. I have no recollection on the subject. My main
338 recollection or impression is, that Jacob L. Green, secretary, in most of the cases, probably, had endorsed them over to a New

York banking-house, and as far as my recollection goes, it was the house of Drexel, Morgan and Company.

Sixty-fourth cross-interrogatory. Fix, as near as you can, the date of your interview with Jacob L. Green, at the office of A. H. Dillon, junior, spoken of by you in the early part of your testimony.

64. X answer. I cannot be any more specific than I have been. I have stated all I know or remember of it. I am satisfied, in my own mind, that the interview referred to could not have occurred in the years 1873 or 1874, but must have occurred late in the fall or winter of 1872, or possibly 1871 and 1872.

Sixty-fifth cross-interrogatory. Did Dillon continue to draw cheques every month in favor of Jacob L. Green, secretary, and were the same paid by your bank, and what was the date of the last of said cheques?

65. X answer. Dillon's cheques in favor of Jacob L. Green, secretary, were drawn and paid up to the cheque of eight thousand dollars, about June the tenth, 1874, which was not paid for want of funds to his credit.

339 Sixty-sixth cross-interrogatory. You have given the history of the twelve thousand dollar note reduced to ten thousand dollars; was any discount of said note, from first to last, ever entered in the account of A. H. Dillon, junior, general agent?

66. X answer. No.

Sixty-seventh cross-interrogatory. In your testimony given in this case, that at first discounting of this note appeared in Alice P. Dillon's account. After the close of that account I understood you to say that it appeared in the discount ledger under the head of temporary discounts until its last appearance, and was then entered, and there only once entered, as the last item of Dillon's private account. Am I, or not, correct in this statement?

67. X answer. From recollection I think you are; but I have given the history of the note and all its discounts, and all its renewals, and all its entries, in the fullest detail, verified by the books of the bank, and it contains all the information I can give.

Sixty-eighth cross-interrogatory. Please look at the testimony of Seth Reed, on page No. of the record, answer to twenty-third
340 interrogatory, and at the account stated therein, and state whether that is not the last entry of the discount of the ten thousand dollar note?

68. X answer. It is.

Sixty-ninth cross-interrogatory. You have spoken of a cheque having been drawn Dillon on February the seventeenth, 1874, for thirteen thousand five hundred dollars; do you mean to say that the money was actually drawn out by Dillon, or not?

69. X answer. I do not know anything about it, except what the books state; and I have already stated that. His account is debited with thirteen thousand five hundred dollars, and if he did not draw the money he must have got the cheque certified, and the bank was liable to pay it at any moment, to any one who held it.

Seventieth cross-interrogatory. You have stated that you directed the clerk to allow him interest on that sum; would you have done so if the same had in point of fact been drawn out?

70. X answer. I would.

Seventy-first cross interrogatory. After you charged up the ten
341 thousand dollar note to the account of A. H. Dillon, junior, general agent, why did you not immediately notify Dillon of that fact?

71. X answer. The reason was simply that we wished him to make

the account good; the charging up of the ten thousand dollar note on the first day of June having thrown the account over.

Seventy-second cross interrogatory. I understand you that *that* you waited till Dillon's subsequent deposits made the account good before you gave such notice to him?

72. X answer. You understand me correctly.

Seventy-third cross interrogatory. Who has the assets and effects of the Central National Bank?

73. X answer. The bank was, as I hold, legally dissolved, and the assets belonging to the stockholders were handed to them.

Seventy-fourth cross-interrogatory. Do I understand you to say that all the stockholders have been paid in full?

74. X answer. You do, with the eqception of this ten shares of Mrs. Alice P. Dillon, now in litigation, and for which there are numerous reasons for it not being liquidated.

342 Seventy-fifth cross-interrogatory. You have furnished me with a list of the shareholders on June the first, 1874; do I understand you to say that all of said shareholders therein shown have been paid in full one hundred dollars per share, with the exception of the Dillon stock? and, if so, about what time were they paid?

75. X answer. You understand me correctly, and as to the time, as I have already testified, the whole business of the bank was closed, and our business place vacated on the first day of March, 1875. They were all paid, and all paid prior to the first day of March, 1875. The resolution of dissolution was passed on the fifteenth of July, 1874, and our business was all wound up and our place vacated on the first day of March, 1875.

Seventy-sixth cross-interrogatory. I understand you by your answer to say that you paid the stockholders?

76. X answer. Yes, I did.

Seventy-seventh cross-interrogatory. Was there any surplus after paying the stockholders? if so, how much?

343 77. X answer. They were paid one hundred and two dollars per share as a final payment. There was no surplus left after that. They had received, prior to that, a dividend of thirty dollars per share, making a total of payment to the original stockholders, from beginning to end, of one hundred and thirty-two dollars per share.

Seventy eighth cross-interrogatory. Did you make any provision for the claim of the Connecticut Mutual Life Insurance Company against the Central National Bank in this case?

78. X answer. I did not. On July the fifteenth, 1874, when the stockholders voted to dissolve, there was no bill filed or legal claim made by the Connecticut Mutual Life Insurance Company against the Central National Bank of Baltimore. I have never believed their claim was a legal or valid one, and as the organization of the bank provided for the individual liability of the stockholders up to the amount of the capital of the bank, I made no provision for the claim you ask of.

Seventy-ninth cross-interrogatory. You have stated that there was no surplus; do you mean to say thereby that all the assets of the bank have been collected in?

344 79. X answer. I mean to say that with a few trifling exceptions all the assets of the bank have been collected in, and those few I took as cash in part payment of my stock; there was no surplus over and above that sum, and the business was finally closed.

Eightieth cross-interrogatory. You have stated that the bill in this

case was not filed on the fifteenth of July, 1874; now state whether it was not filed on the eighteenth of July, 1874, and long before you received from the government the bonds deposited on the part of the bank?

80. X answer. I know the bill was not filed on the fifteenth of July, 1874; it was filed subsequent to that in July, 1874, in the latter part; the record will show. It was filed before the bank retired her circulation and withdrew her bonds at Washington City.

81. X answer. The bonds of the United States deposited with Treasurer of the United States to secure the circulation of the Central National Bank of Baltimore were withdrawn, to the best of my recollection,
345 early in June, 1875. The records of the department will show the date, but that is to the best of my knowledge and belief.

Again examined for defendant:

Thirty-third interrogatory. Please state upon what date Mr. Dillon was informed of the ten thousand dollar note having been charged up to him, and how the same was done and by whose direction?

33. Answer. The minute book of the bank shows that at a meeting of the board of directors, held June the ninth, 1874, the following action was held (see Defendant's Exhibit Deposition W. H. D. No. 1.)

The taking of depositions was then adjourned to the fifth day of December, in the same year, at twelve noon, and the same place; at which last mentioned time and place the commissioner met pursuant to notice, and I proceeded in the presence of the solicitors of the respective parties to take the following depositions, that is to say:

ALICE P. DILLON, a witness of lawful age, produced on behalf of the defendants, being by me first duly sworn on the Holy Evangely of Almighty God, being examined on the following interrogatories, to
346 her propounded in that behalf, makes oath, deposeth and saith as follows, that is to say:

First interrogatory. State your residence.

1. Answer. I reside at No. 293 Madison avenue. I am the wife of A. H. Dillon, junior.

Second interrogatory. State what property you had at the time of your marriage with A. H. Dillon, junior, how the same was acquired, and what was the extent thereof, and of what did it consist?

2. Answer. At the time, I had some little property, consisting of a negro man, and soon after my marriage Mr. Dillon's father gave me some lands in the West; the extent of them I do not remember, it has been so long.

Third interrogatory. In what part of the West were the lands located of which you have spoken?

3. Answer. I think they were in Iowa and Kansas; I am not positive at all, as Mr. Dillon has had entire charge of them since.

Fourth interrogatory. Have you or not since your marriage with Mr. Dillon acquired any property by gift, inheritance, or in any other
347 manner; and, if yea, from what person and for what amount, and give the particulars thereof?

4. Answer. As I have just stated, I had lands given me by Mr. Dillon's father soon after my marriage; the extent of them I do not remember. I do not know the value of them, as Mr. Dillon has been attending to them, disposing of it from time to time and making judicious investments. He has attended to them during the whole time, so that I really know nothing about them.

Fifth interrogatory. Did Mr. Dillon at any time since your marriage with him reside at Dubuque, Iowa; and, if yea, what business was he engaged in whilst there? and, state, if you are able, how his said business terminated, whether successfully or otherwise.

5. Answer. He did reside there at the time of and after our marriage, and was practising law. I am not now able to state how it terminated. It has been twelve or fifteen years since we resided there, twelve years any way.

Sixth interrogatory. Have there or not been from time to time
348 frequent purchases of real estate in your name? and, if yea, state the time and place of such transactions, the value and extent thereof, and by whom the necessary means for the same were furnished.

6. Answer. Whenever Mr. Dillon has brought any papers for me to sign, deeds or so on, I have signed them without asking any questions. He has invested my means from time to time, and the extent of them I have not inquired; the details, of course, I have not attended to. Mr. Dillon has attended to all the details, and I know nothing about them.

Seventh interrogatory. What interest have or had you in the house at the corner of Madison avenue and Dolphin street, in the evidence in this cause mentioned, and did you acquire the same, and from whom did the consideration for the purchase thereof come? and state fully the nature and extent of your interest therein.

7. Answer. I did own it at one time; I have no interest in it now. The investments Mr. Dillon had made for me from the sale of lands and judicious investments of all kinds of means belonging to me sup-
349 plied the consideration money.

Eighth interrogatory. As you have stated that your interest in said property has been disposed of, state fully to whom the same was disposed, for what amount, under what circumstances; and, also, state fully by whom the purchase money thereof was received, what has been done with the same, and by whom.

8. Answer. It was sold to Mr. Shields for twelve thousand dollars. I do not remember the circumstances. Mr. Dillon told me he had sold it and I signed whatever paper I was told to sign without asking any questions. The money was received by Mr. Dillon and taken charge of by him. I do not know what he did with it and did not enquire.

Cross-examined for complainant:

First cross-interrogatory. Please state how long you have been married to defendant, A. H. Dillon, junior, agent?

1. X answer. Nearly twenty-three years.

Second cross-interrogatory. State how long, if you please, after your marriage was it when Mr. Dillon, senior, gave you the lands you have mentioned.

350 2 Answer. I cannot remember now whether they were given to me as a marriage gift or immediately after, but it was about the time of the marriage.

Defendant's Exhibit Depositions T. S. is filed, being a memorandum in the handwriting of the commissioner of the information agreed by Thomas Shields in his depositions to be thereafter furnished.

It is agreed that any exhibits or information called for by the record and not found therewith may be afterwards supplied.

No other witnesses being named or produced to me, I then, at the request of the solicitors of the respective parties, closed these depositions and now return them closed under my hand and seal this fifth day of De-

cember, in the year of our Lord eighteen hundred and seventy-seven, at the city of Baltimore, in the State of Maryland.

WILLIAM S. PINKNEY, [SEAL.]
Commissioner.

There are sixty-nine exhibits to the depositions, viz:

351, 352 Complainant's Exhibits, Depositions W. W. O.
Complainant's Exhibits, Depositions G. H. W., Nos. 1, 2, 3.
Complainant's Exhibit, Deposition W. S. P., No. 1.
Complainant's Exhibit, Deposition E. G. M., No. 1.
Complainant's Exhibit, Deposition G. R. P.
Complainant's Exhibit. Deposition Nos. 1, 2, 3, 4, 5, 6, 7, & 8.
Complainant Exhibit, Deposition J. O'C., Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.
Defendant's Exhibit, Depositions No. J. O'C., 1 and 2.
Defendant's Exhibit, Depositions W. S. P., Nos. 1, 2, 3, 4, and 5.
Defendant's Exhibit, Depositions T. S.
Defendant's Exhibit, Depositions N. F. W.
Defendant's Exhibit, Depositions J. H. F.
Defendant's Exhibit, Depositions W. S. W., No. 1.
Defendant's Exhibit, Depositions G. H. W., Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31.

WILLIAM S. PINKNEY,
Comm'r.

353 The exhibits referred to in the foregoing depositions are as follows, to wit:

Complainant's Exhibit, Depositions G. H. W., No. 1.

(Copy.)

Mrs. A. P. Dillon, Baltimore, in a/c with Central National Bank of Baltimore.

Dr.			Cr.		
1871.			1871.		
March 20th		$250	March	9	$500
April 11th		739 94		10	150
				24	300
Balance		1,479 45	April	8	1,404 32
				"	115 07
Footings carried to I ledger:			Footings carried to I ledger.. i. e.,		2,469 39
			1871.		
i. e., Drs		989 94	April	25	$2,469 39
June	24	40 25		29	600
	26	525	May	5	506 55
July	1	508 28	June	7	186 67
	3	405	July	5	1,664 22
	11	767 75		20	26 46
	29	465		21	99 52
Aug.	11	176 30	Aug.	2	12 50
Sept.	5	592		5	352 60
Oct.	14	1,200		9	1,268 44
	Balance	1,574 43		16	2 50
				28	21 25
			Oct.	6	23 85
		$7,243 95			$7,243 95
			Balance carried forward.		$1,574 43

354 (Copy.)

a/c Mrs. A. P. Dillon.

		Dr.		Cr.		
1871.				By balance bro't f'd..		$1,574 43
Nov.	1	$500		Oct. 19		101 48
	17	330 65		25		1,200
	24	2,000		Nov. 14		958 12
Dec.	14	475 25		20		265
	27	495		Dec. 2		2,000
1872.				5		40
Jan'y	8	550		6		500
	22	1,250		11		29
	24	1,250		18		75
	29	500		1872.		
Feb'y	9	800		Jan'y 2		162 48
	12	1,000		"		78 87
	13	1,000		5		40
	20	1,000		6		500
	21	3,500		10		50
March	1	1,507 35		19		103 42
	4	1,500		30		250
	7	2,500		Feb'y 7		1,100
	11	345 62		12		3,250
	14	4,500		14		1,066 37
	15	2,500		15		1,750
	16	3,000		23		2,000
	"	3,000		28		4,000
April	23	12,000		M'ch 7		142 56
	26, balance	1 02		13		200
				April 2		11,934
				19		105 63
				23		125
				"		12,103 56
		$45,704 92				$45,704 92
June	25. To cash	$12,000 00		April 26. By balance		$1 02
	29. " "	2 04		June 22. " cash		1 02
				" 25		12,000
		$12.002 04				$12,002 04
Octo.	28. To cash	$12,000 00		Octo. 28		12,000 00
1873.				1873.		
May	1. " "	12,000 00		May 1		12,000 00

Complainant's Exhibit G. H. W. No. 2.

No. .] BALTIMORE, *Octo.* 28, 1872.

355 Central National Bank, of Baltimore, pay to the order of note due Octo. 28, twelve thousand $\frac{}{100}$ dollars.

$12,000.

ALICE P. DILLON,
By A. H. DILLON, Jr.

[2-cent stamp.]

Complainant's Exhibit Depositions, E. G. M., No. 1.

[McDowell & Co., dealers in carpets, 264 W. Baltimore street.]

BALTIMORE, *Oct.* 1*st*, 1875.

W. S. PINKNEY, Esq.,
31 *N. Calvert st., Balto.:*

D'R SIR: I can only find two of the checks given by me to Mr. Dillon

in payment of my premiums for life insurance. One dated Aug't 1st, 1871, on Central National Bank, for $231\frac{66}{100}$ in favor of A. H. Dillon, jr., and endorsed "for deposit in the Central National Bank."

A. H. DILLON, JR.,
A. H. DILLON, JR.,
Gen'l Ag't.
p. p. WM. W. ORNDORFF.

The 2nd one is dated July 31st, 1872, on National Farmer's & Planter's Bank, for $231.90, drawn to order of A. H. Dillon, jr., and endorsed same as first one.

Very resp'ly,

E. G. McDOWELL.

356 *Complainant's Exhibit Depositions No. 2.*

No. .] BALTIMORE, *Oct. 17th*, 1873.

Central National Bank, pay to the order of A. H. Dillon, jr., twenty-five hundred dollars.

$2,500\frac{00}{100}$.

A. H. DILLON, JR.

(Endorsed:)

Pay to the order of H. K. Enos & Co.

A. H. DILLON, JR.

Pay to the order of H. B. Mickel, cash'r.

H. R. ENOS & CO.

Pay Bank of Commerce, Baltimore, Md., or order, for acc't of Bank of New York. N. B. A.

R. B. TOM, *Cr.*
MARTIN, *C. C.*

Complainant's Exhibit Depositions No. 1.

No. .] BALTIMORE, *Oct. 15th*, 1873.

Central National Bank, pay to the order of Mess. Nicholson & Co. two thousand and twelve $\frac{50}{100}$ dollars.

$2,012\frac{50}{100}$.

A. H. DILLON, JR.

(On the margin:) Central Nat'l Bank, of Balt'o. Good when properly endorsed.

(Endorsed:) Nicholson & Co.

Complainant's Exhibit Depositions No. 3.

No. .] BALTIMORE, *Oct. 17th*, 1873.

357 Central National Bank, pay to the order of Nicholson & Co. three thousand and thirty $\frac{00}{100}$ dollars.

$3,030\frac{00}{100}$.

A. H. DILLON, JR.

(On the margin:) Payable through the clearing-house.

(Endorsed:) Nicholson & Co.

Complainant's Exhibit Depositions No. 4.

No. .] BALTIMORE, *Octo. 18th*, 1873.

Central National Bank, pay to the order of A. H. Dillon, jr., twenty-five hundred $\frac{00}{100}$ dollars.

$2,500$\frac{00}{100}$.

A. H. DILLON, JR.

(On the margin:) Central Nat'l Bank of Balto. Good when properly endorsed.

(Endorsed:) Pay to the order of H. K. Enos & Co.

A. H. DILLON, JR.

Pay to the order of W. B. Mickel, cash'r.

H. K. ENOS & CO.

Pay Bank of Commerce, Baltimore, Md., or order, for acc't of Bank of New York. N. B. A.

R. B. TERRIS.
MARTIN, C. C.

Complainant's Exhibit Depositions No. 6.

No. .] BALTIMORE, *Nov. 1st*, 1873.

Central National Bank, pay to the order of Charles H. Pitts, esq., ac. cashier, two thousand $\frac{00}{100}$ dollars.

$2,000$\frac{00}{100}$.

A. H. DILLON, JR.

Complainant's Exhibit Depositions, No. 7.

358 No. .] BALTIMORE, *Nov. 1st*, 1873.

Central National Bank, pay to the order of Charles H. Pitts, esq'r., ac. cashier, thirty-seven $\frac{50}{100}$ dollars.

$37.50.

A. H. DILLON, JR.,

Complainant's Exhibit Depositions No. 8.

No. .] BALTIMORE, *Nov'r 29th*, 1873.

Central National Bank, pay to the order of bills payable ten thousand $\frac{00}{100}$ dollars.

$10,000$\frac{00}{100}$

A. H. DILLON, JR.

Complainant's Exhibit Depositions G. R. P.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, HARTFORD, CONN.

To whom it concern:

Be it known that A. H. Dillon, jr., of Baltimore, State of Maryland, is appointed and by these presents duly constituted agent for the Connecticut Mutual Life Insurance Company during the pleasure of the directors of said company, to receive applications or proposals for life insurance, and transmit the same to said company; to receive, countersign, and deliver policies issued thereon, and to receive the premium

thereon, and account to the company therefor, according to the
359 rules and by-laws of said company, but in no case is said agent authorized to waive the payment of the premium or change the conditions required to perfect or continue any policy of insurance issued by said company.

Dated at Hartford this 17th day of June, 1868.

[Seal's place.] GUY R. PHELPS,
President.
W. J. OLMSTEAD,
Secretary.

STATE OF MARYLAND,
City of Baltimore, ss:

I hereby certify that the aforegoing is a true abstract taken from the articles of incorporation and charter of the Connecticut Mutual Life Insurance Company of Hartford, Conn., which was left for record June 24th, 1868, at 2½ o'clock p. m., and same day recorded in liber G. R. No. 1, folio 12, &c., one of the "foreign corporation dockets" of Baltimore City.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore City this 23d day of August, A. D. 1875.

[SEAL OF THE SUPERIOR COURT.] GEO. ROBINSON, *Clk.*

Complainant's Exhibit Depositions No. 5.

360 No. .] BALTIMORE, *Octo. 27th*, 1873.

Central National Bank, pay to the order of W. W. Orndorff, esq., twelve hundred fifty-seven $\frac{50}{100}$ dollars.

$1,257\frac{50}{100}$.

A. H. DILLON, JR.

(Across the face:) Twelve hundred and fifty-seven $\frac{50}{100}$ dollars.

(Endorsed:) Pay to the order of Mess. Wilson, Colston & Co.
WM. W. ORNDORFF.

Complainant's Exhibit Depositions W. W. O.

361 *Connecticut Mutual.—Premiums paid for by bank notes & currency from Mar. 1st to June 12th, inclusive.*

Mar.	2	$157 47		25	45 68
	3	46 29		30	148 58
	7	88 93			$1,669 46
	"	22 42			
	"	19 75			
	9	85 62			
	10	107 61	May	2	$55 76
	14	144 60		"	37 05
	"	80 81		5	30 63
	18	20 84		6	34 04
	19	94 00		"	32 70
	"	131 25		"	82 62
	"	118 85		9	202 94
	21	36 38		"	87 79
	"	70 28		"	107 15
	23	46 68		11	135 60
	"	19 13		12	100 54
	"	25 00		14	26 80
	25	113 97		15	24 26

Complainant's Exhibit Depositions W. W. O.—CONTINUED.

Mar. 26		6 51
"		111 33
31		72 81
"		209 59
"		36 27
"		78 31
		$1,844 70
April 1		$106 90
2		137 29
3		51 74
"		51 74
"		223 04
"		04
4		33 02
6		24 66
"		52 81
8		62 44
9		112 54
10		86 44
"		24 55
15		21 08
18		41 13
"		29 61
"		42 16
"		42 16
21		46 94
22		55 60
"		51 86
"		58 24
"		30 22
24		9 73
"		79 26
May 15		40 63
18		143 67
19		131 89
"		323 03
21		29 08
"		30 12
22		28 78
25		25 36
"		24 32
26		56 45
28		104 55
"		3 06
29		122 85
30		42 96
"		51 96
"		51 96
		$2,168 55
June 1		$78 29
"		33 98
"		16 83
2		15 81
4		25 56
9		31 94
10		91 50
"		36 45
11		47 85
"		388 70
"		192 48
"		22 01
		$981 40

RECAPITULATION.

March	$1,844 70
April	1,669 46
May	2,168 55
June 12th, inclusive	981 40
Total	$6,664 11

362 *Bank notes deposited on the days named below.*

Mar.	2	155
	9	165
	10	110
	14	155
	19	120
	20	15
	21	135
	23	125
	26	260
	31	265
		$1,505 00
April	1	$250
	"	95
	2	140
	4	280
	6	55
	8	95
	9	110
	11	65
	20	180
	23	155
	25	80
	29	17
	30	400
		$1,922 00
May	4	$100 00
	7	30 00
	8	75 00
	9	187 00
	14	40 00
	18	175 00
	19	315 00
	22	39 00
	25	90 00
	28	105 00
	29	65 00
	30	230 00
		$1,451 00
June	1	$106 00
	6	330 00
		$436 00

RECAPITULATION.

March	$1,505 00
April	1,922 00
May	1,451 00
To June 12th, inclusive	436 00
	$5,314 00

Checks deposited to ⅌ other than Conn. Mut'l prem's.

Mar.	11	$75 00	for fire insurance.
"	20	455 00	" " "
"	25	35 00	" borrowed money returned, C. G. D.
"	31	146 84	" security life-insurance co.
Ap'l	13	147 39	" fire insurance.
"	17	20 00	rec'd of Dr. Stewart on his ⅌.
"	29	50 00	for borrowed money returned.
		$929 23	

Collections made & credited to ⅌ by bank.

Ap'l 21	$25 98	J. G. Field.
May 13	2,584 50	Knickerbocker Life Ins. Co.
	$2,610 48	

Conn. Mut'l.—Receipts from March 1 to June 12th, inclusive.

$12,591 93	Conn. Mutual receipts for March.
15,435 77	" " " " April.
12,053 07	" " " " May.
4,940 24	" " " to June 12th, inclusive.
$45,021 01	

$44,727 61 amount deposited in bank from Mar. 1st to June 12th, inclusive.

363 *Complainant's Exhibit Depositions W. I. P., No. 1.*

Jan.	30.	To cash			250				
Feb'y	7.	"	"		1,100				
"	12.	"	"		3,250				
"	14.	"	"		1,066	37			
"	15.	"	"		1,750				
"	28.	"	"		4,000				
"	23.	"	"		2,000				
M'ch	7.	"	"		142	56			
"	13.	"	"		100				
"	"	"	"		100				
				12,000					
Ap'l	26.	" A. P. Dillon		66					
					11,934	00			
				12,000					
"	"	"	ditto..	126					
					11,874	00			
"	"	"	ditto..	232					
				2 44					
					229	56			
	23.	Cash			125				
					45,704	92			
Ap'l	26.	To balance			1	02			
June	22.	" cash			1	02			
	25.	" disc.			12,000				
					12,002	04			

1872.						
M'ch	15		37..	2,500		
"	15		38..	3,000		
"	16		39..	3,000		
May	1		×	12,000		
		By balance			1	02
					45,704	92
June	25.	C'k		12,000		
	29.	"		2	04	
				12,002	04	

364 *Complainant's Exhibit, Depositions J. O'C., No. 1.*

DR. In account with Central National Bank, Baltimore. CR.

Please examine and report on this account as soon as convenient.

187 187

Memo. of stock a/c.

JAMES O'CONNOR.

	Shares.
No. of shares held on March 1st, 1871	1,000
" " " " " June 1st, 1874	1,800

Complainant's Exhibit Depositions J. O'C., No. 2.

Memo. list of shareholders "Central," June 1st, 1874.

Johns Hopkins	90	shares.
Jas. G. Negley	10	"
R. H. King	20	"
L. Blumenburg	5	"
J. F. Jennings	10	"
A. P. Dillon	10	"
Thomas Smith	10	"
W. H. Perkins	5	"
E. G. McDowell	10	"
E. M. Hardy	10	"
F. W. Bennett	20	"
Jas. O'Connor	1,800	"
	2,000	shares

@ $100 each, $200,000.

365 *Complainant's Exhibit Depositions J. O'C., No. 3.*

List of shareholders furnished John Carson, esq., March, 1871.

Name.	No. of shares.	
James O'Connor	1,000	$100,000
Elizabeth K. O'Connor	10	1,000
Katherine Taaffe	40	4,000
Robert Dorsey, of Ew'd	25	2,500
David Hostetter	100	10,000
D. Leet Wilson	20	2,000
Daniel Wallace	20	2,000
Sam'l McClurken	10	1,000
Thomas Smith	10	1,000
John F. Jenninge	10	1,000
Jno. L. Willock	10	1,000
Robt. H. King	20	2,000
Johns Hopkins	100	10,000
John W. Garrett	100	10,000
John M. Orem & Son	50	5,000
John C. Bridges	50	5,000
Wm. T. Walters & Co	20	2,000
Dix & Steiner	50	5,000
Francis W. Bennett	20	2,000
David T. Busby	50	5,000
Wm. H. West	25	2,500
McDowell & Robinson	20	2,000
Joseph Plummer	10	1,000
366 Kelly, Piet & Co	10	1,000
E'w'd M. Hardy	10	1,000
Jno. M. Nelson	5	500
W. H. Perkins	5	500
Richard Courtney	5	500
Geo. W. Webb & Co	10	1,000
Wm. S. O'Connor	3	300
Lazear Bro's	20	2,000
Jesse Lazear	10	1,000
Kirkland, Chase & Co	50	5,000
Frank Taffe	1	100
Wm. Taffe	1	100
James O'Connor, trustee	50	5,000
A. S. Abell	50	5,000
	2,000	200,000

Complainant's Exhibit Depositions J. O'C., No. 4.

Memo. schedule furnished by James O'Connor.

The draft of Wm. Fisher & Sons on Halgarten & Co., New York, $28,000, was dated September 22d, 1873.

Complainant's Exhibit Depositions J. O'C., No. 5.

Memo. schedule furnished by James O'Connor.

Alice P. Dillon, on the morning of the 14th March, 1872, had to her credit in Central N. Bank of Baltimore, $742. $\frac{83}{100}$.

367 *Complainant's Exhibit Depositions J. O'C., No. 6.*

Memo. schedule furnished by Jas. O'Connor.

4 a/c of W. Fisher & Sons, furnished of Pacific Mail Nos. 1, 2, 3, & 4. The No. of shares 2,500.

Complainant's Exhibit Depositions J. O'C., No. 7.

Scedule memo. in reply to enquiry of counsel of pl't'f.

The margins paid Wm. Fisher & Sons were paid in cash. The amount

of margin required on P. M. in name of A. H. Dillon, jr., was larger than the margin on the 2,500 shares. The amount of margin required depends on the fluctuations of the market.

Complainant's Exhibit Depositions J. O'C., No. 8.

No. 1.

Dr. Mr. James O'Connor, in account current with Wm. Fisher & Sons.

			Days.	Interest.
1871.				
Nov. 17.	Cash 100 Pac. Mail 47	4,725	49	38 59
'72.				
Jan'y 5.	Com's for borrowing Dec. 19, $\frac{1}{16}$; 26, $\frac{1}{16}$; 27, $\frac{3}{32}$; 28, $\frac{3}{32}$; 29, $\frac{1}{16}$; Jan'y 2, $\frac{1}{16}$;	20 67		
"	" Interest at 6 %, $36.80; @ 7 %	42 93		
"	" Balance	573 36		
		5,361 96		38 59

368 1872. CR.

			Days.	Interest.
Jan'y 3.	Cash, 100 Pac. Mail, 53⅞	5,361 96	2	1 79
5.	Balance of interest			36 80
				38 59
'72.				
Jan'y 5.	Balance, being profit			573 36

E. & O. E.

WM. FISHER & SONS,
Per JNO. B. MACKALL.

Settlement of above was made Jan'y 5, '72, on "general" acc't current made out by the writer.

J. B. M.

Complainant's Exhibit Depositions J. O'C., No. 9.

No. 2.

DR. Mr. James O'Connor, in account current with Wm. Fisher & Sons, special a/c.

			Days.	Interest.
1872.				
Feb'y 9.	Cash, 100 Pac. Mail, 58¼	5,850	8	7 80
10.	" 100 " " "	5,850	7	6 83
13.	" 400 " " 57⅝	23,150		
"	" 100 " " 57½	5,775		
"	" 100 " " 57⅛	5,737 50	4	23 11
17.	Interest @ 6 % $22.21; @ 7 %	25 91		
"	Balance	206 90		
		46,595 31		37 74

1872.				Cr.
Feb'y 15.	Cash, 800 Pac. Mail, 58½	46,595 31	2	15 53
17.	Balance of interest			22 21
		46,585 31		37 74
'72.				
Feb'y 17.	Balance, being profit	206 90		

E. & O. E.

WM. FISHER & SONS,
Per JNO. B. MACKALL.

369 Settlement was made of above Feb'y 17, '72, on acc't current made out by the writer of "general" acc't.

J. B. M.

Complainant's Exhibit Depositions J. O'C., No. 10.

No. 3.

Dr. Mr. James O'Connor, in account current with Wm. Fisher & Sons, "acc't of 1,000 the Pac. Mail."

'72.			Days.	Interest.
Feb'y 20.	Cash, 300 Pac. Mail, 57½	17,325	15	43 31
21.	" 200 " " "	11,550		
"	" 100 " " 57⅝	5,812 50	14	40 51
23.	" 400 " " 58	23,300	12	46 60
Mar. 6.	Interest @ 6 % $78; @ 7 %	91		
6.	Balance	1,290 54		
		59,369 04		130 42

72.			Cr. Days.	Interest.
Feb'y 29.	Cash, 500 Pac. Mail, 59½	29,622 03	6	29 62
March 1.	" 300 " " 59¾	7,848 21	5	14 87
2.	" 200 " " "	11,898 80	4	7 93
6.	Balance of interest			78 1½
		59,369 04		130 32
'72.				
Mar. 6.	Balance, being profit			1,290 54

E. & O. E.

WM. FISHER & SONS,
Per JNO. B. MACKALL.

Above balance (original acc't made out by the writer) was credited in general a/c which was made out by W. W. Remington Mar. 27, '72, and settled Ap'l 3, '72.

370 *Complainant's Exhibit Depositions J. O'C., No. 11.*

No. 4.

DR. Mr. James O'Connor, in account current with Wm. Fisher & Sons.

1872.

				Days.	Interest.
Mar.	9.	Cash, 200 Pac. Mail, 61⅛	12,275	18	36 82
	15.	" 100 " " 62⅜	6,262 50	12	12 52
	16.	" 300 " " 62	18,675	11	34 23
	27.	Interest @ 6 % $5.33; 7%	6 24		
			37,218 74		83 57

CR.

Mar.	1.	Cash, s. 100 Pac., Mail, 60⅜	6,011 89		18	18 03
	4.	" s. 100 " " 60½	6,024 39		"	18 06
	5.	" s. 200 " " 61⅝	12,273 76	12 on 100 / 11 on 100		23 52
	18.	" 200 " " 62⅜	12,423 75		9	18 63
	27.	Balance	484 95			5 33
			37,218 74			83 57

'72.

Mar. 27. Balance, being loss 484 95

E. &. O. E.

WM. FISHER & SONS.

Above balance (original a/c made out by W. W. Remington) was d'v'd in general a/c made out by W. W. R. Mar. 27, '72, & settled April 3, '72.

J. B. M.

Defendant's Exhibit Depositions G. H. W., No. 1.

No. 507.] BALTIMORE, *March 19th*, 1874.

Central National Bank of Baltimore pay to the order of National Fire Ins. Co. of Baltimore, fifty-four dollars.

371 $54 $\frac{00}{100}$.

A. H. DILLON, JR., *Gen'l Agt.*

[2-cent stamp.]

(Endorsed:) To pay prem. on pol. #16011, Daniel Krop.

F. C. LANDIS, *Sec'y.*

Defendant's Exhibit Depositions G. H. W., No. 2.

No. 511.] BALTIMORE, *March 31st*, 1874.

Central National Bank of Baltimore, pay to the order of Henry R. Wilson, esq., gen'l ag't, eighty-three $\frac{96}{100}$ dollars.

$83 $\frac{96}{100}$.

A. H. DILLON, J'R.,
Gen'l Ag't.

[2 cent stamp.]

(Endorsed:) To pay prem. on pol. No. 38937, James Towles, Security Life Ins. Co., New York.

HENRY R. WILSON,
Gen'l Ag't.
WILSON, COLSTON & CO.

Defendant's Exhibit Depositions G. H. W., No. 15.

No. 509.] BALTIMORE, *March 31st*, 1874.

Central National Bank of Baltimore pay to the order of Thomas Shields, esqr, four hundred & seventy-two $\frac{00}{100}$ dollars.

$472.$\frac{00}{100}$.

A. H. DILLON, JR.,
Gen'l Ag't.

[2 cent stamp.]

(Endorsed:) Thos. Shields.

Agreement of counsel.

For the purpose of avoiding the insertion of unimportant matters to the oppression of the record, it is agreed that there were twenty-
372 eight checks of the dates and to the amount following, and like the one here presented as a specimen.

Oct. 1st, 1878.

GEO. HAWKINS WILLIAMS.
J. CARSON.

No. 513.] BALTIMORE, *April 1st*, 1874.

Central National Bank of Baltimore pay to the order of John G. Kestler, esq'r., forty-four and $\frac{22}{100}$ dollars.

$44.$\frac{22}{100}$.

A. H. DILLON, JR.,
Gen'l Ag't.

[U. S. internal revenue, 2 cts.]

(Endorsed:) John G. Kestler.

Checks.

1874,	April	1st.	Check,	$44 22,	order of	John G. Kestler.
"	"	"	"	387 00,	"	J. B. Morris.
"	"	2d.	"	60 00,	"	Proud & Campbell.
"	"	3d.	"	253 00,	"	Irene E. Orndorff.
"	"	7th.	"	136 76,	"	Maryland L. Ins. Co.
"	"	8.	"	60 22,	"	Ass'd Freman's Ins. Co.
"	"	"	"	48 07,	"	R. C. Luckett & Son, ag't.
"	"	"	"	18 00,	"	Coale & Morris, ag'ts.
"	"	11.	"	56 25,	"	E. L. Foche, treas'r.
"	"	13.	"	59 17,	"	F. L. Lawrence.
"	"	"	"	247 79,	"	O. F. Breeze, gen'l ag't.
"	"	17.	"	32 30,	"	Central Nat'l Bank.
"	"	"	"	360 00,	"	No. 523.
"	"	20	"	100 00,	"	Louis Stowe.

1874, April 22.	Check,		43	89,	order of	Dunham & Sherman, gen'l ag'ts.
373 " May 1st.	"		52	45,	"	Jno. G. Kestler.
" " 2d.	"		187	54,	"	Geo. T. Halliday.
" " 8th.	"		342	17,	"	Jno. M. Anderson, col'd.
" " 9th.			84	16,	"	No. 531.
" " 16th.		1,	906	95,	"	No. 531.
" " 26th.			253	00,	"	Bombaugh & Ransom.
" " 27th.			120	51,	"	Lawford & McKim, gen'l ag'ts.
" June 1st.			67	71,	"	Jno. G. Kestler.
" " "			31	26,	"	S. & I. Parry.
" " 4.			30	66,	"	Charles Rupp.
" " 5.			32	53,	"	No. 549.
" " 6.			200	00,	"	A. W. Dillon, jr.
" " 8.			362	49,	"	Dunham & Sherman, gen'l ag'ts.

It is also agreed for the same purpose that the bank book of A. H. Dillon, jr., gen'l ag't, need not go in the records but may be used at the hearing.

J. CARSON.
G. HAWKINS WILLIAMS.

BALTO., 1*st Oct.*, 1878.

Defendant's Exhibit Depositions, J. O'C. No. 1.

A. H. Dillon, jr., gen'l ag't, in a/c with the Central Nat. B'k of Baltimore.

Dr.				Cr.		
1874.				1874.		
June 1, to cash		1,229	56	June 1, by balance.....	8,742	23
1, " "		67	71	1, " cash.....	188	41
1, " " note...	10,000			3, " "	857	21
3, " "		31	26	4, " "	316	88
374 6, " "		200		5, " "	1,210	56
6, " "		32	53	6, " "	651	48
8, " "		30	66	" " "	330	
12, " "		362	49	8, " "	257	80
		11,954	21	10, " "	204	71
Balance		1,000	86	11, " "	60	93
				12, " "	134	36
		12,955	07		12,955	07

Defendant's Exhibit Depositions, N. F. W.

[United States Depository, James O'Connor, president, late president 4th National Bank of Pittsburgh, Central National Bank of Baltimore. Authorized capital, $500,000. Cash capital paid in, $200,000.]

BALTIMORE, *June 1st*, 1874.

To N. F. WILLIAMS, Jr., *Act'g Cashier:*

D. SIR: Should the Dillon note due of this date be paid in part, and

renewed for the balance, in accordance with the contract, it will be all right in you so to do and permit. If not, don t hesitate to charge up the whole note to Mr. Dillon's account as kept by him, and I so advise as counsel of the bank, and refer the matter to me.

Yours, resp'f'lly,

GEO. H. WILLIAMS.

375 *Defendant's Exhibit Depositions I. H. F.*

(Copy.)

5TH AVENUE HOTEL,
New York, May 16, '73.

Mess. WM. FISHER & SONS,
Bankers, Balto., Md.:

GENTLEMEN: Having been detained North on business, I enclose herewith my check on Central Nat. B'k for $1,590.75, being amount due to-morrow on my note, including the interest & 3 days' grace. Please cancel the note & retain it until I call for it.

Yours, very respectfully,
(Signed) A. H. DILLON, JR.

Defendant's Exhibit Depositions W. S. W., No. 1.

Fire, Life, and Marine Insurance.

Capital represented, $46,000,000.

W. S. Wilkinson & Harlan, general agents and brokers, No. 37 Post-office avenue, Baltimore, Md.

Hanover Fire Insurance Company. Forty-fifth semi-annual statement, January 1st, 1875:

Cash capital	$400,000 00
Reinsurance fund	604,075 57
Outstanding liabilities	93,782 64
Net surplus	326,096 61
Total assets	$1,426,954 82

376 ASSETS.

Cash in banks and office	$125,046 03
United States 6 per cent. bonds	591,987 50
Bonds and mortgages, being first lien on improved real estate in the cities of New York and Brooklyn	331,000 00
Loans on call (market value of securities, $136,790)	93,700 00
State, city, and county bonds	105,250 00
Bank stocks	42,100 00
Balance in hands of agents and uncollected office premiums	120,933 13
Accrued interest on bonds and mortgages and call loans.	4,787 04
Real estate	12,151 12
	$1,426,954 82

BENJ. S. WALCOTT, *President.*
I. REMSEN LANE, *Secretary.*
W. S. WILKINSON & HARLAN,
General Agents, No. 37 Post Office avenue, and N. W. corner Charles & Baltimore.

Insurance, Fire, Life, & Marine. Capital represented, $46,000,000. Including an aggregate surplus above liabilities to policy holders of over seven million of dollars. Connecticut Mutual Life Ins. Co.
377 Hanover Fire Ins. Co., of New York. Niagara Fire Ins. Co., of New York. Guaranty Fire Ins. Co., of N. Y. Faneuil Hall Ins. Co., of Boston. Buffalo Fire Ins. Co., of Buffalo. Northern Ins. Co., of New York. Manufacturers' Ins. Co., of Newark. Shoe and Leather Ins. Co., of Boston.

W. S. Wilkinson & Harlan, Maryland Building, cor. Post Office avenue & Second st.

Complainant's Exhibit Depositions G. H. W., No. 3.

No. 42.] BALTIMORE, *May 1st*, 1873.

Central National Bank of Baltimore pay to the order of , twelve thousand dollars.

$12,000$\frac{00}{100}$.

ALICE P. DILLON.
p. p. A. H. DILLON, JR.

Defendant's Exhibit Depositions W. S. P., No. 4.

CONNECTICUT MUTUAL LIFE INSURANCE CO.,
Hartford, June 16th, 1874.

To the CASHIER CENTRAL NAT'L BANK,
Baltimore, Md.:

DEAR SIR: We have received from Messrs. Drexel, Morgan & Co. this morning the draft of A. H. Dillon, jr., gen'l agent of this company, for $8,000, of date June 10th, 1874, protested. Why is this so?
378 We should have from $10,000 to $15,000 to our credit.
Will you please give us the reason without delay?
Very truly, yours,

JOHN M. TAYLOR.
Ass't Sec'y.

Defendant's Exhibit Depositions T. S.

Rent, $690 a year, clear of all expenses.
Nos. of bonds, 82052
82053
82054
82055
82056
86191
86193
627
14544
14552
Nothing on books. Rent p'd last, March 16th, 1876, $690.

Depositors are notified to present their books at once for settlement and receive their money.

By order of the president and directors.

(Signed) N. F. WILLIAMS, JR.,
Acting Cashier.

CENTRAL NAT. BANK OF BALTO.,
Balto., July 15th, 1874.

At a meeting of the stockholders of this bank, held at its banking house this day, to take action authorizing the withdrawal of the bank from business in Balto., and application to be made for a change of title and its transfer to New York City, and after said business, on motion, it was

Resolved, The thanks of the stockholders of this bank are hereby tendered to Jas. O'Connor, esq., president, for the energy, integ-
384 rity, and ability he has shown in the successful management of this bank, and their good wishes to him officially and personally.

F. W. BENNETT, *Chairman.*
N. F. WILLIAMS, JR., *Sc'et'y.*

And thereupon comes into the said circuit court here, as well the Connecticut Mutual Life Insurance Company, complainants, by John Carson and Charles Marshall, esquires, its solicitors, as the Central National Bank of Baltimore, and Asahel H. Dillon, jr., defendants, by George H. Williams, Machen & Gittings, and Wallis & Thomas, esquires, their solicitors.

And afterwards, to wit, on the 23d day of May, 1878, the following motion for dismissal and exhibits were filed, to wit:

In the circuit court of the United States for the district of Maryland.
In equity.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company.
vs.
THE CENTRAL NATIONAL BANK OF BALTIMORE et al.

To the honorable the judges of the circuit court of the United States for the district of Maryland:

The solicitors for the Central National Bank of Baltimore, de-
385 fendant, respectfully shew to your honors that the said Central National Bank of Baltimore was organized and constituted a national banking association and body corporate on or about the 30th day of January, in the year 1871, under and by virtue of the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864; and that afterwards, by a vote of its shareholders owning two-thirds of its stock, taken on the 15th day of July, A. D. 1874, the said association went into liquidation and was closed, and in conformity with the provisions of the 42d and succeeding sections of the said act of Congress, and under and in pursuance of sections 5220, 5221, and 5222 of the Revised Statutes of the United States, the said association was dissolved and became extinct,

as will *will* more particularly appear by Exhibits C. N. B., Nos. 1, 2, 3, 4, 5, and 6, herewith filed and prayed to be taken as part of this motion.

That the bill of the complainant in this case was filed in the circuit court of Baltimore City on the 18th day of July, 1874, and after the said going into voluntary liquidation of the said Central National Bank of Baltimore.

386 That the complainant, on the 8th day of January, 1878, filed in this court its bill of complaint, purporting to be exhibited by virtue of section 2 of chapter 156 of an act of Congress approved June 30th, 1876, entitled "An act authorising the appointment of receivers of national banks, and for other purposes," praying process as well against the said Central National Bank of Baltimore as against the persons who were shareholders thereof at the time the same went into voluntary liquidation as aforesaid, and seeking the enforcement of the same demand which is sought in this case to be enforced; and the said last mentioned bill, so filed in this court as under the act of Congress aforesaid, is still pending in this honorable court, as will appear more particularly by reference to the same and the proceedings thereon, on file in this court, or by a transcript of the record thereof, as your honors may require; and it is prayed that the same, when produced, may be treated as part of this motion.

Wherefore, by reason of the premises and of the pendency of the complainant's said other bill filed in this court for the same cause, and because the said complainant was not entitled by law to institute, nor is now entitled to prosecute this suit against the said Central National Bank of Baltimore, the said banking association having previously

387 gone into voluntary liquidation as aforesaid; and for the reason that the said Central National Bank of Baltimore having been duly dissolved pursuant to law no suit can be maintained against it, and that the said circuit court of Baltimore City was without jurisdiction in the premises, and this honorable court is also without jurisdiction to grant the relief sought hereby—

It is hereby prayed that the said bill of complaint of the Connecticut Mutual Life Insurance Company against the Central National Bank of Baltimore in this cause may be dismissed, &c.

And as, &c.

MACHEN & GITTINGS,
Solicitors for the Central National Bank of Baltimore.

Exhibit C. N. B., No. 1.

ORGANIZATION CERTIFICATE.

[5 c. rev., J. O. C., January 11, '71, stamp.]

We, the undersigned, whose names are specified in article fourth of this certificate, having associated ourselves for the purposes of organizing a banking association and transacting the business of banking under the act of Congress entitled "An act to provide a national cur-

388 rency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, and of subsequent acts in addition to or amendatory thereof, do make and execute the following organization certificate:

First. The name of the association shall be The Central National Bank of Baltimore.

Second. The said association shall be located in the city of Baltimore,

county of Baltimore, and State of Maryland, where its operations of discount and deposit are to be carried on.

Third. The capital stock of this association shall be two hundred thousand dollars ($200,000), and the same shall be divided into two thousand shares of one hundred dollars each.

Fourth. The name and residence of each of the shareholders of this association, with the number of shares held by each, are as follows:

Name.	Residence.	No. of shares.
James O'Connor	Baltimore	1,000
E. K. O'Connor	"	10
C. Taaffe	"	40
Robert Dorsey of Edward	"	25
389 Dr. Hostetter	Pittsburgh	100
D. Leet Wilson	"	20
Dan'l Wallace	"	20
Sam'l McClurkan	"	10
Thos. Smith	"	10
John F. Jennings	"	10
John S. Willock	"	10
Robert H. King	"	20
Johns Hopkins	Baltimore	100
John W. Garrett	Baltimore	100
John W. Orem & Son	Baltimore	50
W. Morris Orem	Baltimore	50
John C. Bridges	Baltimore	20
William T. Walters & Co. (J. P. McCay, 5; Jno. W. McCay, 10)	Baltimore	50
Dix & Steiner (J. Franklin Dix, Frederick B. Steiner)	Baltimore	20
Francis W. Bennett	Baltimore	50
David T. Buzby	Baltimore	25
William H. West	Baltimore	20
McDowell, Robinson & Co. (E. G. McDowell, A. M. Hough, Clarence McDowell, Alex. Robinson	Baltimore	10
Joseph Plummer		10
Kelly, Piet & Co. (Michael J. Kelly, W. P. Pollard, John B. Piet, Theo. J. Kelly)	Baltimore	10
Ed. M. Hardy	Baltimore	5
John M. Nelson	Balto	5
W. H. Perkins	Baltimore	5
R. Courtney & Brothers (James P. Courtney)	Baltimore	10
George W. Webb & Co. (Albert Kermick)	Baltimore	20
Lazear Brothers. (James B. Lazear, William L. Lazear) Jesse Lazear	Baltimore	10
390 Kirkland, Chase & Co. (Alex Kirkland, Robert B. Kirkland, Brent Chase, Allen A. Chapman)	Baltimore	50
Frank Taaffe	Baltimore	1
William Taaffe	Baltimore	1
Wm. S. O'Connor	Baltimore	1
Areneath S. Abell	Baltimore	50
James O'Connor, trustee	Baltimore	50
		2,000

Fifth. This certificate is made in order that we may avail ourselves of the advantages of the aforesaid act.

In witness whereof we have hereunto set our hands this sixteenth day of January, 1871.

(Signed:) James O'Connor, E. K. O'Connor, C. Taaffe, Dr. Hostetter, D. Leet Wilson, Dan'l Wallace, Sam'l McClurkan, Thos. Smith, Jno. F. Jennings, Jno. S. Willock, Rob't H. King, James O'Connor, trustee, pp., Frank Taaffe, pp., J. O'Connor, William Taaffe, pp. J. O'Connor, William S. O'Connor, pp. J. O'Connor, James O'Connor, Johns Hop-
391 kins, John W. Garrett, John M. Orem & Son, Geo. W. Webb & Co., W. H. Perkins, R. Courtney & Bro., Kirkland, Chase & Co., Lazear Brothers, J. Lazear, pp. W. L. Lazear, A. S. Abell, John C. King, W. T. Walters & Co., Dix & Steiner, David T. Buzby, F. W. Bennett, Wm. H. West, Robert Dorsey of Edward, McDowell, Robinson & Co., Kelley, Piet & Co., Joseph Plummer, by James O'Connor, att'y, E. M. Hardy, John M. Nelson.

STATE OF MARYLAND,
City of Baltimore, to wit:

On this the twenty-eighth day of January, A. D. 1871, before me, a notary public of the city of Baltimore, personally came James O'Connor, E. K. O'Connor, Lazier Bros., J. B. Lazier, Wm. M. Lazier, Jesse Lazier; Areneath S. Abell, C. Taaffe, David Hostetter, D. Leet Wilson, Dan'l Wallace, Sam'l McClurkan. Tho's Smith, Jno. F. Jennings, Jno. S. Willock, R. H. King, Joseph Plummer, George W. Webb & Co., George W. Webb, Alfred Remick, W. H. Perkins, A. Courtney, Jas. O'Con-
392 nor, trustee; Frank Taaffe, Wm. Taaffe, Wm. S. O'Connor, Johns Hopkins, Jas. P. Courtney, as R. Courtney & Bro.; Kirkland, Chase & Co.; Alex. Kirkland, Rob't R. Kirkland, David Chase, A. A. Chapman, John W. Garrett, John M. Orem & Son, W. Morris Orem; Jno. C. Bridges, Wm. T. Walters & Co., Jno. McCoy, Jas. McKay, Dix & Steiner, S. Franklin Dix & Fred. E. Steiner; Dan'l T. Buzby, Francis W. Bennett, Wm. H. West, Rob't Dorsey, of Edward; McDowell, Robinson & Co., Ed. G. McDowell, Clarence McDowell, Alexander Robinson, A. M. Hough; Kelly, Piet & Co., M. J. Kelly, Jno B. Piet, W. F. Pollard, Theo. J. Kelly, Edward M. Hardy, Jno. M. Nelson, to me well known, who severally acknowledged that they executed the foregoing certificate for the purposes therein mentioned.

Witness my hand and seal of office the day and year aforesaid.

|SEAL OF NOTARY.| W. S. WILKINSON,
Notary Public.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

I certify the foregoing to be a true and complete copy of the original organization certificate of the Central National Bank of Balti-
393 more, with the acknowledgements thereof, now on file and of record in this office, and of the whole of such originals, and that such originals were so filed and recorded on the 30 day of January, A. D. 1871.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this 14 day of March, A. D. 1876.

[L. S.] JNO. JAY KNOX,
Comptroller of the Currency.

Exhibit C. N. B., No. 2.

Articles of association for the purpose of organizing an association to carry on the business of banking under the act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, and of subsequent acts in addition to or amendatory thereof, the undersigned subscribers for the stock of said association do enter into the following articles of association:

First. The name and title of this association shall be the Cen-
394 tral National Bank of Baltimore.

Second. The place where its banking house or office shall be located and its operations of discount and deposit carried on, and its general business conducted, shall be in the city of Baltimore, in the State of Maryland, U. S.

Third. The board of directors shall consist of twelve stockholders.

The first meeting of the stockholders for the election of directors shall be held at , on the , or at such other place and time as a majority of the undersigned stockholders may direct.

Fourth. The regular annual meetings of the stockholders for the election of directors shall be held at the banking house of this association on the second Tuesday of January of each year; but if no election shall be held on that day it may be held on any other day, according to the provisions of the tenth section of the act; and all elections shall be held according to such regulations as may be prescribed by the board of directors not inconsistent with the aforesaid provisions of the said tenth section of the act.

Fifth. The capital stock of this association shall be two hun-
395 dred thousand dollars, to be divided into shares of one hundred dollars each; but the capital may be increased according to the provisions of the thirteenth section of the act to any sum not exceeding five hundred thousand dollars; and in case of the increase of the capital of the association each stockholder shall have the privilege of subscribing for such numbers of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold his office (unless he shall be disqualified, or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director; and they shall have power to elect a vice-president, who shall also be a member of the board of directors, and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them, and continue them
396 in office or to dismiss them as, in the opinion of a majority of the board, the interest of the association may demand. They shall also have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held and to appoint judges of the elections; to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made, and generally to do and perform all the acts that it may be legal for a board of directors to do under the act aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make under said act, for the general regulation of the business of the association and the management and administration of its affairs; which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal, debt, or otherwise, without the consent of the board.

Seventh. This association shall continue for the period of twenty
397 years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements, and provisions of the act.

Eighth. These articles of the association may be changed or amended at any time by stockholders owning a majority of the stock of the association, in any manner not inconsistent with the provisions of the act;

and the board of directors or any three stockholders may call a meeting of the stockholders for this purpose.

In witness whereof, we have hereunto set our hands this sixteenth day of January, eighteen hundred and seventy-one.

(Signed) James O'Connor, Elizabeth K. O'Connor, pp. James O'Connor; John M. Nelson, Catharine Taaffe, pp. James O'Connor; John M. Orem & Son, David Hostetter, pp. James O'Connor; A. S. Abell, D. Leet Wilson, pp. James O'Connor; Daniel Wallace, pp. James O'Connor; John C. Bridges, Samuel E. McClurkan, pp. James O'Connor; Kirkland, Chase & Co., Thomas Smith, pp. James O'Connor;
398 John F. Jennings, pp. James O'Connor; John S. Willock, pp. James O'Connor; E. M. Hardy, Robert H. King, pp. James O'Connor; Wm. H. West, Joseph Plummer, pp. James O'Connor; James O'Connor, trustee; W. F. Walters & Co., Frank Taaffe, pp. James O'Connor; William Taaffe, pp. James O'Connor; William S. O'Connor, pp. James O'Connor; Johns Hopkins, John W. Garrett, David T. Buzby, Dix & Steiner, McDowell, Robinson & Co., R. Courtney & Bros., W. H. Perkins, F. W. Bennett, Kelly, Piet & Co., Geo. W. Webb & Co., Lazier Brothers, J. Lazier, pp. W. L. Lazier.

BALTIMORE, *January 28th*, 1871.

I, Walter S. Wilkinson, notary public, duly commissioned and sworn in and for the city of Baltimore, county of Baltimore, and State of Maryland, do hereby certify that all the signatures of the associates,
399 subscribers to the stock of the Central National Bank of Baltimore and herewith attached were made by the parties thereunto subscribing in my presence, and in witness whereof I have hereunto set my hand and seal notarial.

[SEAL OF NOTARY.] W. S. WILKINSON,
Notary Public.

I certify that the articles of association of the Central National Bank of Baltimore, Maryland, were executed in duplicate, and that one of the instruments so executed is the foregoing; and that the other, in all respects like the foregoing and stamped in the same manner, is on file with said bank.

JAMES O'CONNOR,
President.

BALTIMORE, *February 18th*, 1871.

[5 c. stamp.]

I hereby certify the foregoing to be a true and complete copy of the articles of association of "The Central National Bank of Baltimore," executed in duplicate, and that one of said duplicates is now on file in this office.

In testimony whereof I have hereto subscribed my name and
400 caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this 14th day of M'ch, A. D. 1876.

L. S.] JOHN JAY KNOX,
Comptroller of the Currency.

Exhibit C. N. B., No. 3.

CENTRAL NATIONAL BANK OF BALTIMORE, MARYLAND,
Baltimore, July 15th, 1874.

To the COMPTROLLER OF THE TREASURY,
Washington, D. C.:

SIR: It is hereby certified, in pursuance of section 42 of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, that at a meeting of the stockholders of the Central National Bank, located at Baltimore, in the State of Maryland, duly notified and held pursuant to law and the articles of association of said bank, at the office of said association at Baltimore aforesaid, on the 15th day of July, 1874, it was voted by the shareholders of said association, owning more than two-thirds of its stock, that said association go into liquidation and be closed.

401 In testimony whereof I have, by instruction of the board of directors of said association, hereto subscribed my name and affixed the seal of said association at aforesaid the day and year above written.

[SEAL OF THE BANK.] N. F. WILLIAMS, JR.,
Acting Cashier.

[Revenue stamp.]

Notice.

The Central National Bank, located at Baltimore, in the State of Maryland, is closing up its affairs. All note holders and other creditors of said association are therefore hereby notified to present the notes and other claims against the association for payment.

N. F. WILLIAMS, JR.,
Acting Cashier.

Dated Baltimore, July 15th, 1874.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
Washington, March 14, 1876.

I hereby certify the foregoing to be a true and complete copy of the original "certificate and notice of vote to go into liquidation" of the Central National Bank of Baltimore and of the whole of said
402 certificate, and that said original certificate is now on file in this office.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this 14 day of March, A. D. 1876.

[SEAL OF COMPTROLLER.] JOHN JAY KNOX,
Comptroller of the Currency.

Exhibit C. N. B., No. 4.

FINANCIAL DIVIDENDS, &C.

NOTICE.—The Central National Bank, located at Baltimore, in the State of Maryland, is closing up its affairs. All note-holders and other

creditors of said association are therefore hereby notified to present the notes and other claims against the association for payment.

N. F. WILLIAMS, JR.,
Acting Cashier.

Dated Baltimore, July 15th, 1874.
Jy. 22—2,011.

NOTICE.—The Central National Bank, located at Baltimore, in the State of Maryland, is closing up its affairs. All note-holders and
403 other creditors of said association are therefore hereby notified to present the notes and other claims against the association for payment.

Dated Baltimore, July 15th, 1874.

N. F. WILLIAMS, JR.,
Acting Cashier.

J'y 24—52 t., 1.

Exhibit C. N. B., No. 5.

No. 317.] TREASURY OF THE UNITED STATES,
Washington, D. C., Jan'y 8, 1875.

I certify that the Central National Bank, Baltimore, Md., this day deposited with the Treasurer of the United States one hundred sixty-six thousand six hundred dollars for the redemption of the outstanding notes of said association, for which I have signed duplicate receipts.

L. R. TUTTLE,
Assistant Treasurer U. S.

$166,600.
(On the margin:) Original.
(Across the face:) Agency.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
Washington, March 14th, 1876.

I hereby certify the foregoing to a true and complete copy of the original certificate of deposit of the Assistant Treasurer U. S. as made Jan'y 8, 1875, and of the whole of said certificate, and that said
404 original certificate is now on file in this office.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents at the city of Washington, in the District of Columbia, this 14th day of March, A. D. 1876.

[COMPTROLLER'S SEAL.] JOHN JAY KNOX,
Comptroller of the Currency.

Exhibit C. N. B., No. 6.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF CURRENCY,
Washington, January 15th, 1876.

This is to certify that the Central National Bank of Baltimore, Md., went into voluntary liquidation on July 15, 1874, under sections 5220 and 5221 of the Revised Statutes of the United States, and on January 8th, 1875, deposited legal tender notes with the Treasurer of the United States for the full amount of its outstanding circulation as provided in

section 5222 of the Revised Statutes, whereupon the bonds deposited by the association for the purpose of securing its circulating notes were delivered to the bank, thus finally closing its connection with
405 this department.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents at the city of Washington, in the District of Columbia, this 15th day of January, A. D. 1876.

SEAL OF THE COMPTROLLER OF THE CURRENCY, CURRENCY BUREAU, TREASURY DEPARTMENT.

JOHN JAY KNOX,
Comptroller of the Currency.

Same day answer to petition for dismissal filed as follows, to wit:

In the circuit court of the United States for the 4th circuit in and for the district of Maryland.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company
vs.
THE CENTRAL NATIONAL BANK.

The answer of the Connecticut Mutual Life Insurance Company to the petition of the Central National Bank.

It admits the organization of said bank as alleged in said petition.

That your complainant has no personal knowledge of the proceedings of said bank to go into liquidation; it neither admits nor
406 denies the allegations of said petition in that behalf, but leaves them to be established by competent proof.

Your complainant expressly denies that said bank was dissolved or has now become extinct.

Your complainant admits the filing of the bill in this case on the 18th day of July, 1874; it further admits of filing of the bill of the 8th day of January, 1878, against the stockholders, to which bill the said bank under the rules of equity pleading is made a party, and that said bill is still pending.

Without this that there is any other matter, cause or thing herein contained, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied, and your complainant prays that said motion may be overruled with costs to your complainant.

JOHN CARSON,
CHARLES MARSHALL,
For Insurance Company.

Whereupon, all and singular the premises being seen and heard, the petition to dismiss is by the court here overruled.

407 On the 25th of May, 1878, the following motion and order of court thereon is filed, to wit:

In the circuit court of the United States for the 4th circuit in and for the Maryland district.

THE CONNECTICUT MUTUAL LIFE INS. CO.
vs.
THE CENTRAL NATIONAL BANK, ASAHEL H. Dillon, jr.

The complainant, by John Carson and Charles Marshall, its solicitors,

now moves the court to proceed with the hearing of this cause, the same having been duly set down for hearing on Thursday, the 23d inst., and on that day the motion to dismiss, filed by the bank, having been duly argued and heard by consent of all the solicitors in the cause.

JOHN CARSON &
CHARLES MARSHALL,
Sol's for Compl't.

Upon the foregoing motion the attention of the court was called to the fact that the answers of the respondent, A. H. Dillon, jr., which had been filed, had been lost from among the papers in the cause, the court then and there decided that it would not proceed to hear said cause
408 without said answer if the respondent's solicitor objected to the hearing for that reason, and asked said solicitor if he did object, and, said solicitor making no remark, the court thereupon ordered the hearing to proceed.

WILLIAM F. GILES.

On the 30th day of May, 1878, the following motion to file general replication, &c., and order of the court thereon is filed, to wit:

In the circuit court of the United States for the 4th circuit in and for the Maryland district.

CONNECTICUT MUTUAL LIFE INS. CO.
vs.
CENTRAL NATIONAL BANK ET AL.

1. The complainant asks leave nunc pro tunc to file a general replication to the original answer.
2. To file a replication to defendants' 1st plea.
3. To deny the legal sufficiency of the defendants 2d & 3d pleas, and setting the said two pleas for argument.

J. CARSON,
CHAS. MARSHALL,
Sol's for Complainant.

409 MAY 30TH, 1878.

Permission to file replication granted, permission to set down pleas 2 & 3 overruled.

WILLIAM F. GILES.

On the same day the following monthly statements of receipts and disbursements of the Connecticut Mutual Life Insurance Company for May, June, & July, of 1874, were filed.

Monthly statement of receipts and disbursements on account of the Connecticut Mutual Life Insurance Company, ending thirty-first day of May, 1874.

DR. *A. H. Dillon, jr., gen'l agent at Baltimore, Md.* CR.

To premium on renewals and policies collected.

No. of policy.	Life insured.	Amount of premium.	Interest.	Cash.	How paid. Dividends.
	Amounts brought forward	13,933 87	1,053 42	8,203 23	5,790 64
128,386	Calvin T. Davison, com's 25 %	122 85		122 85	
128,388	George W. B. Bartlett, "	62 31	S. A.	62 31	
128,356	Nathan Rose, "	Held over.			
128,537	John M. Fallin, "	"			
128,561	Thomas S. Clark, jr., "	135 60		135 60	
128,582	Michael Holzman, "	107 15		107 15	
128,765	Henry M. C. Wolf, "	Held over.			
128,766	Colin M. Hawkins, "	323 03		323 03	
128,564	Wm. S. Zimmerman, "	Held over.			
128,925	William J. Wilson, "	174 43		174 43	
				9,128 60	
				5,790 64	
		14,919 24		14,919 24	
		1,053 42			
		1,100 45			
	To balance on % of June	17,073 11			

By commissions and charges.

By postage		16 00
" exchange		8 50
" expressage		3 50
" medical exam'n, 10 & $5.00		50 00
" dividends		5,790 64
" commissions		
On $8.17.95, @ 5 %	41 90	
" 6,857.86, 6 "	411 47	
" 4,211.45, 7 "	294 80	
" 1,955.31, 10 "	195 53	
" 1,056.67, 25 "	264 17	
" 5 % bonus as per vouchers herewith	179 13	
Less overcharge in com's on ren'l	1,387 00	
No. 102,850, Ottinger, being error in Ap'l report	14 90	1,372 10
Maryland State tax on collections for the year ending Apr'l 30th, 1874. Prem's	150,577 33	
Dividend	68,606 15	
Tax 1 ½ % on	81,971 18	1,229 56
Agent's certificate $2.00. Affidavit c. 25		2 25
Bill for advertising card in Balto. Underwriter		250 00
One year's subscription "		3 00
Adv'g ann'l stat't in Washington Star		125 00
" " " " Baltimore American		65 00
Recp't for S. V. of No. 114,248, Ramsburg		131 30
Dividend voucher for No. 37,007, Oettinger		24 64
" " " " 104,275, do		1 62
Check No. 544, June 10th		8,000 00
		17,073 11

E. & O. E.

A. H. DILLON, JR., *Gen'l Agt.*,
Per ORNDORFF.

Monthly statement of receipts and disbursements on account of the Connecticut Mutual Life Insurance Company, ending thirtieth day of June, 1874.
A. H. Dillon, jr., gen'l agent at Baltimore, Md.

DR. CR.

To premium and renewals on policies collected.						By commissions and charges.
No. of policy.	Life insured.	Amount of premium.	Interest.	Cash.	How paid. Loan on policies.	Dividend.
14735	Francis Dandelot, 5 %	155 50	4 20	57 10		98 40
22509	Moses P. Kimball, 7 %	82 50	2 52	40 44		42 06
22604	George Delphy, 5 %	75	2 28	37 08		37 92
22622	Ignatius Lauer, "	99 30	3 18	49 92		49 38
22706	James F. Wagner, "	155 50	4 80	77 10		78 40
24252	Lewis A. Direly, 7	132 40	12 36	59 44		72 96
30318	Albert J. Ulman, "	132	12 90	64 25		67 75
30459	George Doolittle, "	49 82	4 86	24 47		25 35
30528	Moses Brownolds, "	72 90	7 14	35 79		37 11
30529	Moses Oettinger, "	165 50		94 95		70 55
30558	Solomon Van Leer, "	64	6 24	31 52		32 48
37489	Albert Burch, "	177	17 58	93 51		83 49
37647	Theodore A. Warner, "	165 50	16 44	84 10		81 40
46155	John S. Smith, "	128 50	12 84	65 45		63 05
46233	Jordan Stabler, "	229 10	21 42	195		34 10
46234	George Delphy, "	121 76	11 46	112 48		9 28
46325	Charles B. Gallagher, "	170	17 22	90		80
46553	Zerubbable Hallock, "	151	15 12	76 38		74 62
46653	George H. Sargeant, "	97	9 78	51 30		45 70
46654	Solomon Van Leer, "	102	10 32	54		48
46827	William J. Davison, " (held over)					
46970	William Williams, "	58	5 82	29 86		28 14
57582	Victor Du Pont, "	304 40	29 16	162 95		141 45
57605	Frederick D. Morrison, "	115 60	11 40	59 20		56 40
57606	do "	115 60	11 40	59 20		56 40
57608	John J. Jacobson, "	250	25 20	129 70		120 30
57609	do "	250	25 20	129 70		120 30
57683	John Appleton "	422 50	43 50	230 80		191 70
57684	Frederick D. Wheelwright, "	90 20	9 30	49 46		40 74
		4,132 58	353 64	2,245 15		1,887 43

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Monthly statement of receipts and disbursements of the Connecticut Mutual Life Insurance Company, ending thirtieth day of June, 1874, A. H. Dillon, jr., gen'l agent at Baltimore, Md.

DR. CR.

To premium and renewals on policies collected.						By commissions and charges.
No. of policy.	Life insured.	Amount of premium.	Interest.	Cash.	How paid. Loan on policies.	Dividend.
	Amounts brought forward	4,132 58	353 64	2,245 15		1,887 43
57837	Derich W. Keyser, 7 %	205 50	20 76	114 10		94 40
57868	William Platt, "	68	6 72	36 92		31 08
57869	do "	68	6 72	36 92		31 08
57902	John Startzman, "	77 10	7 68	40 17		36 93
58190	James Aitcheson, "	225 50	23 10	123 65		104 85
58347	Alexander Gould, jr., "	624	63 12	341 40		282 60
58348	do "	624	63 12	341 40		282 60
58370	Henry F. Loane, "	51 11	5 04	26 38		24 73
58371	James A. Roseburg, " (held over)					
58422	Washington C. Sanderson, "	62 40	5 94	33 39		29 01
58457	William Russell, "	155 50	15 60	81 90		73 60
71499	William Martien, 6 % (returned herewith)					
71736	William D. Miller, "	312	31 44	174 35		137 65
71781	Robert Lawson, "	507 65	52 32	287 65		220
71784	Samuel B. Kimble, "	55 83	5 46	31 23		24 60
71967	William H. Buck, "	135 30	13 92	75 93		59 37
72048	William J. Parran, "	155 50	15 60	83 95		71 55
72479	John C. Balderston, "	290	29 46	156 30		133 70
72568	James H. Ward, "	250	25 20	132 40		117 60
72635	Henry F. Loane, "	75	7 44	39 72		35 28
84966	Milton L. Howser, " (returned herewith)					
85095	Reuben Schaffer, "	205 50	20 76	121 10		84 40
85294	Elias M. Recker, "	108 85	10 86	61 08		47 77
85330	Moses Brownolds, "	56 20	5 64	31 46		24 74
85763	Edward J. Crumrine, "	145	14 46	81 35		63 65
85850	Lewis A. Birely, " (held over)					
95282	Murray Harrison, "	127 25		88		39 25
95299	Levi Dillenberg, "	125	12 36	70 05		54 95
		8,842 77	816 86	4,855 95		3,986 82

Monthly statement of receipts and disbursements on account of the Connecticut Mutual Life Insurance Company, ending thirtieth day of June, 1874. A. H. Dillon, jr., gen'l agent at Baltimore, Md.

DR. CR.

To premium and renewals on policies collected						By commissions and charges.
No. of policy.	Life insured.	Amount of premium.	Interest.	Cash.	How paid. Loan on policies.	Dividend.
	Amounts bro't forward	8,842 77	816 36	4,855 95		3,986 82
95307	John Waller, 6 %	51 56	4 98	29		22 56
95463	Robert Lawson, "	244 40	S. N.	180 26		64 14
95869	William Lamping, "	619 10	62 34	366 90		252 90
96063	William H. Wells, "	117 75	11 52	66 90		51 55
97353	Michael J. Kelly, "	175 77	Q. N.	175 77		
103868	John V. Slater. 10 %	75 48	B. H.	55 58		19 90
103933	Daniel T. Hart, "	22 02		15 81		6 21
104045	Arthur Stabler, "	41 74	72	29 74		12
104097	Charles H. Haverkamp, "	32 10	54	23 13		8 97
104141	William H. Cole, "	388 70		388 70		
104142	Rachel Wright, "	275 40		192 48		82 92
104284	Frederick D. Morrison, "	123 45		88 95		34 50
104418	John Lind, " (held over)					
104440	Joseph F. Nourse, "	98 30	1 74	71 68		26 62
104602	Tryon Edwards, "	164 50	2 94	115 66		48 84
104654	William Reynolds, jr., "	42 86		30 74		12 12
109453	Henry R. McNally, "	68 28	S. H.	50 53		17 75
112957	Samuel C. Chew, "	101 89	S. H.	84 57		17 32
112958	Faris C. Pitt, "	330 25		279 30		50 95
112997	Thomas V. S. Quigley, "	64 84	1 14	49 68		15 16
113074	Evan Lyons, jr., "	49		34 85		14 15
113168	Elgar L. Tschiffely, "	55 05		41 80		13 25
113169	Jay H. Arnold, "	69 87		53 19		16 68
113184	Alfred H. Reip, "	115 11		87 79		27 32
113282	Thomas T. Withers, "	25 45		19 47		5 98
115840	Otho M. Muncaster, "	33 43	S. H.	25 79		7 64
115895	Edward M. Craig, "	21 15	S. H.	16 18		4 97
118238	Joseph T. Dyer, "	44 91	S. H.	32 62		12 29
		12,295 13	902 28	7,461 62		4,833 51

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Monthly statement of receipts and disbursements on account of the Connecticut Mutual Life Insurance Company, ending thirtieth day of June, 1874. A. H. Dillon, jr., gen'l agent, at Baltimore, Md.

DR. CR.

To premium and renewals on policies collected.						By commissions and charges.
No. of policy.	Life insured.	Amount of premium.	Interest.	Cash.	How paid. Loans on policies.	Dividend.
	Amounts brought for'd	12,295 13	902 28	7,461 62		4,833 51
118292	Frank Milliken, 10 %	54 74	S. A.	47 89		6 85
118534	Evan Lyons, jr., "	24 69		19 13		5 56
118776	Thomas C. Hoge "	35 32	S. A.	27 54		7 78
123401	Abram Walter, "	239 65		180		59 65
123476	Jesse V. N. Hayck, "	27 31	S. A.	22 01		5 30
123533	Henry A. Wise, " (held over)					
123534	Simon B. Conover, " " "					
123629	Frederick Bungerter, "	23 97		19 03		4 94
123631	George N. Wells, "	40 68		31 94		8 74
123678	Frank E. Middleton, "	145 10		123 65		21 45
123712	Benedict F. Harvey, "	417 50		373 15		44 35
125659	Marcus S. Hess, 25 %	87 59	S. A.	87 59		
125751	William H. Smith, "	36 45	S. A.	36 45		
125791	Orlando G. White, "	36 37	S. A.	36 37		
128356	Nathan Ross, " (returned herewith)					
128537	John M. Follin, "	22 90	S. A.	22 90		
128765	Henry M C. Woolf, " (returned herewith)					
128864	William B. Zimmerman, " " "					
129128	Jeremiah Nicodemus, "	409 18		287 18	122	
129177	William H. Cole, "	170 52		120 52	50	
129178	M. La Rue Harrison, " (held over)					
129225	Moses K. Armstrong, "	102 28		102 28		
129296	James B. Crawford, "	176 79		176 79		
129297	Fritz Lewis, "	198 80		198 80		
129340	Frank G. Davison, " (held over)					
129580	Fitz William Fox, " " "					
129584	Charles W. King, "	123 45		123 45		
		14,668 42	902 28	9,498 29	172 00	4,998 13

Monthly statement of receipts and disbursements on account of the Connecticut Mutual Life Insurance Company, ending thirtieth day of June, 1874.
A. H. Dillon, jr., gen'l agent, at Baltimore, Md.

DR. CR.

To premium and renewals on policies collected.							By commissions and charges.		
No. of policy.	Life insured.	Amount of premium.	Interest.	Cash.	How paid. Loan on policies.	Dividend.			
	Amounts bro't forward	14,668 42	902 28	9,498 29	172 00	4,998 13	Postage		14 35
				172 00			Exchange		7 20
				4,998 13			Expressage		3 25
		14,668 42		14,668 42			Medical exam's, 11 @ $5		55 00
		902 28					Dividends		4,998 13
							Loans on policies		172 00
							Commissions:		
							On $485.30, @ 5 %	24 27	
							" 3,757.66 " 6	225 46	
							" 5,808.39 " 7	406 59	
							" 3,252.74 " 10	325 27	
							" 1,364.33 " 25	341 08	
									1,322 67
							District of Columbia tax for six months ending June 30, '74		79 42
							Receipt for S. V. No. 104044, Bocklage		23 67
							" " " " 121530 & 1, King		122 52
							Dividend voucher No. 104141. Col'e		
							" for $265.71 "		120 52
							Balance in May report on ¾ of June		1,100 45
							" of $11,000.86 in Central Nat'l B'k for which suit was brought for the co. July 18th		3,000 86
							Check No. 107, herewith to balance		4,550 66
		15,570 70							15,570 70

E. & O. E.

A. H. DILLON, JR., *Gen'l Ag't,*
Per ORRIDORFF.

CENTRAL NAT. BK. OF BALT. VS. CONN. MUT. LIFE INS. CO. 149

Monthly statement of receipts and disbursements on account of the Connecticut Mutual Life Insurance Company, ending thirty-first day of July, 1874.
A. H. Dillon, jr., gen'l agent, at Baltimore, Md.

DR. CR.

To premium on renewals and policies collected.						By commissions and charges.
No. of policy.	Life insured.	Amount of premium.	Interest.	How paid.		
				Cash.	Dividends.	
	Coms.					
5154	Tryon Edwards, 7 %	64	1 74	21 50	42 50	
14934	Robert Mowry, "	93 30	2 52	34 26	59 04	
15016	Gustavus Ober, 5 %	125	3 36	44 70	80 30	
15080	Rachel Heilbran, "	128	3 48	47 68	80 30	
17899	John R. Holliday, "	203	5 46	87 40	115 60	
18886	Edward Kimberly, 7 %	55	1 50	22 76	32 24	
19664	do. "	58	1 56	25 38	32 62	
20385	William H. Kimberly, "	82 50	2 22	37 23	45 27	
21816	Mary Langerfeld, 5 %	56	1 74	27 75	28 25	
21817	Theodore Langerfeld, "	60 75	1 92	29 93	30 82	
24404	Nathan Gotthelf, 7 %	115 50	10 74	50 45	65 05	
27450	Daniel J. Goldenberg, 5 %	65 10	6 24	30 54	34 56	
38244	William H. Early, 7 %	181 50	18 24	95 35	86 15	
38532	John T. Graham, "	121 50	11 94	61 10	60 40	
46827	William J. Davison, "	155 88	14 58	143 49	12 39	
47008	William P. Webb, "	205 10	20 34	181 60	23 50	
47092	Asahel H. Dillon, jr., "	29	2 88	14 93	14 07	
47093	do. "	29	2 88	14 93	14 07	
47174	William H. J. Reitz, "	238 65		47 44	191 21	
47262	William J. Tilley, "	63 70	6 42	33 50	30 20	
47641	Daniel T. Hawkins, "	68 50	6 84	66 31	2 19	
47704	Henry A. Didier, "	87	8 70	44 79	42 21	
58371	James A. Rosberry, "	312	31 44	170 70	141 30	
58531	John Wainwright, "	238 65	22 86	126 70	111 95	
58725	Thomas Godey, "	374 35	34 56	204 75	169 60	
58726	Henry W. Thomas, "	517 50	52 80	282 80	234 70	
58780	Lewis H. Reitz, "	248 85		73 65	175 20	
58781	Samuel R. Warren, "	Held over				
58899	William Ehrman, "	228 90	20 94	126 69	102 21	
		4,206 23	297 90	2,148 31	2,057 92	

150 CENTRAL NAT. BK. OF BALT. VS. CONN. MUT. LIFE INS. CO.

Monthly statement of receipts and disbursements on account of the Connecticut Mutual Life Insurance Company, ending thirty-first day of July, 1874. A. H. Dillon, jr., gen'l agent, at Baltimore, Md.

DR. CR.

To premium on renewals and policies collected.

No. of policy.	Life insured.	Amount of premium.	Interest.	How paid. Cash.	How paid. Dividends.
	Amounts bro't forward	4,206 23	297 90	2,148 31	2,057 92
	Com'ns.				
58933	James D. Gilmour, 7 %	340	34 20	184 60	155 40
58934	James M. Mason, "	92	9 42	50 05	41 95
59111	Mary F. Chatham, "	55 95	5 58	31 49	24 46
59136	Richard Fuller, "	422 50	43 50	230 80	191 70
59235	Nicholas Dutousch, "	90 20	9 30	49 46	40 74
59289	George P. Tiffany, "	76 25	7 68	39 35	36 90
59290	do. "	76 25	7 68	39 35	36 90
59291	do. "	76 25	7 68	39 35	36 90
59292	do. "	76 25	7 68	39 35	36 90
72962	J. Harmanus Fisher, " (Held over)				
73234	John J. Reardon, 6 %	25 22	2 52	13 88	11 34
73235	do. "	25 22	2 52	13 88	11 34
73331	Ernst Knabe, "	254 20	24 42	137 30	116 90
73522	Abraham Bacharach, "	133 13	13 32	76 08	57 05
85850	Lewis A. Bicely, "	586 30	62 10	342 50	243 80
85992	William A. Cummings, "	233 80	22 20	127 40	106 40
86086	George R. Watkins, "	669 50	70 50	382 60	286 90
86087	do. "	699 50	70 50	382 60	286 90
86089	Charles W. Kefanon, " (Held over)				
86282	Frank Donaldson, "	373	37 98	223 60	149 40
86354	John Henderson, "	217 12	20 70	118 36	98 76
86415	Job Scott, "	182 64	17 46	99 60	83 04
86519	Temezeeni Main, "	125	12 36	68 95	56 05
86520	John D. Main, "	99 35	9 90	57 15	42 20
86749	John G. Yates, " (Held over)				
96261	Richard J. Gittings, "	287 50		196	91 50
96309	Nathaniel P. Campbell, "	234 70	4 20	163 45	71 25
96431	Alexander F. Murdock, "	71 86	Q. a.	50 99	20 87
		9,699 22	801 30	5,366 45	4,393 47

CENTRAL NAT. BK. OF BALT. VS. CONN. MUT. LIFE INS. CO. 151

Monthly statement of receipts and disbursements on account of the Connecticut Mutual Life Insurance Company, ending thirty-first day of July, 1874. A. H. Dillon, jr., gen'l agent, at Baltimore, Md.

DR. CR.

To premium on renewals and policies collected.

No. of policy.	Life insured.	Amount of premium.	Interest.	How paid. Cash.	How paid. Dividends.
	Amount bro't forward	9,699 22	801 30	5,306 45	4,393 47
96581	Thomas B. H. Turner, 6 %	87 46		64 38	23 08
96623	William D. Hartman, "	66 33		45 57	20 76
99678	Herman Grote, "	53 99	sa.	45 29	8 70
104418	John Lind, 10%	22 35	sa.	16 60	5 75
104821	William F. Morris, "	458 80		314 40	144 40
105004	Lewis J. Groves, "	27 12		19 55	7 57
105005	William W. Fanton, "	32 47		25 37	7 10
105244	Richard B. Clarke, "	124 08		84 33	39 75
109587	Samuel E. Grove, "	166 62	sa.	124 57	42 05
109646	George T. Keen, "	55 72		42 77	12 95
113475	William R. Lincoln, "	270 45		207 40	63 05
113749	John Dibb, "	189 65	3 36	145 60	44 05
113806	Orville Ewing, jr., "	111 44	sa.	85 54	25 90
113922	Reuben S. Parks, "	89 78		69 14	20 64
116430	Gilmor Mendith, "	370 19	sa.	287 09	83 10
118919	George Russell, " (Held over)				
118952	James Knox, "	127 45		98 75	28 50
118964	Robert Cohen, "	512 50		385 55	126 95
119052	Daniel P. Magruder, "	280 40		218 20	62 20
119101	Jacob Gotthelf, " (Returned herewith surrendered for cash value to aps.)				
121213	John Booker, "	190 94	sa.	149 38	41 56
121483	George W. Craig, "	25 48		19 42	6 06
123533	Henry A. Wise, "	23 29		18 45	4 84
123534	Simon B. Conover, " (Returned herewith)				
123904	Edward H. Campston, jr., "	198 40	3 54	155 40	43
123905	John F. Mudd, "	40 97	sa.	33 02	7 95
124031	Andrew B. Coyle, "	24 22	sa.	19 38	4 84
124218	William C. Whittle, jr., " (Returned herewith)				
		13,249 83	808 20	7,981 60	5,268 22

152 CENTRAL NAT. BK. OF BALT. VS. CONN. MUT. LIFE INS. CO.

Monthly statement of receipts and disbursements on account of the Connecticut Mutual Life Insurance Company, ending thirty-first day of July, 1874. A. H. Dillon, jr., gen'l agent at Baltimore, Md.

DR. CR.

To premium on renewals and policies collected.				How paid.		By commissions and charges.		
No. of policy.	Life insured.	Amt. of premium.	Interest.	Cash.	Dividends.			
	Amounts bro't forward	13,249 82	808 20	7,981 60	5,268 22	Postage		16 00
126372	Samuel R. Waite, 25 %	121 11	Sa.	121 11		Exchange		7 50
129178	M. La Rue Morrison, "	109 32		77 32		(32) Expressage		2 50
129340	Frank G. Davidson, "	31 31		31 31		Med. examinations, 4 @ $5.00		20 00
129580	Fitz William Fox, "	119 85		119 85		Dividends		5,268 22
129675	Oscar P. Britton, "	21 70	Sa.	21 70		Loans on policies		177 00
129768	Jacob Campbell, "	485		340		(145) Commissions:		
129931	Benjamin F. Byelin, "	21 70	Sa.	21 70		On $637.85 @ 5 %	31 89	
130112	William N. C. Nellervitte, "	189 84		189 84		4,395.82 " 6	263 75	
				8,904 43		4,874.03 " 7	341 18	
				177		3,342.12 " 10	334 21	
				5,268 22		1,099.83 " 25	274 96	
		14,349 67		14,349 65				1,245 99
		808 20				Receipt for S. V., No. 124610, Davidson		32 00
						Certificate No. 194, Buck		32 10
						M. Murdock, notary public, for affidavit to answer in the case of Albert Grant vs. the Co		1 00
						Check No. 108, July 29		5,000 00
						" 117, herewith to balance		3,355 54
		15,157 85						15,157 85
	"Policy."							
127857	Thomas S. Sedgwick	Returned	herewith;	not taken.				

CENTRAL NAT. BK. OF BALT. VS. CONN. MUT. LIFE INS. CO. 153

449 Same day, statement of balances to the account of A. H. Dillon, jr., gen'l agent, furnished by Mr. O'Connor, 28th May, 1878, which statement is as follows, to wit:

LAW OFFICE OF JOHN CARSON,
65 FAYETTE STREET,
Baltimore, , 187 .

March 14th, 1872		$7,162 17
" 15,	"	Sunday.
April 2d,	"	$10,311 00
" 23d,	"	$6,180 00
June 25,	"	Sunday.
June 24,	"	$6,988.66
Octo. 28th,	" morning	$12,299 76

Evening 28th, $7,199.76.

April 3d, 1873	$11,913 20
Nov. 1st, 1873	$4,508 00
Nov. 14, 1873	Sunday.

Nov. 13, $5,608.00.

Nov. 29, 1873	$2,709 00
Dec. 11th, 1873	$5,279 00
June 1st, 1874	$8,742 23

On the 10th June, 1878, the following motion to dismiss the bill was filed:

In the circuit court of the United States for the district of Maryland, in equity.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company
vs.
THE CENTRAL NATIONAL BANK OF BALTIMORE, et al.

450 The solicitors of the Central National Bank of Baltimore, the above-named defendant, respectfully move and pray this honorable court to dismiss the bill of complaint of this complainant in this case as against the said Central National Bank of Baltimore, for want of jurisdiction to entertain the same, because of the dissolution of the said defendant corporation.

And in addition to the facts mentioned in the previous motion on this behalf, filed in this court on the 23d day of May, A. D. 1878, further show that on or about the first day of March, 1875, and before the removal of this cause into this honorable court all the property and assets of the said Central National Bank of Baltimore were distributed among its shareholders, and the said bank was wholly and finally closed, and that the said Central National Bank of Baltimore now no longer exists and has no corporate existence; all whereof will be fully established by proof if this honorable court will permit the same to be produced, and such proof is hereby respectfully tendered.

GEO. HAWKINS WILLIAMS,
O. W. MACHEN,
Solicitors for the Central National Bank of Baltimore.

451 U. STATES OF AMERICA,
District of Maryland, ss:

I, Robert Lyon Rogers, a commissioner of the United States, in and for the district of Maryland, do hereby certify that on this the 6th day of June, A. D. 1878, personally appeared before me James O'Connor, and being first by me duly sworn according to law, made oath that the matters and facts set forth and stated in the foregoing paper writing or motion are true as therein set forth and stated to the best of his knowledge and belief.

Given under my hand and seal at the city of Baltimore in the district of Maryland, this 6th day of June A. D. 1878.

[COMM'R'S SEAL.] ROB'T LYON ROGERS,
U. S. Commissioner for Maryland.

Whereupon the court passed the following order, overruling motion to dismiss, to wit:

June 6th, 1878.—The within motion overruled, having been filed after the case had been argued and submitted, and after the court had orally delivered its opinion in the cause.

WILLIAM F. GILES.

452 On the same day (10th June, 1878) the court made and passed the following decree, to wit:

In the circuit court of the United States for the fourth circuit, district of Maryland.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company of Hartford, Connecticut,
vs.
THE CENTRAL NATIONAL BANK OF BALTIMORE & Asahel H. Dillon, jr.

This cause standing ready for hearing, and having been argued by the solicitors of the respective parties to said cause, and having been submitted upon the bill, answer, pleadings, and other proceedings and evidence in the cause, and the same having been by the court heard, read, and considered;

It is, thereupon, this tenth day of June, eighteen hundred and seventy-eight, by the circuit court of the United States for the fourth circuit and district of Maryland, and by the authority adjudged, ordered, and decreed that the respondent, The Central National Bank of Baltimore, pay to the complainant, The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, the sum of eleven thousand dol-
453 lars and eighty-six cents ($11,000$\frac{86}{100}$), with interest thereon from the eighteenth day of July, eighteen hundred and seventy-four, until paid, and its costs in this cause to be taxed by the clerk of this court.

WILLIAM F. GILES.

On the 13th June, 1878, the following petition for rehearing was filed to wit:

In the circuit court of the United States in and for the district of Maryland. In equity.

THE CONNECTICUT MUTUAL LIFE INSURANCE CO.
vs.
THE CENTRAL NAT'L BANK OF BALTIMORE ET AL.

The petition of the defendant in the above case respectfully prays for a rehearing of the above cause upon the following grounds, to wit:

First. That in addition to the errors in leete relied upon in argument, namely, that the complainant being possessed of knowledge of each and every item of money claimed, with the bank book containing the same by them given in evidence, that no pretext existed for the filing of a bill for an account, and that the action at law for money had and re-
454 ceived was an allsufficient remedy, if any they had. That the balance of money claimed, even if due, was in no manner so impressed with a trust as between the complainant and the defendant, however otherwise may be the case between said complainant and said Dillon, as to give jurisdiction to a court of equity in the matter of a trust. That if so, it not being denied, and being also fully proved, that the said bank account was of the usual kind as kept with bankers, and its deposite was of a thoroughly mixed fund, embracing the money of others other than any of the parties to this cause, and being so mixed had lost all ear marks, and all possibility of being legally traced.

That in addition to all that, these petitioners submit to your honor, that without any reference to a master, the decree ascertains the amount as due from this defendant to be the sum of eleven thousand dollars and eighty-six cents. That in no state of case, it is respectfully submitted, can these figures be accurate for the following reasons, to wit: That by the account filed by the complainant as between it and the codefendant Dillon, it was conceded that by the said account of the 31 May, 1874, ending on that day, the complainant owed Dillon the sum of
455 1,100$\frac{45}{100}$$, assuming the cheque of eight thousand dollars to have been paid, but as it was not paid then by their conceded account of their mutual dealings, which no one disputes, on the said 31 May, and ending therewith, the said Dillon but owed said complainant 6,899.55$, and as on that day, by the bank book as balanced, Dillon had to his credit 8,742.23, then even conceding all plaintiff's claim and theories to be as pretended, deducting the conceded balance, 6,899.55, the residue, confessedly on the 1 June $1,842.68, whoever it may have belonged to, was not the money of the complainant. But as the amount deposited from the 31st May, the 12 June (vide Exhibit I. O. C., No. 1 and the bank book), the day on which the account was closed, was $4,212.84, less the amount chequed out by Dillon during that time 1,954.21—$2,258.63 Conceding every penny of this to have been complainant's money, of which there is no evidence, and which is denied, and adding it to the balance of the 31 May, of 6,899.55$, on no event upon any theory of the case and state of the evidence could the amount in bank *be* due to complainant be beyond the sum of 9,158.18, nor pretended.

456 It is further in evidence that from the 31 May to 12 June, the whole receipts of Dillon for said complainant were but 4,940.24$, and add this to the amount less the cheques, the balance could not be pretended to be greater even then than 9,885.59$, and as these figures are not disputed but conceded, even upon the complainant's theory, until contradicted, the decree could not rightfully be for 11,000.86$.

And your petitioner further respectfully submits that even upon the theory (not admitted by it but relied on by the complainant) that the complainant has an equity to have it ascertained how much of the balance claimed by complainant to stand to the credit of A. H. Dillon, jr., general agent, being the result of a blended bank account of money derived from several scources, the complainant is equitably interested in the same is not ascertained by the evidence yet in the cause, and the question needs to be determined by reference to a master.

For which reasons and because of other manifold errors of law and fact appearing on the record and want of equity in other respects of the complainant, and also of the want of jurisdiction of this honorable court to decree against the said Central National Bank of Baltimore,
457 by reason of its dissolution, your petitioner respectfully prays that the said cause be reheard, and that in the mean time the decree be suspended until the further order of the court; and as in duty, &c.

GEO. HAWKINS WILLIAMS,
A. W. MACHEW,
For Petitioner.

On the 19th June, 1878, the following answer was filed, to wit:

In the circuit court of the United States for the fourth circuit, district of Maryland. In equity.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company
vs.
THE CENTRAL NATIONAL BANK ET AL.

The answer of the complainant in the above cause to the petition for a rehearing filed by the respondent, the Central National Bank, on the 13th day of June, 1878, respectfully shows:

First. That all the grounds for a rehearing upon which said petition is based, save the single ground of error as to the amount of the decree, have been heretofore fully presented to this court in the argu-
458 ment of said cause, and have been deemed by this court wholly insufficient, and your complainant respectfully submits that no error in the premises has been committed by this court.

Second. The respondent as to error in the amount of the decree makes statements which are clearly erroneous.

It assumes that Dillon's balance in bank on May 31st, 1874, was $8,742.23, whereas it was $7,512.67. For proof of this see admission, testimony, page 44. This error grows out of the form in which Exhibit J. O. C. No. 1 was prepared. It begins with two balances, viz: $8,742.23 and $1,229.56. Subtract one from the other and you have the above balance, $7.512.67, as conceded on page 44 of testimony

Dillon owed compl't. May 31st, 1874, $7,428.74. Testimony, p. 44.

Now, assuming that Dillon owed the co. May 31, '74, $6,899.55, for the sake of the argument, then the account would stand:

Def't's statement.	*True statement.*
$8,742.23	$7,512.67
6,899.55	6,899.55
$1,842.68	$ 613.12

Of course we deny that it can be assumed that Dillon only owed the co. $6,899.55 on May 31st, 1874; it was $7,428$\frac{74}{100}$. Take the next statement of deposits and checks from June 1st to June 12th,
459 1874. The deposits, $4,212.84, are correct, but the checks are wrongly stated at $1,954.21, because this sum embraces the above balance of $1,229.56. I have shown above this must come off:

$1,954.21
1,229.56

$ 724.65

The checks from June 1st to June 12 were only 724\frac{65}{100}$.

	Def't's statement.	*True statement.*
Total deposits June 1st, '74, to June 12, '74,	$4,212.84	$4,212.84
Total checks do. do.	1,954.21	724.65
Co.'s money	$2,258.63	$3,488.19

$ 7,428.74
3,488.19

$10,915.93

Now says the defendant add	$2,258.63	$ 3,488.19
And debt above	6,899.55	6,899.55
	$9,158.18	$10,387.74

That, then, $9,158.18 is all the co. can claim.

We say, upon your own theory, add the $3,488.19 to the admitted debt, $6,899.55, and you have of our money in bank, on your own hypothesis, $10,389.74. The petition says there is no proof that these deposits, $4,212.84, were the complainant's money; we say it is so proved beyond cavil, Mr. Orndorff's testimony, p. 43, 44, and Exhibit W. W. O.

But, again, says the petition, the whole receipts from June 1 to June 12th, 1874, were $4,940.24, and states the acc't thus:

	Def't's statement.	*True statement.*
Total receipts	$4,940.24	$ 4,940.24
Less checks	1,954.21	724.55
	2,986.03	4,215.59
Add debt	6,899.55	6,899.55
	$9,885.58	$11,115.14

460 So that, upon this hypothesis of the defendant, our claim, instead of being $9,855$\frac{58}{100}$, is $11,115$\frac{14}{100}$ more than the decree gives us.

Third. We claim that the true amount of the decree would be $11,000$\frac{86}{100}$, for the following reasons:

1st. Dillon's total receipts for the comp't from March 1st to June 1st, 1874, were $45,021.00; Dillon's total deposits from March 1 to June 12th, 1874, were 44,727.61. In these deposits of $44,727.61 there was in-

cluded, which was not the comp's money, $3,539.71 (test. p. 43, 44, Exhibit W. W. O.; test. pg. 44, 49, 50; test. p. 50, 51, 79). This entire sum of $3,539.71 was paid out by Dillon before June 1st or June 12th, 1874; consequently what remained in the bank on June 12th, 1874, was necessarily the compl't's money, viz, $11,000.86.

2. After June 12th, 1874, the compl't intervenes and claims this $11,000$\frac{86}{100}$ as its money. It clearly had the right to do so, and Dillon was bound to look to the compl't for any claim he had for comm's or expenses as against the fund, and the bank could claim no more than Dillon could. The compl't had the right to take the whole fund irrespective of any claim of Dillon. But on and after June 12th, 1874, what claim had Dillon vs. the complainant touching this $11,000$\frac{86}{100}$?

461 Dillon then owed the complainant much more than this $11,000$\frac{86}{100}$. Dillon admits that all this sum belongs to the compl't (test. p. 23). By his reports for May and June he admits he owes the complainant this $11,000$\frac{86}{100}$; he actually pays it to them, so far as he can, by crediting himself with this $11,000$\frac{86}{100}$, as in bank belonging to complainant. In the May report he credits $8,000.00 of it, and in the June reports he credits the balance as theirs, $3,000$\frac{86}{100}$ (test. p. 24). Dillon, by his June report, owed the compl't $15,570.70.

He pays it thus:

Charges, expenses, and dividends	$6,918 73
Residue of $8,000 check (May report)	1,100 45
Balance in bank (after $8,000 check)	3,000 86
Check (new acc't) not on C. N. B	4,550 66
	15,570 70

Had the $8,000 check credited in the May report been paid, Dillon would then by that account have overpaid the complainant $1,100$\frac{45}{100}$, but it was not paid, and to pay his indebtedness to the compl't for June, 1874, he had to assume that the $8,000 was paid in law, he had to take credit for the overpayment of $1,100$\frac{45}{100}$, and a further credit for $3,000$\frac{86}{100}$, the residue of the $11,000$\frac{86}{100}$ in bank, assuming that the $8,000 was paid. Here then we have in bank on June 12th, 1874,

462 $11,000$\frac{86}{100}$ of our own money; Dillon then owes us that amount, concedes the money in bank to be ours, and yet the bank, claiming what Dillon has not done or cannot do, disputes that this sum is ours, and it takes the whole amount to pay us what Dillon conceded he then owed us.

4. But it is insisted that by the May report when Dillon sent the $8,000 check he overpaid the co. $1,100$\frac{45}{100}$, and therefore only owed it $6,899$\frac{55}{100}$. This is not the fact. The reports were usually sent by the 20th of the following month. The May report contains the $8,000 check, yet this check was not drawn until the 10th of June (test. p. 23), thus showing that this report could not have been made until after June 10th, 1874.

Now, between the 1st and 10th of June, 1874, Dillon had collected between $4,000 and $5,000 of the co.'s money and owed it to the co.; how then could he have only owed the co. $6,899$\frac{45}{100}$?

The May reports only shows the collections received in May for renewals due in May or held over from April; it would not show any premiums due in June, and paid by anticipation in May, nor could it possibly show the state of the account between Dillon and the company when the report was made.

Orndorff swears (test. p. 44) that on the 31st May, 1874, Dillon's

463 debt to the co. was not $6,899 45/100 but $7,428 74/100, and this could easily be so, if in May he collected in advance any of the June renewals; and when the report of May is made after June 10th, 1874, Dillon owes the co. nearly $5,000 more.

Again, to make the debt $6,899 45/100 and the overpayment $1,100 45/100, as of May 31st, 1874, you must allow Dillon $1,372 10/100 of commissions, as claimed in the May report. How can that be done and thereby change the title of the money in bank, and make a portion of it Dillon's individual money, when D. has in his hands unaccounted for the difference between $7,428 74/100 and $6,899 45/100, and all the June renewals near $5,000. The complainant further represents that as the bank has never paid the $8,000 check mentioned in the May report, the accounts between the co. and Dillon are all open, and that you cannot take these accounts separately but must take them together.

It is therefore submitted that the questions to be decided are:

First. Is the $11,000 86/100 the money of the co.? We have proved it was and is.

Second. Does it require all the money to pay the debt which Dillon owed the company on and after June 12th, 1874? We have
464 shown it does, and Dillon concedes it, and does not claim any of the money; by giving the co. all this money we only get our debt from Dillon.

We submit therefore the amount of the decree is correct.

JOHN CARSON,
Sol'r for Compl't.

On the 27th June, 1878, the court passed the following order, to wit:

THE CONNECTICUT MUTUAL INS. CO.
vs.
THE CENTRAL NATIONAL BANK ET AL.

On the request of the counsel for the defendant I have re-examined the evidence in this cause as to the amount due by Asahel H. Dillon, general agent, to the complainant, and find that the amount stated in the decree passed by me in this case is the true amount, and I decline to alter the said decree.

WILLIAM F. GILES.

On the 28th June, 1878, the following prayer of appeal on the part of the Central National Bank of Baltimore, with notice to and refusal
465 of codefendant to unite therein, and order of court thereon granting severance and allowing appeal of said Central National Bank filed.

In the circuit court of the United States in and for the district of Maryland. In equity.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company
vs.
THE CENTRAL NATIONAL BANK OF BALTIMORE et al.

To the honorable the circuit court of the United States in and for the district of Maryland.

The defendant, the Central National Bank of Baltimore, prays leave

to appeal, from the decree of the court on the above case, and herewith files a bond to entitle it to a supersedeas of said decree until the matter be heard in the appellate court.

And its codefendant having been notified and having refused to unite in any manner in said appeal, as will appear by said written notice and refusal hereto attached it prays also for the usual order of summons and severance in such case and as in duty, &c.

GEO. HAWKINS WILLIAMS,
Solicitor for Central Nat'l Bank of Balt'o.

466 In the circuit court of the U. S. in equity in and for the district of Maryland.

THE CONNECTICUT MUTUAL LIFE INSURance Co.
vs.
THE CENTRAL NAT'L BANK OF BALTIMORE et al.

To A. H. DILLON, Esq.,
Codefendant:

SIR: The Central Nat'l Bank of Baltimore is about to pray an appeal from the decree in the above cause, of which you are hereby notified, and you are hereby also requested to appear and join therein, that the said appeal may be duly prosecuted within the time prescribed by law.

GEO. HAWKINS WILLIAMS,
Solicitor for Central N. Bank.

JUNE 27TH, 1878.

To the Central Nat'l Bank of Baltimore:

Notice of the above is hereby admitted, and in reply thereto take notice that I hereby refuse to appear to prosecute said appeal or in any manner to join therein; and that the same if taken must be by said Central Nat'l Bank alone and on its own behalf.

28 June, 1878.

A. H. DILLON,
By S. T. WALLIS,
His Solicitor.

467 Ordered this 29th day of June, A. D. 1878, that severance as prayed be had and that the appeal be allowed on behalf of the Central National Bank of Baltimore.

WILLIAM F. GILES.

29th June, 1878, the following appeal bond was filed, to wit:

Know all men by the presents that we The Central National Bank of Baltimore, James O'Connor and Edward M. Hardy, of the State of Maryland, are held and firmly bound unto the Connecticut Mutual Life Insurance Company in the full sum of twenty-eight thousand dollars lawful money of the United States to be paid unto it or its assigns, to which payment well and truly to be made and done we hereby bind ourselves and our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals and dated this twelfth day of June, in the year eighteen hundred and seventy-eight.

Whereas heretofore, to wit, on the day of in the year eighteen hundred and seventy eight, a decree was rendered by the
468 circuit court of the United States for the fourth circuit in and for the district of Maryland sitting in equity, in a cause wherein the said Connecticut Life Insurance Company was complainant, and said Central National Bank of Baltimore and one A. H. Dillon, jr., were defendants, against the said Central National Bank of Baltimore.

And whereas the said The Central National Bank of Baltimore has entered an appeal to the Supreme Court of the United States from said decree,

Now the condition of the above obligation is such that if the said The Central National Bank of Baltimore shall well and truly prosecute with effect its said appeal and pay to said The Connecticut Mutual Life Insurance Company or assigns all damages and costs if it fail to make the same good, by said circuit court decreed, and also such costs and charges as may be answered unto said company by the Supreme Court of the United States in case the said The Central National Bank shall fail to make good the said appeal, then the above obligation to be void and of none effect, otherwise to be and remain in full force and virtue in law.

469 CENTRAL NATIONAL BANK OF BALTIMORE.
JAMES O'CONNOR. [SEAL.]
President.
JAMES O'CONNOR. [SEAL.]
E. M. HARDY. [SEAL.]

Witness as to the signature of Central Nat'l Bank, Baltimore, James O'Connor, pres't; of James O'Connor and of E. M. Hardy, F. M. Beck.

Which said bond is thus endorsed, to wit:

Bond approved June 29th, 1878.

WILLIAM F. GILES.

It is thereupon ordered by the court here that the record and proceedings in the cause aforesaid, with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same are transmitted accordingly.

Test:

JAMES W. CHEW, *Clerk.*

470 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

To the Connecticut Mutual Life Insurance Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, on the second Monday of October next, to answer the appeal of the Central National Bank of Baltimore, entered in the clerk's office of the circuit court of the United States for the fourth circuit in and for the Maryland district, in a cause wherein the Connecticut Mutual Life Insurance Company is the complainant, and the Central National Bank of Baltimore is the defendant, in equity, to show cause, if any there be, why the decree rendered against the said Central National Bank of Baltimore in the said cause should not be corrected and speedy justice should not be done to the parties in this behalf.

Witness my hand and seal this 28th day of June, in the year of our Lord one thousand eight hundred and seventy-eight.

WILLIAM F. GILES. [SEAL.]

Service acknowledged.

JOHN CARSON,
Sol'r for Appellee.

471 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

I hereby certify the aforegoing is truly taken from the record of proceedings of the circuit court of the United States for the fourth circuit in and for the Maryland district.

In testimony whereof I hereunto subscribe my name and affix the seal of the said circuit court this 10th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.]

JAMES W. CHEW,
Clerk of said Circuit Court.

(Indorsement on cover:) No. 283. The Central National Bank of Baltimore, appellant, vs. The Connecticut Mutual Life Insurance Company, Maryland C. C. U. S. Filed 17th October, 1878.

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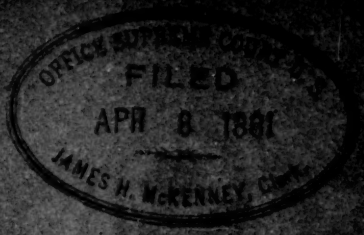

Supreme Court of the United States.

No. 233.

THE CENTRAL NATIONAL BANK OF BALTIMORE, APPELLANT,

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

BRIEF OF APPELLANT.

THE CENTRAL NATIONAL BANK OF BALTIMORE, APPELLANT.

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

SUPREME COURT OF THE UNITED STATES,

No. 283.

BRIEF FOR APPELLANT.

STATEMENT.

This is the case of a bill in Equity, filed by an Insurance Company against a National Bank, to recover the balance of an account which existed between an agent of the complainant and the bank; upon the ground that the deposits from which the balance arose were, as alleged, the complainant's moneys. Before any claim was made by the Connecticut Mutual Life Insurance Company to the fund, the Bank, at the maturity of a promissory note, made by the agent, drawn payable at the bank, and discounted by it, had charged up the amount against the agent in the account. No cause of controversy would exist, had not the Insurance Company denied the right of the bank so to debit the amount of the note.

The question therefore upon the merits is as to the right of the Insurance Company to recover against the Bank under the circumstances of this case, both parties being originally creditors of the same debtor, Dillon, and the Bank, before notice of the claim of the Insurance Company, having, in the ordinary course of banking business, charged against Dillon's account his matured note which it held.

Besides that question however, and prior to it in order, are several others, some of which, at least, are believed to be of considerable importance apart from the interests involved in the present case. The principal of these are—

Was there not an adequate *remedy at law* for the plaintiffs' case, rendering unnecessary a resort to Equity?

Had the Court jurisdiction to give a decree against the Central National Bank of Baltimore after the *dissolution* of that corporation in one of the modes provided by the organic law, by going into liquidation and becoming closed by the vote of two-thirds of its shareholders, depositing with the Treasurer of the United States the money to redeem its circulating notes, and ceasing to exist for all the purposes for which it was originally called into being?

Was it just and equitable to give the decree in question while the complainant was prosecuting in the same court another suit for the same cause against the shareholders under the Act of 1876 ch. 156, to which suit it had, anomalously, made the Central National Bank, also, a party defendant?

Was it lawful to pass such decree in favor of the Complainant, while there were pleas of the Appellant, covering the whole case, which had not been set down for argument nor traversed?

Do not the other irregularities in the rendition of the decree which are disclosed in the record constitute sufficient ground, if there were none other, for reversing it?

The suit was instituted in the Circuit Court of Baltimore City, a court of Equity of the State of Maryland, and afterwards removed into the Circuit Court of the United States for the District of Maryland.

The original bill of complaint was filed in the State court on the 18th of July 1874. It averred that one Asahel H. Dillon, Jr., in the year 1864, was appointed by the said Connecticut Mutual Life Insurance Company its agent for a territory including the State of Maryland; that Dillon in that year opened an office in Baltimore, and thenceforward continued to act as the complainant's agent; that it was part of his duty to receive all premiums accruing to the Complainant upon policies issued to residents of the said territory; that the premiums received were usually forwarded by him twice a month, and were all fully accounted for and paid to the complainant at the close of each month, the mode of payment being by checks, drawn by Dillon upon a Baltimore bank to the order of the secretary of the complainant; that on the 1st of April, Dillon, who previously had kept a bank account in the Chesapeake Bank, opened an account with the Central National Bank of Baltimore, which had then recently been created under the National Bank Act; that the form or titling of the account was, "Central

National Bank in account with A. H. Dillon, jr., genl. agt."; that Dillon from time to time deposited to the credit of the said account all the money he received as complainant's agent, and chequed thereon, paying the expenses incident to the agency, and remitting cheques twice a month payable to the order of the complainant's secretary; that on the 10th of June 1874, Dillon drew a check on the said Central National Bank for $8,000 to the order of Jacob L. Greene, secretary of the complainant, and remitted it to the home office at Hartford, Connecticut, which cheque was presented for payment on the 12th of June 1874, but refused payment by the said Bank; that on the day of such presentment thereof there was to the credit of the said account $11,000.86, which, however, the said Bank claimed had been reduced by the amount of a note payable June 1st, 1874, for $10,000, of which said Dillon and his wife were the makers, and which, according to information in writing given to Dillon by the bank, had been, by order of the board of directors of the latter, charged up against the said Dillon in the said account. The bill also averred that, on the 24th day of June 1874, it notified the bank that the said sum of $11,000.86, so on deposit, was the money of the complainant, being premiums collected by Dillon as its agent in the months of May and June of that year, and demanded payment of said sum from the said bank, which it refused to make, upon the pretension that the said money was Dillon's individually and that application of it had been made to the payment of said Dillon's note. The bill charged knowledge by the Bank that the said account was really and in effect an account between the complainant and the Bank, although kept in the name of A. H. Dillon, jr., general agent, and that the money deposited therein was the money of the complainant. The complainant further charged "that said sum of $11,000.86 was its money and property exclusively, and belonged exclusively to the complainant, and was the proceeds of premiums collected by Dillon during the months of May and June last;" of all which, it charged the bank had full knowledge. It charged that the Bank was by reason of the premises "a trustee for the complainant" of said sum of $11,000.86, and that its refusal to pay the same to the complainant and attempt to apply it to the payment of the note was a breach of trust on its part.

The bill prayed an account, and that the said Central bank might be held as trustee and decreed to account to the complainant for said sum of $11,000.86, that said sum should be decreed trust

funds belonging and payable to the complainant, and for general relief.

Printed Record, pp. 1–6.

Process of subpœna was issued against the Central National Bank of Baltimore, and was returned as served upon it by service on James O'Connor as president. Print. Rec. p. 7.

An Answer was filed for the Central National Bank on the 7th of November, 1874. It averred that Dillon, besides his agency for the Complainant, was engaged in other business, denied knowledge by the Defendant of the alleged monthly accounting between the Complainant and Dillon, admitted that an account purporting to be with "A. H. Dillon, Jr. general agent," was in fact opened, averred that the latter words "general agent," were merely part of the description of the depositor and in no manner indicated that the account was for a principal, that the Bank was ignorant as to the sources whence the several deposits came, and that in fact much of the money had no relation to the complainant or its business.

The Answer stated that on 9th December 1873 Dillon applied to the bank, as one of its customers, for a loan of $10,000, that the bank in consideration of his being such customer and of his wife's being a stockholder, lent him the money upon the terms of an agreement, C. N. B. No. 1, (Printed Rec. p. 10,) and received from him and his wife their joint and several promissory note, dated November 29th, 1873, at six months, for $10,000, payable at the Central National Bank of Baltimore, (for the note, see Exhibit C. N. B. No. 2, Printed Rec. p. 11 ;) that the note, at maturity, not being paid, either in whole or in part, nor renewed, was charged to said account ; that this was prior to the presentation of the said cheque of $8000, which was not paid, there being no sufficient balance to the credit of the account to meet it.

The Answer denied that the moneys deposited in the account were trust moneys. It also denied all privity of contract, legal or equitable, between the Complainant and Defendant, and suggested that even upon the allegations of the bill, Dillon was a necessary party.

Finally, the Answer insists that "the Complainant, in stating the exact amount to the credit of said Dillon's account, and not questioning any of the items therein, save the debit of said note of $10,000, so charged as aforesaid, deprives itself of all right to an accounting, and its remedy, if any, upon its own showing, is

complete and adequate at law, and in no event could be cognizable in equity." And the respondent therefore denied the jurisdiction of the Court as to the matters complained of. Printed Rec. pp. 8–10.

The Complainant, on the 4th of March 1875, filed an amended bill, which incorporated the allegations of the former bill, and further stated that the said Central National Bank of Baltimore had taken proceedings under the Act of Congress under which national banks are organized to wind up its business and cease to act as a national bank, charged that, after redeeming its circulating notes, the said bank would be entitled to withdraw the U. S. bonds deposited by it as security therefor, and distribute the bonds or the proceeds among the stockholders, that the said Bank had no means to which the Complainant could resort for the satisfaction of its claim, except said bonds, that if the same were distributed among the stockholders, the Complainant would be subjected to a multiplicity of suits, and that if the Bank were permitted to proceed to wind up its affairs under the Act of Congress the said bonds would be distributed before the rights of the Complainant would be determined, and before it could enforce the satisfaction of its claim. The amended bill prayed an injunction against the Central National Bank, to restrain it from distributing its assets without retaining subject to the order of the court a sufficient amount to satisfy the demand of the Complainant. It also prayed subpœna against Asahel H. Dillon, Jr., as a co-defendant.

Printed Rec. pp. 12–15.

To this amended bill, the Bank (on the 27th of April 1875) filed three pleas, as follows:

(1) That the plaintiff is not in any sense a creditor of the defendant.

(2) And for a further plea, that there never was, nor is, any privity between the plaintiff [and the defendant] as to the various matters alleged in said bill.

(3) And for a further plea that this court has no jurisdiction as to the matters alleged; the remedy, if any, being complete and adequate at law.

And the pleas concluded with a prayer for judgment whether the Central National Bank should be compelled to make further answer to the bill, and to be dismissed with its costs.

Printed Rec. p. 17.

On the 1st of June 1875, a petition was filed by the Connecticut Mut. Life Insurance Company, stating that the Central National Bank had wholly ceased to transact business as a bank, vacated the office it formerly occupied, and removed its function and effects; that it was the intention of the Bank forthwith to distribute its funds and effects among its stockholders, and as part thereof the money of the Complainant so withheld, and that the Complainant, without the intervention of the court, would be unable without great delay and expense, if at all, to recover the sum so unlawfully appropriated by the said bank. The petition contained a further averment in these words: "And your petitioner avers that since the filing of the amended bill your petitioner has *ascertained*, and now avers, that the amount of its money so fraudulently appropriated by the said defendant is the sum of $11,000.86, which your complainant avers the said bank now holds as charged in the bill." The petition prayed that the Central National Bank might be compelled to bring into court the said sum of money.

Printed Rec. p. 18.

The Central National Bank then filed the additional (4th) plea, that it was incorporated under the Act of Congress approved June 3rd, 1864, and its supplements, and as such was exempt from process of injunction as prayed in the amended bill. Print. Rec. p. 19.

The motion for an injunction was not afterwards pressed, and, excepting the filing of an answer by the defendant Dillon (which, however, disappeared before the hearing, and is not in the record,) and the taking of some depositions relating to the controversy on the merits, no further proceedings were had until the 10th of April 1877, when, upon the petition of the Central National Bank under the Act of 1875 Sess. 2 ch. 137, the case was removed into the Circuit Court of the United States for the District of Maryland.

Printed Rec. pp. 20, 21.

The evidence taken before a Commissioner of the State Court was returned into the United States Circuit Court on the 5th of December 1877.

On the 23rd of May 1878, a motion for the dismissal of the bill of complaint was made by the solicitors for the said Central National Bank, on the ground that that corporation went into voluntary liquidation under the 42nd and succeeding sections of the Act of Congress, 1864, Sess. I, ch. 106, and Revised Statutes of the United States, sections 5220, 5221 and 5222, on the 15th day of

July 1874, and was dissolved; and on the further ground that the Complainant had, on the 8th of January 1878, filed in the Circuit Court of the United States for the District of Maryland a bill of complaint under the second section of the Act of Congress, approved June 30 1876, chapter 156, "authorizing the appointment of receivers of national banks and for other purposes," praying process as well against the said Central National Bank of Baltimore as against the persons who were shareholders at the time it went into voluntary liquidation, and seeking the enforcement of the same demand sought to be enforced in this case, which bill was still pending.

Printed Rec. pp. 134, 135.

The motion was supported by documentary proofs of the organization and subsequent dissolution of the defendant Bank, certified under the seal of the Comptroller of the Currency.

Printed Rec., pp. 135–42.

The Answer of the Complainant to this motion, neither admitting or denying the facts alleged as to the liquidation proceeding, denied that the bank was dissolved or had become extinct. It *admitted* the filing of the bill of the 8th January 1878, mentioned in the motion, and that it was still pending, and described it as a bill "against the stockholders, to which bill the said bank under the rules of equity pleading was made a party."

Printed Record, p. 142.

The evidence produced consisted of the Organization Certificate, C. N. B. No. 1, Printed Rec., pp. 135–7.

Articles of Association, C. N. B. No. 2., Print. Rec., p. 137.

Certificate and notice of vote to go into liquidation, and notice to creditors. C. N. B. No 3 and C. N. B. No. 4, Print. Rec , p. 140.

Certificate of deposit with the Treasurer of the United States of the sum required for the redemption of the outstanding notes of the bank. C. N. B. No. 5, Print. Rec., p. 141.

Final certificate, C. N. B., No. 6, Print. Rec., pp. 141, 142, which is as follows:

TREASURY DEPARTMENT,
Office of Comptroller of Currency,
WASHINGTON, *January 15th,* 1876.

This is to certify that the Central National Bank of Baltimore, Md., went into voluntary liquidation on July 15, 1874, under sec-

tions 5220 and 5221 of the Revised Statutes of the United States, and on January 8th 1875 deposited legal tender notes with the Treasurer of the United States for the full amount of its outstanding circulation as provided in section 5222 of the Revised Statutes, whereupon the bonds deposited by the association for the purpose of securing its circulating notes were delivered to the bank, thus finally closing its connection with this department.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents at the City of Washington, in the District of Columbia, this 15th day of January A. D. 1876. JOHN JAY KNOX,

[Seal.] Comptroller of the Treasury.

The facts as to the dissolution are also proved in the testimony of James O'Connor, pp. 91–94, 113, and Exhibits Depositions W. S. P., Nos. 1, 2 and 3, Print. Rec. pp. 132–4.

The Court, Giles, J., upon hearing, overruled the motion to dismiss.

Printed Rec. p. 142.

On the 25th of May 1878 the complainant's solicitors moved that the hearing of the cause on the merits be proceeded with, and the court so ordered, notwithstanding the fact that no answer of the defendant Dillon appeared among the papers in the cause; (Rec. p. 143;) and regardless also of the fact that the case was not at issue.

Afterwards, on the 30th of May, 1878, the complainant prayed leave, *nunc pro tunc*, to file a general replication to the original answer, to file a replication to defendants' first plea, and to deny the legal sufficiency of defendants' 2d and 3d pleas, and set the said two pleas for argument. Printed Rec. p. 143.

The court granted permission to file replication; and overruled the application for permission to set down pleas 2 and 3. Printed Rec. p. 143.

No replication, however, was actually filed either to the 1st plea or to the Answer, and the record remained in its previous condition.

The other pleas, that is to say, the 2d plea, of want of privity between the parties—the 3d plea, that the remedy was complete and adequate at law, and that the court therefore had no jurisdiction—and the 4th plea of the Act of Congress relating to National Banks, all stood neither set down for argument nor traversed.

A good deal of Testimony was taken in the cause, which will be found in the Record. The effort of the Insurance Company was to show, first, that the bank account in question, although its name did not appear in it, was actually its own; and secondly, that the Bank was chargeable with knowledge of the fact. It is claimed on behalf of the appellant that neither endeavour was successful, and that the evidence shows, on the contrary, that Dillon, carried on other business than that of his agency for the Appellee, and used the account in question for all his purposes, and that the bank was made to regard it, and did regard it as his private account, at his disposal as much as the account of any of the bank's customers was subject to the disposition of such customer, and dealt with him upon that footing always. It was proved that the joint and several note for $10,000, dated Nov. 29th, 1873, of Dillon and his wife, payable 6 months after date at the said Central National Bank, (Printed Record p. 11) not being otherwise paid, was, at maturity charged up against Dillon in this account—the only one he then had with the Bank, and that up to this time the Bank had received no notification from the Insurance Company, and no information from any source, that it claimed any interest in the account. It further appeared that after so charging up the note, the whole balance remaining to the credit of the account at the time when the claim of the Insurance Company was first made, was $1,000.86. Testimony of N. F. Williams, Printed Record page 39, Leary, page 50, and Reed, pages 47 and 59.

More particular reference to the evidence upon the merits, is made in the argument part of this Brief.

On the 10th of June 1878 the Court passed its decree adjudging that the Central National Bank of Baltimore pay to the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, the sum of $11,000.86, with interest thereon from the 18th day of July 1874 and costs. Printed Rec. p. 155.

From this decree the Central National Bank of Baltimore appealed. Printed Rec. p. 160.

ASSIGNMENT OF ERRORS.

The said decree of the Circuit Court of the United States for the District of Maryland is erroneous

1. In that the Court below, as a court of Equity, had no jurisdiction to grant the relief sought by the Complainant; because

tions 5220 and 5221 of the Revised Statutes of the United States, and on Jauuary 8th 1875 deposited legal tender notes with the Treasurer of the United States for the full amount of its outstanding circulation as provided in section 5222 of the Revised Statutes, whereupon the bonds deposited by the association for the purpose of securing its circulating notes were delivered to the bank, thus finally closing its connection with this department.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents at the City of Washington, in the District of Columbia, this 15th day of January A. D. 1876. JOHN JAY KNOX,

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Afterwards, on the 30th of May, 1878, the complainant prayed leave, *nunc pro tunc*, to file a general replication to the original answer, to file a replication to defendants' first plea, and to deny the legal sufficiency of defendants' 2d and 3d pleas, and set the said two pleas for argument. Printed Rec. p. 143.

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From this decree the Central National Bank of Baltimore appealed. Printed Rec. p. 160.

ASSIGNMENT OF ERRORS.

The said decree of the Circuit Court of the United States for the District of Maryland is erroneous

1. In that the Court below, as a court of Equity, had no jurisdiction to grant the relief sought by the Complainant; because

there was a clear, adequate and complete remedy for the plaintiff's case at law.

2. In that the Court had no jurisdiction to give such decree against the said Central National Bank of Baltimore; because previously thereto, the said banking corporation was *dissolved*, having gone into liquidation and become closed by the vote of its shareholders owning two-thirds of its stock, pursuant to sections 5220 and 5221 of the Revised Statutes of the United States; which vote being taken on the 15th day of July 1874, due notice thereof was thereupon given to the Comptroller of the Currency, and publication made according to the requirements of the said section 5221, and the said Central National Bank of Baltimore on the 8th day of January, 1875, deposited with the Treasurer af the United States lawful money of the United States sufficient to redeem all its outstanding circulation, as provided in section 5222 of the said Revised Statutes, and thereupon its assets and property were divided among its shareholders, and the said Central National Bank of Baltimore ceased to have any corporate existence; as appears by the proceedings and proofs in this cause; see Printed record, pages 134 to 142, and the said Exhibits C. N. B. Nos. 1, 2, 3, 4, 5 and 6; Print. rec. pages 135 to 142; testimony of James O'Connor, Printed record pages 91 to 94, and 113; Exhibits W. S. P. Nos. 1, 2 and 3, Printed record pages 132–4; and admissions in the amended bill of complaint, Printed record, page 14, and Complainant's Petition, Printed record, page 18.

3. In that in the condition of the pleadings a decree could not regularly and rightly be rendered against the Appellant.

4. In that the said sum of $11,000.86, decreed to be paid by the appellant, with interest, was not, upon the evidence in the case, justly or equitably due from the appellant to the said Connecticut Mutual Life Insurance Company, nor was any interest thereon due; and the said decree is wholly contrary to equity and justice; and it was error therefore to sign and enter the same.

5. In that the Court below did not allow the Appellant the credit to which it was entitled of $10,000 as of June 1st 1874.

6. It was error not to dismiss the bill of complaint of the said complainant.

7. The said 2nd, 3rd and 4th pleas of the Appellant to the amended bill not having been replied to, nor set down for argument, by the complainant, and, also, although leave was obtained to file a replication to the appellant's first plea, none having been in fact filed thereto by the complainant, the truth and sufficiency of the said several pleas stood admitted by the Complainant, and, according to the practice in equity, and Rule 38 of the Rules of Practice for the Courts of Equity of the United States prescribed by the Supreme Court, the bill of the complainant ought to have been dismissed as of course, and it was error to pass the said decree in favor of the complainant.

8. Each of the said pleas of the Central National Bank of Baltimore, and more particularly the 1st, 2nd and 3rd pleas respectively, being a complete answer to the Complainant's bill, to which the same were pleaded, and their truth and sufficiency being admitted by the Complainant, the decree should have been a decree for the said Central National Bank of Baltimore, and dismissing the bill of complaint.

9. It was error to pass the said decree, because the untraversed pleas of the Appellant were not only admitted by the complainant's omission to take issue upon them, but were sustained by the proofs in the cause, and completely met the plaintiff's case; and because the plaintiff is not in any sense a creditor of the defendant, and no privity exists between them.

10. The complainant having omitted to file a replication to the Answer of the Central National Bank of Baltimore, the only regular course was to dismiss the bill, according to Rule 66 of the said Equity Rules of Practice, and it was error to sign a decree in favor of the complainant.

11. It was error, to pass a final decree when the case was not at issue as to the co-defendant Dillon, and, also, in the absence of an answer by him.

12. It was error to overrule and dismiss the said motion to dismiss the bill of complaint, filed on behalf of the Appellant, on the 23rd day of May 1878, in which it was shown as follows, viz., "that the said Central National Bank of Baltimore was organized and constituted a national banking association and body corporate on or about the 30th day of January in the year 1871 under and by virtue of the Act of Congress entitled 'An

act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof approved June 3rd 1864;' and that afterwards, by a vote of its shareholders owning two-thirds of its stock, taken on the 15th day of July A. D. 1874, the said association went into liquidation and was closed, and in conformity with the provisions of the 42nd and succeeding sections of the said Act of Congress, and under and in pursuance of sections 5220, 5221 and 5222 of the Revised Statutes of the United States, the said association was dissolved and became extinct, as will more particularly appear by Exhibits C. N. B. Nos. 1, 2, 3, 4, 5 and 6, herewith filed and prayed to be taken as part of this motion. That the bill of the complainant in this case were filed in the Circuit Court of Baltimore City on the 18th day of July 1874, and after the said going into voluntary liquidation of the said Central National Bank of Baltimore. That the Complainant on the 8th day of January 1878 filed in this Court its bill of complaint, purporting to be exhibited by virtue of section 2 of chapter 156 of an Act of Congress approved June 30th 1876, entitled 'an Act authorizing the appointment of receivers of national banks and for other purposes,' praying process as well against the said Central National Bank of Baltimore as against the persons who were the shareholders thereof at the time the same went into voluntary liquidation as aforesaid, and seeking the enforcement of the same demand which is sought in this case to be enforced; and the said last mentioned bill so filed in this court as under the Act of Congress aforesaid, is still pending in this honorable court, as will more particularly appear by reference to the same and the proceedings thereon, on file in this court, or by a transcript of the record thereof, as your honors may require; and it is prayed that the same when produced may be treated as part of this motion.—Wherefore by reason of the premises and of the pendency of the complainant's said other bill filed in this court for the same cause, and because the complainant was not entitled by law to institute, nor is now entitled to prosecute this suit against the Central National Bank of Baltimore, the said banking association having previously gone into liquidation as aforesaid; and for the reason that the said Central National Bank of Baltimore having been duly dissolved pursuant to law no suit can be maintained against it, and that the said Circuit Court of Baltimore City was without jurisdiction in the premises, and this honorable court is also without jurisdiction to grant the relief sought thereby, it is hereby prayed that the said bill of complaint

of the Connecticut Mutual Life Insurance Company against the Central National Bank of Baltimore in this cause may be dismissed." (Printed record pages 134 to 142.)

13. It was error to overrule the subsequent motion to dismiss, filed on behalf the Appellant on the 10th day of June 1878. (Printed Record page 154.)

14. It was error to pass the said decree, in face of the fact of the pendency of the Complainant's said bill in equity, filed on the 8th day of January, 1878, in the said Circuit Court of the United States, under the Act of Congress approved June 30th 1876, chapter 156, section 2, as stated in the petition of the Appellant, filed the 23rd day of May 1878, (Printed Record, page 135,) and admitted by the Complainant in its answer to the said petition. (Printed Record, page 142.)

15. The decree was given irregularly and when the cause was not at issue, nor ready for hearing on the merits, and is therefore erroneous.

16. It was error so to pass a final decree for the Complainant in a case of this nature without a previous reference to a master.

17. The amount decreed to be paid is excessive.

BRIEF OF ARGUMENT.

I. The existence of a plain, adequate and complete remedy at law, was a bar to the remedy in equity sought by the Complainant.

Hipp *v.* Babin, 19 How. 278.
Parker *v.* Winnipiseogee Cotton Co. 2 Black, 545, 551.
Wright *v.* Ellison, 1 Wall. 22.
Maguiac *v.* Thompson, 15 How. 299.
French *v.* Hay, 22 Wall. 231.
Lewis *v.* Cocks, 23 Wall. 466.
Baker *v.* Biddle, Baldwin, 394.
Blakeley *v.* Biscoe, Hempstead, 114.
Foley *v.* Hill, 2 House of Lords Cases 28, affg. 1 Phill. Ch. 399.
Grubb's Appeal, 90 Penn. (9 Norris) 228.
Rev. Stat. U. S. Sect. 723.

This test of jurisdiction would be applied upon the removal of the case into the United States Court, even although the rules of procedure in the State Court left no room for it there.

Thompson *v.* Railroad Co. 6 Wall. 134.
Van Worden *v.* Morton, 99 U. S. 378.
Hurt *v.* Hollingsworth, 100 U. S. 103.

It is, however, perfectly well recognized in the jurisprudence of *Maryland.* One of the most vigorous discussions of its character and mode of application to be found anywhere is contained in *Adair v. Winchester,* 7 Gill & Johns. 114.

See also

Clagett *v.* Worthington, 3 Gill, 95.
Lawson *v.* Davis, 7 Gill, 345.
Edes *v.* Garey, 46 Md. 24, 39.

The objection is so influential that the Court will regard it even if not made below, (23 Wall. 470; 19 How. 278;) but in this case it was presented at the outset, in the answer to the original bill, and, when an amended bill was filed, it was renewed still more formally by plea. If therefore, the plaintiff below, in the effort to deprive the defendant of a trial by jury, has mistakenly prosecuted a long suit which it is impossible for it to maintain, no matter what evidence may be adduced in its support, no complaint of surprise can come from the appellee.

In ascertaining the bounds of the equity jurisdiction, the Courts of the United States will not look beyond the equity jurisdiction exercised by the English Court of Chancery at the time of the American Revolution, nor recognize later expansions of jurisdiction in England, whether referable to legislation, or to judicial encroachment upon the proper domain of the common law.

Fontain *v.* Ravenel, 17 How. 384.

The rule is too real and fundamental to be permitted to be either evaded or frittered away. No mere allegations in pleading therefore can avail to prevent its application, when it can be seen that the case substantially is one for which the common law afforded an adequate remedy.

Russell *v.* Clark's Executor, 7 Cranch, 69, 89.
North Penn. Coal Co. *v.* Snowden, 6 Wright, (Penn.) 488.

There was nothing in the present case to require any of the peculiar instrumentalities of Equity. No discovery was needed or sought; the facts upon which the plaintiff's case rested were all in the knowledge of the plaintiff or its agent, or perfectly accessible by ordinary means of evidence. An answer under oath was not even demanded, and in Maryland, not expressly to call for an answer under oath, it is to waive a sworn answer. Code, Art. 16, sec. 103. And no discovery, of course, is sought where an answer under oath is not demanded

Badger *v.* McNamara, 123 Mass. 117.

A trust is averred, but the *trust* that is to sustain the jurisdiction must be that trust which is a creature of a court of equity, not cognizable at law, on which no action lies, but is only for the consideration of equity, which acts to carry into effect the principles of law where it provides no adequate remedy and supplies its defects. For the breach of all other trusts an action lies at law: whenever the money is held on a legal trust, the right being legal, the legal remedy is adequate.

Baker *v.* Biddle, Baldwin, 423.
Adair *v.* Winchester, 7 G. & J. 119.
Taylor *v.* Turner, 87 Ill., 296, 203.

The jurisdiction of Equity in matters of *account* only obtains where an action of Account would be the proper remedy at law, or where *great complexity* exists in the accounts, or some difficulty at law interposes.

Fowle *v.* Lawrason, 5 Pet. 503.
Dinwiddie *v.* Bailey, 6 Ves. 136.

This clearly is no case for an account in equity.

Foley *v.* Hill, 2 Ho. Lds. Cas. 28.
Blakely *v.* Biscoe, 1 Hempstead, 114.
Baker *v.* Biddle, Baldwin, 421.
Grubb's Appeal, 90 Penn. 228.
O'Mahony *v.* Dickson, 2 Sch. & Lef. 400.
Morse on Bank. 2nd ed. 33.

It is now unquestionable law that the relation between banker and customer has nothing of the nature of a trust in it, but is simply that of debtor and creditor. This principle was declared and enforced in the House of Lords in *Foley v. Hill*, a case of great

authority which received the express approval of this Court in 10th Wallace 156, and it has been affirmed and applied in numerous decisions.

Bank of the Republic *v.* Millard, 10 Wall. 155.
Thompson *v.* Riggs, 5 Wall. 663.
Marine Bank *v.* Fulton Bank, 2 Wall. 256.
Carr *v.* National Security Bank, 107 Mass. 49.
In re Bank of Madison, 5 Bissell, 515.
Hardy *v.* Chesapeake Bank, 51 Md., 585.
The People *v.* Merchants' and Mechanics' Bank, 78 N. Y., 269.

And so it is laid down in the text books. Money paid into a banker's is merely a common law debt, and cannot be got out again by means of a bill in equity, there being nothing of a fiduciary character in the connection between the parties.

Grant on Banking, 3.
Morse on Bank. 2nd ed. 29, 30.

In Pennell *v.* Deffell, 4 De G. M. & G. 393, the leading case upon the modern English equitable doctrine of following trust funds which have been deposited in bank by a trustee, Lord Justice *Turner* expressly distinguished the case as between the bank and its customer. He said, "The case of Foley *v.* Hill, 2 Ho. Lds Cas. 28, is perfectly distinct from the present. The question there was between the banker and the customer, not as in the present case between the customer and his *cestuis que trustent.* The case establishes merely that the relation of trustee and *cestui que trust* does not exist between bankers and their customers, and does not at all affect the question on which the present case depends, viz. what are the rights of the *cestuis que trustent* of the customer against the customer, their trustee."

And it is, therefore, unnecessary to follow the nice distinctions into which English courts have been led in applying this "modern doctrine of Equity"; which it is admitted did not exist in Lord Hardwicke's time, (Jessel, M. R., 13 Chan. Div. 708, 710, 712 and 715,) and apparently came into being—doubtfully and hesitatingly, in *Ex parte* Sayers, 5 Ves., 169, A. D. 1800, in the time of Lord Loughborough, and which, at any rate, does not affect the *Banker*, in whose hands the moneys have been deposited, and only touches the question of right between the *customer* or his representatives and *his* supposed *cestui que trust*, as

to the *balance* standing clear of the banker's claims or liens. For that class of cases see judgments of Justice Fry, the Master of the Rolls, and the Lords Justices Baggally and Thesiger, where Fry and Thesiger took one side and Jessel and Baggally the other, in *In re* Hallett's Estate, Knatchbull *v.* Hallett, L. R., 13 Chan. Div. 696, and *Ex parte* Dale & Co., L. R., 11 Chan. Div. 772.

Jurisdiction in equity over a corporation must be determined not by the capacity in which the complainant seeks relief, but by the case which is stated in his bill against the defendant.

Treadwell *v.* Salisbury Man. Co. 7 Gray, 462.

Money deposited by a customer with a banker is recoverable under a common *indebitatus* count for *money lent.*

Bullen & Leake's Prec. Plead. (3rd Ed.) 41.

Pott *v.* Clegg, 16 M. & W. 327.

Alexander *v.* Barker, 2 Cromp. & Jerv. 133.

And such an action has been brought to determine the very question which is presented here, viz. as to the right of the bank under the circumstances of the case to debit the customer with the amount of a negotiable instrument upon which he was liable as a party.

Pollard *v.* Ogden, 2 El. & Black. 459.

And *money had and received* would certainly lie.

Bullen & Leake, Prec. Plead. 44.

Calland *v.* Loyd, 6 M. & W. 26.

Bastable *v.* Poole, 1 Cr. Mee. & Rosc, 410.

The Connecticut Mutual Insurance Company claims through Dillon, and if Dillon could not under the circumstances of this case maintain a bill in Equity against the Bank—supposing the Insurance Company to be out of the case, the latter, claiming through him, whether as his assignee or as his principal, clearly cannot do so. As his principal, the Insurance Company simply takes his place; the name Dillon stands for the Connecticut Mutual Insurance Company, and the latter sues as the party *really* dealt with by the bank through its agent. As his assignee, the Appellee certainly can have no better standing.

A court of Equity will not entertain a bill by the assignee of a strictly legal right, upon the ground that he cannot bring an action at law in his name, but must use the name of the assignor.

Walker *v.* Brooks, 125 Mass. 243.

Among the numerous cases referred to, in the learned opinion of Gray, C. J., in Walker *v.* Brooks, is De Ghetoff *v.* London Assurance Co., 4 Brown's Parl. Cas. Tomlin's ed. 436, deciding that one for whose benefit a policy of marine insurance had been taken in the name of the agent could not maintain a bill in equity against the insurer, in affirmance of Lord King, C., who said with reference to the contention of the complainant, "At this rate all policies of insurance would be tried in this court, for they are generally taken in the name of a trustee," (Moseley 83,) and Rose *v.* Clarke, 1 Yo. & Coll. Ch. 534, where it was held that an equitable title to money secured by bond is not of itself sufficient to entitle the party interested to sue the obligor in equity for payment of the money, and Adair *v.* Winchester, 7 G. & J. 114 (before cited) and Mouseley *v.* Boush, 4 Rand. 396.

In Maryland, by statute, an assignee by writing of any chose in action for the payment of money may maintain an action at law in his own name.

1 Maryland Code, Art. 9, sec. 1.

That an action at law can be maintained by a *principal* against a bank with which the plaintiff's agent has deposited, in his own name, moneys of the plaintiff, for the balance existing at the time when the plaintiff gave notice of his claim, has been expressly decided.

Frazier *v.* Erie Bank, 8 Watts & Serg. 18.

Stair *v.* York National Bank, 55 Penn. 364.

And see School District in Greenfield *v.* First National Bank, 102 Mass. 174.

It seems impossible to read the original bill in the present case without recognizing that a claim so simple and precise as is there set forth was ground for an action at law, if any recovery at all was possible. Particular reference is asked to the distinct allegation at the bottom of page 5, printed record. After the answer had set up the defence of want of jurisdiction in equity, some attempt was made in the amended bill to depart from the certainty of the original allegations, but it was speedily abandoned in complainant's Petition, filed less than three months afterwards, in which it was averred that the complainant had ascertained that the amount of its money held by the Central National Bank was $11,000 86—the sum claimed in the original bill, and the same for which the decree eventually passed.

Comparing the statements of bill and answer, it is seen that the only real subject of dispute originally was the propriety of a single credit claimed by the bank. The Bank admitted a balance, to Dillon's credit in the account, of $1,000.86; the Insurance Company claimed that the balance ought to be $11,000.86; and the difference was the amount of the note with which the Bank had credited itself, as the Insurance Company before instituting suit had been fully informed.

If we go from the pleadings to the proofs we find the same state of things; compare testimony of N. F. Williams, cashier, printed record, p. 41, 26th cross-interrogatory, with Dillon's, page 29, to 12th and 14th interrogatories—no question of account between the parties, and the only matter in dispute the right of the Bank to credit itself with the amount of the note—a legal question with which a court of law was perfectly competent to deal.

II. The dissolution of the Central National Bank of Baltimore necessarily involved the abatement of the suit attempted to be prosecuted against it.

The corporation came into existence originally, and could subsist afterwards, only by virtue of the Statute of the United States. To that therefore we must look to ascertain the duration of its life. By the 8th section of the Act of 1864, ch. 106, 13 Stat. at large 101, it was provided that the association formed under it should have succession for the period of twenty years from its organization, "unless *sooner dissolved* according to the provisions of its articles of association, or by the *act of its shareholders owning two-thirds of its stock*, or unless the franchise shall be forfeited by a violation of this act." Hence it is apparent that, short of the expiration of the full term of twenty years, the corporate existence of the association might come to an end, either by the voluntary act of the shareholders owning two-thirds of the stock, or by a forfeiture caused by some violation of law. The 42nd section prescribed more particularly the method of procedure in the first of these cases. Repeating, in other words, the provision of section 8, it began by enacting, "any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." It then prescribed the manner of certifying the fact to the comptroller of the currency and giving notice by

publication, and the mode of redeeming its circulation. The provision as to this last, as fixed by the Revised Statutes, section 5222, is that, "within six months from the date of the vote of liquidation, the association shall deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation."

As regards a dissolution by *forfeiture*, the ~~57th~~ section of the original act, sec. 5239 of Revised Statutes, shows that what was intended was a forfeiture judicially determined and declared in a suit brought for the purpose in a proper Court of the United States by the comptroller of the currency.

Nothing therefore would seem to be plainer than that a dissolution would take place equally in either one of the two cases, viz: an adjudication of forfeiture, or a vote of two-thirds of the shareholders, supplemented by the further proceedings prescribed in the Statute having their consummation in the payment into the Treasury of the money required to redeem the bank's outstanding circulation. That the result, in either case, is the *dissolution* of the corporation—to be followed by all the consequences of dissolution, seems put beyond doubt by the express provisions of the Statute. In one part it is declared (Act of 1864, ch. 106, sec. 42; Rev. Stat. sec. 5220,) that "any association may go into liquidation and be *closed* by the vote of its shareholders owning, &c;" this being in that part of the law which is intended to regulate the *mode of proceeding*. In section 8 of the Act of 1864 (Rev. Stat. 5136,) the creative section, which defines the powers of the corporation and duration of its existence, the word, referring to the same thing, is *dissolved*. And the corporate life given by the law is originally subjected to this limitation—it is to last for twenty years *unless* sooner dissolved by the act of its shareholders owning, &c.

This construction of the law has received the direct sanction of the Supreme Court, in the case of the First National Bank of Bethel.

Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 395.

For the purposes of this case, it is unnecessary to determine whether the dissolution is complete (except as to those things expressly provided for in the statute for the protection of the currency) upon the vote of the shareholders, or whether it requires, to consummate it, the severance of all connection with the Government by the payment of the money required for the redemption

of its outstanding circulation. If the former be the correct view, the corporation was already dissolved when the suit was begun, if the latter, the dissolution occurred on the 8th day of January 1875, before the passage of the decree. But there is an evident absurdity in holding that the corporate existence could continue at farthest beyond the last of these points of time. Congress, confessedly, has no authority to create corporations, except for purposes connected with some matter which is within the scope of the powers expressly granted to the United States by the Constitution. It is in connection with the national currency, and as a means to an end for which it is the right and duty of Congress to legislate, that the National Banks are created. When they cease to be capable of performing the purpose of their creation, the sustaining power of Congress ceases to operate. The bank lives by its connection with the Government, and when that connection is once finally severed it must cease to exist.

If the bank which has gone into voluntary liquidation under the Statute has not come to an end when its circulation has been redeemed, what later point of time can be taken as the final term of its existence? The text of the law declares that in such case it does not live to the end of its term of twenty years, but is dissolved *sooner*. If it be not dead when its connection with the Government has forever terminated, when does it expire?

What is the *effect* of a dissolution *upon the suit?* This is perfectly settled by authority. The death of a corporation is undistinguishable from the death of a natural person, where, unless some statute provide against an abatement, and there be also a personal representative capable of being brought in to take the place of the defunct defendant, the suit abates of necessity. So it has been decided by this Court, in a case where the dissolution had been caused by a judicially declared forfeiture.

National Bank *v.* Colby, 21 Wall. 614, 615.

A dissolution accomplished by a voluntary surrender of the charter abates a suit pending against the corporation not less conclusively than a dissolution effected *in invitum.*

Greeley *v.* Smith, 3 Story C. C. 658.

Mumma *v.* Potomac Company, 8 Pet. 281.

May *v.* State Bank of North Carolina, 2 Rob. Va. 56.

Whether a bill lies under the Act of 1876, which was not enacted until June 30, 1876, against shareholders of a bank which was dissolved and closed more than a year before the passage of the act, is a question which it is not necessary now to discuss. The bill was filed and was not abandoned, and the Bank was made a party defendant, and it was inequitable to allow the complainant to proceed at the same time to recover a decree against it in this case.

IV. (1) The failure of the complainant either to set down for argument or traverse the pleas of the defendant made it impossible for a decree to be rightly passed in its favor; in that state of the pleadings the only action it was competent for the court to take was to dismiss the bill. (Print. rec. p. 17, p. 19 and. p. 143.)

Equity Rule 38.

Before the adoption of the present equity rules, if any plea was not set down for argument but was traversed, and upon the issue so taken the truth of the plea was established in evidence, the dismissal of the bill at the hearing was a matter of course, irrespective of any question of the legal sufficiency of the plea.

Hughes *v.* Blake, 6 Wheat. 472.

The pleas were all good: as to the 1st plea, see

Story Eq. Plead. *sect.* 727.

What must be the consequence of omitting either to traverse or set down for argument, the Rule explicitly declares.

(2) Another fatal irregularity is found in the omission to file the general replication to the answer, although leave to do so *nunc pro tunc* had been obtained.

Equity Rule 66.

That the leave was not availed of was possibly due to the fact that it did not extend to give permission to set down the 2nd and 3rd pleas as asked, so that as the case stood the record could not be rendered perfect or the case made ready for hearing.

At any rate the omission was fatal.

Robinson *v.* Satterlee, 3 Sawyer, 134.

Independently of the rule, the failure to put in a replication is an admission of the truth of the answer.

Legard *v.* Sheffield, 2 Atk. 377.

(3) The absence of an *answer* by *Dillon*, and the want of an issue upon an answer, unless shown to contain an admission of the plaintiff's case as stated in the bill and amended bill, are also fatal defects. Dillon was recognized by the complainant as being a necessary party, and made a party defendant accordingly; surely therefore the court could not lawfully decree against the Central National Bank without seeing Dillon's answer and perceiving whether there was anything there which required issue to be taken upon it and proof offered to meet it.

V. Upon the merits, the complainant had no equity entitling it to the decree given in its favor.

With respect to the addition "general agent" suffixed to the proper name of the depositor, while the bill of Complaint, the interrogatories of counsel, and the complainant's principal witness, Dillon, in his testimony, studiously used the term "general agent" as the appropriate description of his relation to the Complainant—Dillon going so far as to testify that his powers of attorney from the complainant set forth that he was "appointed general agent of the company," (Printed record p. 32 answer to 6th cross-int.,) the Power of Attorney itself, when produced, showed that he was simply constituted *agent*. Printed Rec. pp. 119, 120.

And the business he carried on as agent was not at all confined to the affairs of the Complainant.

Testimony of Mr. McDowell, p. 65.
Mr. O'Connor, p. 73 and p. 96.
Mr. Orndorff (Dillon's clerk) p. 37, ans. to 4th cross-int.

He himself admitted that he carried on a general agency for all corporations or individuals with whom he could make satisfactory arrangements.

Print. Rec. p. 32 and p. 34.

The words "general agent," if they meant anything, rather indicated the business of the depositor, than pointed to an agency for any particular principal. And see testimony of Mr. McDowell,

(a director) who says he always understood the term to mean "general insurance agent." Printed record, p. 65, to 16th cross-int.

It is also in evidence that Dillon had a motive for adding the word "agent" to his name, according to a not uncommon commercial practice, in the existence of a number of unsatisfied *judgments* against him in the State of Iowa.

Exhibit J. O'C. No. 2. Print. Rec. p. 132.

Testimony of Mr. O'Connor, Print. Rec. p. 82.

It has been held that the word "Assignee" appended to the name of the depositor does not earmark the fund nor indicate that it belongs to a particular person or fund.

Laubach *v.* Leibert, 87 Penn. 55.

And the addition of the official title of an officer of the Government (Collector) was held not to indicate that the fund belonged to the Government, but left it subject to the disposition of the depositor, as if no such description had been affixed to his name.

Swartwout *v.* Mechanics' Bank, 5 Denio, 555.

And the signature to a check "A. B. *agent*" does not furnish any qualification of the personal responsibility of the drawer, nor give the drawee notice of the unnamed principal.

Bickford *v.* First National Bank of Chicago, 42 Ill. 238.

Tryon *v.* Oxley, 3 G. Green, (Iowa) 289.

And the addition of any merely descriptive word, as "Trustee" or "Executor," does not impose any obligation upon the bank to look beyond the depositor, and the credit given him is a credit to him personally.

Morse on Banking, 2nd ed. 293.

And see

Miller *v.* Receiver of the Franklin Bank, 1 Paige, 446.

Cowell *vs.* Springs Company, 100 U. S. 55.

The rights which a third person may have as against the depositor present an entirely different question. See *Foley v. Hill*, 2 Ho. Lds. Cas. 28, and other cases above cited.

Dillon in a circumstantial narrative, which bears evidence of improbability on its face, swore to a certain declaration of the president of the Bank, as showing that he was dealt with as the agent

of the Complainant; but his statement is flatly contradicted by three witnesses.

Leary Print. Rec. p, 52.
Reed, p. 46, 9th int.
O'Connor, p. 77, (13th int.)

The fact of an introduction, given Mr. Green, the Secretary of the Complainant, to Mr. O'Connor the president of the appellant, by Dillon in the office of the latter was introduced with some parade, but it is remarkable that nothing was said at that interview as to any interest of the Complainant in the bank account of Dillon. Compare testimony of Dillon with that of Mr. O'Connor, Rec. p. 34, and p. 76. See also testimony of Dr. Jas. A. Steuart, p. 73. And Mr. Green's own testimony was not offered by the Complainant.

It is obvious too that had it been the intention originally that the account should be treated as that of the agent of the Connecticut Mutual Life Insurance Company, nothing would have been easier than so to define it on the Bank's ledger and the pass-book.

So far from the account being regarded by the Bank as that of Complainant's agent, the contrary is directly testified by Mr. McDowell, a director of the bank as well as the holder of a policy in the Connecticut Mutual, Rec. p. 63, and p. 66; and by

Mr. O'Connor, the President, pp. 74 (8th int.) 96, 98, (25th int.)
Mr. Leary, paying and receiving teller, p. 56, (26th int.)
Mr. Reed, book-keeper, p. 47 (19th int.)

No privity with the Complainant was ever recognized by the Bank; O'Connor, p. 74: and none was ever claimed by the Complainant; O'Connor, p. 76.

The use actually made of the account negatived the idea of its being kept for the account and benefit of the Complainant.

Promiscuously with the moneys collected by Dillon as its agent, he deposited moneys received from various other sources—moneys collected for other employers or principals, as the Berkley Life Insurance Company, Phoenix Insurance Company of Hartford and others, and the private moneys of Dillon himself.

It was eminently a blended and mixed account.

Orndorff, p. 37, 6th cross-int.

And this is admitted by Dillon, p. 31.

He was allowed interest upon the balances, and no part of this interest did he ever account for to the Complainant.

O'Connor, p. 75.

Dillon, p. 33.

Dillon chequed upon it constantly for purposes other than those of the Complainant. He admits, himself, that he chequed upon it "for all sorts of things"—p. 31, ans. to 24th int.

Out of 411 cheques, drawn upon this account, only about 68 were drawn to the order of Complainants' secretary.

Reed, p. 61.

Out of this account he paid his private bills.

E. McDowell, p. 63.

John B. Morris, pp. 66, 67.

Parks Fisher, pp. 68.

And see statement in detail by Mr. O'Connor, p. 75.

He chequed upon this account to pay the discount on the very note now in issue. Print. rec. p. 62.

And on it he had previously chequed, in June 1872, to pay another note of $232.

Admission, p. 62.

Upon this account he proposed to draw a cheque for $2,000, if the bank had consented as he desired to vary the terms of the agreement as to this note, a variation which the bank after the discovery of his fraud in regard to the dwelling house would not agree to.

O'Connor, p. 90.

In short, this was Dillon's general account, his only one for general purposes in this or any other bank, during the period of time in question.

Dillon, p. 32, to 5th cross-int.

The objects and purposes of another account, in Dillon's name simply without addition are fully explained in the testimony of Mr. Reed, pp. 59, 60, and Mr. O'Connor, p. 94. It was a temporary account and never intended to be otherwise, and was closed

within two months from the time it was opened: it was not even entered in a pass-book.

Reed, pp. 59, 60 and 61 (to 24th int.)

There was for a time another account, in the name of Alice P. Dillon, (A. H. Dillon's wife) which Dillon made use of, but this account, also, was closed before the time of the transactions in controversy.

Under these circumstances, and after such a course of dealing, the Bank, upon the faith of this being the proper and personal account of Dillon—partly because of that, and partly because of Mrs. Dillon's being a stockholder and apparent owner of a dwelling house in Madison Avenue, Baltimore, discounted the six months promissory note of November 29th 1873, for $10,000. This was done by the action of the board of directors, and, in addition to the note, an express written agreement, signed both by Dillon and his wife, to provide for the payment of it was demanded and taken. At this time, there was no account of Dillon's, or of his wife, open on the books of the bank, except the "A. H. Dillon jr. general agent" account. And during the frequent renewals which had been previously made of the original loan of which the note in question was the consequence, this account and the degree of protection the probability of its continuance afforded the bank, was a subject of consideration among the directors. (Testimony of Mr. O'Connor, p. 100.) After the discounting of the note of 29th November 1873 and before its maturity, the officers of the Bank discovered (Testimony of Mr. O'Connor, p. 98) that they had been deceived by Dillon's representations as to the title to the Madison Avenue house, and that the land records disclosed that it had been assigned to one Thomas Shields, although the Dillons continued to reside in it. The note coming to maturity under these circumstances, and the stipulations of the written agreement failing to be complied with by Dillon, the amount of the note was debited against Dillon in the account, according to the established practice as to notes payable as this was at the bank and held by the bank.

The practice was proved in the defendant's evidence, see testimony of Mr. Reed, p. 61, (26th int.) and Mr. O'Connor, p. 91 and p. 100, and no evidence to the contrary was produced on the part of the Complainant.

Independently of usage, of course, the Bank, under the law, was entitled to debit its customer in account with the amount of his overdue note which it had discounted.

Commercial Bank *v.* Hughes, 17 Wend. 94.
Marsh *v.* Oneida Central Bank, 34 Barb. 298.
Ex parte Howard National Bank, 2 Lowell, 487.

The Bank having reason to believe that the note would not be otherwise provided for, the cashier was instructed some days before its maturity to charge it up against Dillon in his account, when it fell due, if it was not paid; and this, accordingly, was done on June 1st, 1874.

Nathaniel F. Williams Jr., discount clerk and acting cashier, Print. Rec. p. 40, 16th cross-int.
Bank Account, Exhibit J. O. C. No. 1, Print. Rec. p. 129.

A third party who intervenes and claims a right to adopt an account which has existed between a Bank and one with whom it has dealt as customer, is bound by the engagements of the actual customer, and *a fortiori* by any charges previously made which were proper as against him.

Brownrigg *v.* Rae, 5 Exch. 489.
School District in Greenfield *v.* First National Bank, 102 Mass. 174.
Justh *v.* National Bank of the Commonwealth, 56 N. Y., 478, 483.
Tassell *v.* Cooper, 9 C. B. 509.
And see Jackson *v.* Bank of United States, 10 Barr, 61.

11 Louis. Ann R. 76.

The Connecticut Mutual Life Insurance Company would have been so bound even had the account been kept in its name, if Dillon was the customer dealt with.

Brownrigg *v.* Rae, 5 Exch. 489.

The check for $8,000 delivered to the Appellee by Dillon established no privity between the Insurance Company and the Bank, and operated neither at law nor in equity as an assignment *pro tanto* of the fund.

Bank of the Republic *v.* Millard, 10 Wall. 152.
First National Bank of Washington *v.* Whitman, 94 U. S., 343.
Ætna National Bank *v.* Fourth National Bank, 46 N. Y. 82.
Carr *v.* National Security Bank, 107 Mass. 45.
Essex County National Bank *v.* Bank of Montreal, 15 Amer. L. Reg. 418.

Some matters have been injected into the case by the Complainant—occasioning the taking of a good deal of testimony on one side and the other—which are believed to be entirely irrelevant; such as certain speculative operations in stocks, with which Mr. O'Connor (the president of the bank,) and A. H. Dillon, jr. were interested. Many of the statements of Mr. Dillon in regard to these matters are disproved by the testimony of Mr. O'Connor, where a full and clear account of them all will be found. But for the purposes of this case it is enough to point out that the *Bank* was in no manner concerned with any of them, (Print. Rec. p. 98,) that they had nothing to do with the relations subsisting between the Complainant and Dillon, and that they have no legal bearing whatever upon any of the issues in the cause.

Another matter of this kind is found in the statement of Dillon that the opening of the bank account in question was in consequence of the solicitations of Mr. O'Connor. This is positively denied by the latter, Print. Rec. p. 74; (and compare testimony of Mr. Parks Fisher, p. 68, (8th int.,) 69, (9th cross-int.) and Mr. J. Harmanus Fisher, p. 70, (8th int.)) but would be immaterial, if true.

ARTHUR W. MACHEN,
For Appellant.

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JAMES H. McKENNEY, CLERK

In the Supreme Court of the United States,

OCTOBER TERM, 1880. No. 283.

THE CENTRAL NATIONAL BANK OF BALTIMORE, *Appellant*,

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

Appeal from the Circuit Court of United States for the District of Maryland.

BRIEF OF APPELLEE.

JOHN CARSON,
For Appellee.

In the Supreme Court of the United States,

OCTOBER TERM, 1880. No. 283.

THE CENTRAL NATIONAL BANK OF BALTIMORE, *Appellant*,

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Appellee*.

BRIEF OF APPELLEE.

This is an appeal from the Circuit Court of the United States for the District of Maryland.

The original bill in this cause was filed on the 18th day of July, 1874, (record, page 2,) in the Circuit Court of Baltimore city, one of the State Courts of Maryland, and the only Court in Baltimore city, exercising equity jurisdiction. It was removed into the Circuit Court of the United States, April 10th, 1877, upon the petition of the appellant, (record, page 20,) by an order of the Judge of the Circuit Court of Baltimore city. (Record, page 21.)

The bill states that prior to the month of December, 1864, the appellee appointed one A. H. Dillon, Jr., its

general agent for Maryland, Delaware, West Virginia and the District of Columbia, and that it was his duty to collect all premiums accruing to the appellee therein, and to pay all its death-losses within that territory.

That said Dillon remitted to the appellee twice a month, by checks, as hereinafter stated, and fully accounted with it after the close of each month, by his check, as general agent, upon a Baltimore Bank, to the order of the secretary of the appellee, at Hartford; that in the month of April, 1871, said Dillon opened a bank account with the appellee, headed as follows:

"DR. *Central National Bank in account with A. H. Dillon, Jr., General Agent.* CR."

In this account, said Dillon deposted the appellee's money; out of it he paid the expenses of his agency and his commissions, and twice a month he remitted to the appellee, by checks drawn on the appellant, by Dillon as general agent, to the order of Co's. secretary at Hartford, Conn., and these checks were regularly paid up to June 10th, 1874.

That on the day last named, Dillon, as general agent, drew a check for $8000 to the order of the Co's. secretary at Hartford, which check was presented for payment in Baltimore, on June 14th, 1874, and payment thereof was refused by the bank, and said check was duly protested.

The bill further avers that on June 1st, 1874, the bank held an overdue note of said Dillon and wife for

$10,000, and between June 1st, 1874, and June 11th, 1874, it charged said note up to his account as general agent; that the appellant's board of directors ratified this act on June 11th, 1874, (record, page 7,) although Mrs. Dillon was at that time the owner of ten shares of the bank's stock, then worth, with the accrued dividends, about $1300.

The bill then avers that said bank and all its officers, from the opening of said account, down to the filing of the bill in this cause, well knew that said Dillon was the general agent of the appellant, and that its moneys were, from time to time, being deposited in said account.

It avers that during the general agency account, Dillon kept another account in said bank in his wife's name, on which account Dillon individually signed for his wife all the checks drawn thereon, some of which were received by Mr. O'Connor, the President of the Bank.

That Dillon himself, part of the time, kept an individual account in said bank in his own name.

That Dillon and O'Connor were engaged in joint stock operations; that the $10,000 note was originally $12,000, and grew out of stock speculations; that in the fall of 1873, O'Connor paid Dillon over $3000 of stock profits; that $2000 was paid to reduce the $12,000 note to $10,000, and the residue was used with O'Connor's knowledge to buy Mrs. Dillon's ten shares of stock.

The bill then avers that Dillon's general agent's account has not been balanced or settled up by the bank since March 17, 1874. The bill asks for an account of how much of the money in bank is the appellant's; for

relief against the fraud of the appellant in charging up said $10,000 note, and that appellant may be held as trustee for the money of the appellee, deposited in said account.

The answer of the bank, filed November 9th, 1874, (record, pages 8–10,) says that Dillon was a general agent of other people, as well as of appellee.

That in opening his account as general agent, that term was a mere *descriptio personæ*, without any intimation that he was a special agent of any one, or that the account was a special account of any one, and that the bank was ignorant as to the sources of his deposits.

It avers that other money than the company's was deposited in and drawn out of said account, and that said account was a mixed one, without notice to the bank that it concerned anyone save Dillon, as general agent for all who employed him as such agent.

The answer insists that Dillon is a necessary party, and our remedy is at law.

On the 4th day of March, 1875, an amended bill was filed, (record, pages 12-15,) making Dillon a co-defendant, averring in substance the allegations of the original bill, averring that because of the non-balancing of Dillon's bank account, it is impossible to tell what amount of money remains to said Dillon's credit, and what amount the appellee is entitled to. The amended bill further alleges that the bank has given notice of its intention to wind up, and to cease to act as a national bank; that as soon as its circulating notes are paid off, it will be entitled to withdraw its bonds from the Treasury of the United States, and that before this suit is determined.

That said bonds constitute a trust fund for the payment of the bank's creditors, and that except these bonds said bank has no means to which appellee can resort for the collection of its claim, save suits against its stockholders.

The amended bill prays for the same relief asked in the original bill, and for an injunction against the bank to prevent it from distributing its assets to stockholders, without retaining sufficient to pay appellee's claim.

To the amended bill the appellant filed three pleas, (record, page 17,) on the 27th day of April, 1875 :

1. Appellee is not a creditor of appellant.

2. No privity between them as to the matter of the bill.

3. Remedy at law.

The case coming on for hearing in the United States Circuit Court, the appellant on the 23d day of May, 1878, filed the motion to dismiss the bill of complaint, (record, pages 134-135.) This motion presents the 1st point made below.

I.

It is this—that because the bank suspended operations, and went into liquidation, and redeemed its circulation, and received a re-assignment of its bonds, a dissolution of the bank was thereby worked, and all suits against it abated.

1. The statement of facts in the motion to dismiss is not correct.

All the bank did, was to retire from business in Baltimore, and it determined to transfer itself to the city of New York, under another name. This is apparent from the extracts from the minute book of the bank, to be found on record, pages 133, 134.

2. It is respectfully submitted that the question raised by the motion to dismiss was, in effect, decided in the negative by this Court in the case of

Bank of Bethel vs. Pahquioque Bank, 14 Wall., 383.

I refer especially to so much of this Court's opinion, as is to be found on middle of page 398, and middle of page 400.

3. The very same question, presented by this same bank, was decided against it by the Court of Appeals of Maryland, in the case of

Ordway vs. Central National Bank of Baltimore, 47 Md., 217.

This opinion was delivered by one of the ablest Judges in Maryland. I simply refer the Court to this case, and the authorities there cited, as not only fully answering the motion to dismiss, but also sustaining the right to sue a National Bank in the State Courts.

4. For other authorities against the motion to dismiss, see—

Kincaid vs. Dwinelle, 59 N. Y., 552.
Fisk vs. U. P. R. Co., 10 Blatch, 518.
Jones vs. Man. Natl. Bank, 6 Bissell, 301.
State vs. Bank of Md., 6 Gill & Johns., 205.

Brinkerhoff vs. Brown, 7 John. Ch. R., 217.
Boston Glass M. Co. vs. Langdon, 24 Pick. 49.

II.

It is said that our remedy was at law, not in equity. The bill was filed in a State Court, and alleged FRAUD. That the bank had taken the appellee's money, with full knowledge of that fact, to pay a debt due to it by Mr. and Mrs. Dillon.

1. In Maryland, in all cases of *fraud,* the jurisdiction at law and equity is concurrent; the remedy in equity is as ample as at law.

Dillon vs. Conn. Mut. Life Ins. Co., 44 Md, 386.
Richardson vs. Stillenger, 12 G. & J., 480.
Gott vs. Carr, 6 G. & J., 315.
Lamborn vs. White, 6 H. & J., 255.
Singery vs. Atty. Genl., 2 H. &. J., 497.
Taymon vs. Mitchell, 1 Md. Ch. Decis., 496.

Such is the law in this Court as to Fraud.
Atkins vs. Dick, 14 Peters, 119.
Jones vs. Bolles, 9 Wall., 369.

The concurrent jurisdiction of law and equity has been maintained by this Court in
Herbert vs. Wren, 7 Cr., 370.
Parker vs. W. L. C. & W. Co., 2 Black, 546.

The rule in England is the same as to the concurrent jurisdiction of law and equity in cases of fraud.

Ramshire vs. Bolton, 8 Eq. L. R., 292.
Piercy vs. Finney, 12 Eq. L. R., 67.
St. Aubyn vs. Smart, 5 Eq. L. R., 187.
Same vs. Same, 3 Ch. Ap. L. R., 649.
Hill vs. Lane, 11 Eq. L. R., 219, 220.
Hoare vs. Bremridge, 14 Eq. L. R., 528-29.

2. But the equity jurisdiction in this case is further maintainable, upon the ground that the relation of Dillon and the bank, to the appellant, was that of *trustee and cestui que trust*. The relation between them was fiduciary.

a. This has been expressly held in Maryland.

Dillon vs. Conn. Mut. Life Ins Co., 44 Md., 386.

See also—1 Story Eq., sections 463, 466.

This Court has said in Fowle vs. Lawrason, 5 Peters, 495, that the equity jurisdiction is undoubted where a trustee is a party.

In the case of May vs. LeClaire, 11 Wall., page 236, it said, "equity takes jurisdiction sometimes on account of the parties, and sometimes on account of the relief proper to be administered."

In the latter case, page 227, the objection was made that is here made, viz: that the remedy as to the personalty was at law, but this Court disposed of that objection on page 236.

In Lewis vs. United States, 92 U. S., page 622, it is said, "the case presented is that of a trust fund, a

trustee holding, and a *cestui que trust* claiming it. This gave the Circuit Court original jurisdiction.

b. When the bank took the money, the trust property, for Dillon and wife's debt to it, and thereby mixed itself up with a breach of trust, it became liable to be proceeded against as a trustee *de son tort,* or as a constructive trustee.

2 Perry on Trusts, section 907, and cases cited.
2 Story's Eq. Juris., sections 1257-1266.
Oliver vs. Piatt, 3 How., 333.
May vs. LeClaire, 11 Wall., 236.
Duncan vs. Jaudon, 15 Wall., 165.

No stronger cases as to the liability of a constructive trustee are to be found in the books then the two cases just cited.

In Meader vs. Norton, 11 Wall., page 458, it is said, "where one party has acquired the legal right to property to which another has the better right, a Court of Equity will convert him into a trustee of the true owner, and compel him to convey the legal title." And 2 Story Equity, section 1258, says, "abuse of a trust can confer no rights on the party abusing it, or those who claim in privity with him."

3. The equity jurisdiction is maintainable on the ground of Account. I submit that the facts of the case bring it within the rule laid down in 5 Peters, 495. By reference to Mr. Orndorff's testimony, record, page 35, and Exhibit W. W. O., record, pages 120, 123, it appears that Dillon did not deposit all of the company's money in this account by more than $3,000; that

he did deposit therein over $2,000 of money of other parties not that of the company, and that he usually deposited his own commissions.

All of the money of other parties it is proved he paid out before this controversy arose. Record, pages 37, 38, 122.

That Dillon's bank account was not balanced from March 17th, 1874; that his deposits from March 1st, 1874 to June 12th, 1874, inclusive, were $44,727.61; during this time he checked out $33,726.75, and that his true balance June 12th, 1874, was $11,000.86.

The bank in its original answer, and in the trial of this cause has wholly overlooked the fact that to prove its case, the appellees not only required an account between Dillon and the bank, but also an accouat between it and Dillon.

It had to prove Dillon's receipts of its money to June 12th, 1874, how much was in cash, and in checks, how much of its receipts, Dillon deposited in bank, and whether in cash or checks!

When Mr. Dillon was examined, record, page 34, cross-answer 23, he said he could not eviscerate from his deposits, the money belonging to the company.

Mr. Orndorff was employed to do this. He was first sworn on June 7th, 1875, record, page 27, and then brought back June 15th, record, page 35; after being a week hard at work on the job, he then testified, and furnished Exhibit W. W. O., which by agreement was received as evidence in lieu of the books, checks, &c., record, page 35.

It is manifest that without Orndorff's evidence and Account, the complainants would have broken down

below; but with it, the Court was enabled to pass a final decree without sending the case to the auditor. Had we been in a Court of law, we would probably have been non-suited, as it required a week's exclusive work of a practical book-keeper, who had kept Mr. Dillon's books, to collate and examine the books, checks and papers necessary to make out Exhibit W. W. O., and this would have been impracticable in a Court of law.

4. *a.* When this bill was filed, July 18th, 1874, this Court had not pronounced its opinions in 93 U. S., 642 and 96 U. S., 35, as to the action for money had and received. The English authorities denied our right to recover at law in a case like this.

Sims vs. Bond, 27 Eng. Com. Law, 98.
Cobb vs. Becke, 51 Eng. Com. Law, 935.
Robbins vs. Fennell, 63 Eng. Com. Law, 253.
Tassell vs. Cooper, 67 Eng. Com. Law, 531.

This Court in the case of Scammon vs. Kimball, 92 U. S., 370, cite with approval the above case of Sims vs. Bond, and say that "deposits are in truth loans by the customer to the banker; and the party who seeks to recover the balance of such an account, must prove that the loan was in reality intended to be his, and that it was received as such." Could we, upon this law, and upon the facts of this case, have maintained against the bank an action for money had and received? I answer, no. The cases in 93 U. S., 642, and 96 U. S., 35, lay down no new doctrine, or doctrine inconsistent with 92 U. S., 370. The 93 U. S., was an equity case, and 96 U. S.,

was an appeal from the Court of Claims. In both cases the Court say, there was guilty knowledge and absence of right in the defendants, whose acts were tortious and fraudulent.

Tort has always constituted one of the well-known exceptions, where the action for money had and received will lie; and upon the facts of these two cases, there can be no doubt that the action for money had and received would have lain. And that such has always been the law, is apparent from the old case in 2d Burrows, to which your Honors refer in 93 and 96 U. S. The difficulty in this case, as in the English cases, above quoted, was that the deposits were rightly made. There was no tort or fraud until the bank appropriated the money to its own use.

In Dicey on Parties to Actions, top page 107, marginal page 91, it is said: "The action for money had and received lies wherever the defendant has received money which in justice and equity belongs te the plaintiff, *under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff.*" It is the latter clause of this sentence which modifies the doctrine so broadly stated in the first part of it, and which is so broadly stated by this Court in the two cases above referred to. It reconciles the old case in 2 Burr. with the later English cases above quoted, and harmonizes 92, 93 and 96 U. S. It was this same principle which this Court applied in Wilson vs. Smith, 3 How., 763.

In 57 Pa., 206, the Court, in speaking of the above English cases, say: they would have been differently decided, if parties could stand in a Court of law on an

equitable right. In Maryland, common law and chancery are distinct, and are administered by separate tribunals, and unless the action for money had and received will lie, there is no remedy at law.

b. For the reason thus assigned, it is submitted there was no remedy at law upon the facts of this case, and that the weight of authority is against an action at law.

But conceding for the sake of the argument that the action for money had and received would lie, that does not oust the jurisdiction of equity, especially in a complicated case like this.

2 Story Eq., section 1256.
5 Peters, 495.
1 Story Eq., sections 453-455-459.
Southampton D. Co. vs. Southampton H. & P. B., 11 Eq. L. R,, 254.

In 2 Black, 546, your Honors say that the 16th section of the judiciary acts is merely declaratory of the pre-existing rule, and does not apply when the remedy at law is not plain, adequate and complete, and as practical and efficient to the ends of justice, and to its prompt administration, as the remedy in equity.

III.

As between *cestui que trust* and trustee, and all claiming under the trustee, save by purchase for a valuable consideration, without notice, all trust property however changed, may be *followed and recovered.* This is the *familiar doctrine* in equity.

This Court so decided in 1844, in Oliver vs. Piatt, 3 Howard, 333.

The same doctrine was held in England in 1853, in the famous case of

Pennell vs. Deffell, 4 De. G. M. &. G. 388.

And was followed in 1865, in

Frith vs. Cartland, 2 Hemming & Miller, 422.

This latter case goes beyond Oliver vs. Piatt, and holds that if trust and individual funds are mixed, all belongs to the trust.

See the re-affirmance of this doctrine in 13 Ch. Div. L. R., page 697, below.

These cases have been approved and followed in this country, in

Van Allen vs. Amer. Natl. Bank, 52 N. Y., 1, decided in 1873.

F. & M. Natl. Bank vs. King, 57 Penna. 203, decided in 1868.

The above cases have lately, in 1880, been reviewed, approved and extended in England.

In re Hallett's estate, Knatchbull vs. Hallett, 13 Div. Chan. L. R, page 697.

The cases cited above are approved and extended, and the law of them is declared to be applicable, not merely to trustee and *cestui que trust, but to all persons holding fiduciary relations.*

Clayton's case, 1 Mer., page 572, is overruled.

It is there held that if a person holding money in a fiduciary capacity, puts it into a bag, and subsequently puts his own money into the same bag, and then draws out part of the money for his own purposes, he draws out his own money, not the fiduciary money.

That there is no difference in equity whether he puts the fiduciary money into a bag or into a bank; that if he subsequently deposits in the bank his own money, and then checks on it, he checks out his own, not the fiduciary money.

That he is not presumed to commit a fraud, and draw out the trust money, but to draw out his own money, irrespective of the dates of the deposits; and that the fiduciary money is still left in bank.

Clayton's case to the contrary is overruled.

IV.

Had the bank knowledge that Dillon was the agent of the insurance company, and was dealing with its funds? I answer, the testimony demonstrates it.

1. The way the account was headed, A. H. Dillon, Jr., general agent, gave notice that it was not an individual account, but a fiduciary one.

Bodenham vs. Hoskins, 2 DeG., M. & G. 906.
Pennell vs. Hurley, 2 Collyer, 244.
Ex parte Kingston, L. R., 6 Chan. Ap. 637.
Duncan vs. Jaudon, 15 Wall. 165.

Mr. Dillon's course of dealing with the bank was finally to endorse every check, as general agent, even when drawn to him individually, or otherwise, *and*

this endorsement the bank required. (Record, page 27, answer 9.)

It is submitted that this course of dealing is conclusive as to knowledge.

Two of these checks, thus endorsed, given by Mr. E. G. McDowell, one of the bank's witnesses, and a director in the bank, in payment of his policy with the appellee, (record, pages 63, 64,) will be found on record, page 118. Mr. McDowell, who was from first to last a director in the bank, admits that he knew all the time that Dillon was general agent of the appellee, and got from him his renewal receipts each year, when he paid his premium. (Record, pages 63, 64 and 28.)

Mr. Dillon's testimony (record, pages 27, 42) *demonstrates the full knowledge in the premises, of Mr. O'Connor, the President of the bank. Mr. O'Connor solicited him to remove this account from another bank, (record, pages* 28, 30; *record, page* 109, *answers* 47–52,) *and procured its removal by allowing Dillon* 4 *per cent. interest on current balances. (Record, page* 30, *answer* 20; *page* 109, *answer* 47–52.) *The first account which Dillon opened, on March 9th,* 1871, *with the bank, was in his wife's name, (record, pages* 116, 117; *record, page* 29, *answer* 17; *record, page* 50, *answer* 4; *record, page* 45, *answer* 3,) *but was really his own account, as he drew all the checks. (Record, page* 108, *answer* 45; *record, page* 43, *answer* 30; *record, page* 105, *answer* 24; *page* 84, *answer* 17, *top of page.)*

The company account, which had theretofore been kept in the Chesapeake Bank, was not entirely removed to the Central National Bank for some months after April 1st, 1872, and then only by degrees, with the full

knowledge of Mr. O'Connor, the President of the bank. (Record, page 109, answer 47.)

A third account was opened by Mr. Dillon with the same bank, in his own name, from October 15th, 1873, to December 11th, 1873, and will be found in the record, on pages 59, 60. *The last item of this account, December 11th, is a mistake, and should be* $10,000, *instead of* $1,000, *as will appear from the summing up of the items, and from Mr. O'Connor's answer. (Record, page* 112, *answer* 68.)

Is not the existence of these three accounts remarkable, and do they not signify that the bank did not consider them one and the same thing? Is not this significance the more remarkable, when it is borne in mind that the first two discounts of the $12,000 note, the original of the present $10,000 note, were entered in Mrs. Dillon's account; that all subsequent discounts thereof, except the last, were entered upon the ledger under *temporary discounts,* (record, page 112, answer 66; answer 19, page 95); and that the last discount of this very note of $10,000, which has given rise to this controversy, was entered in Mr. Dillon's individual account? (record, page 60,) and there constitutes the last item of $10,000. (Record, page 112, answer 68; record, page 62, answer 26.) *Why were these discounts never entered in the general agency account?* The facts show they were not, and O'Connor swears they were not. (Record, page 112, answer 67.) Mr. O'Connor's 17th answer, record, page 83, gives his account of the origin and history of this $10,000 note. It is substantially the same as given by Mr. Dillon.

Dillon had lost heavily in stock gambling, and O'Connor was fully aware of his losing operations (record, page 103, answers 11–14; page 104, answer 18) before Dillon came to him on March 14th, 1872, to overcheck Mrs. Dillon's account $12,000.

On this same day Dillon's account as general agent had to its credit over $7,000. Record, page 154.

Dillon never dreamed he could use this money, but demands a loan of O'Connor, and the latter never suggests that he has $7,000 in bank, and need not borrow $12,000, but permits Dillon without security, to over check Mrs. Dillon's account over $12,000, on March 14th, 15th and 16th. Record, page 117.

The overcheck continued seventeen days, until April 2d, 1872, record, pages 49, 50, answers 15, 16, when it was settled by the discount of Mrs. Dillon's note, signed by A. H. Dillon, Junior, attorney, of $12,000, at ten days. Record, page 117, answers 15, 16; page 84, answer 17.

On April 2d, 1872, Dillon as general agent, had in bank over $10,000, Record, page 154.

When this note matured, 12–15 of April, it was not paid, but laid over eight days, and was renewed by a new note, signed as before, at sixty days, dated April 23d, 1872; and on this day Dillon, as general agent, had in bank over $6,000. Record, page 154.

When this latter note matured, June 25th, 1872, it was again renewed for four months; and on June 25th, 1872, Dillon, as general agent, had in bank nearly $7,000.

Are not these facts of the utmost significance?

Can they be accounted for on any other hypothesis, than that Dillon and O'Connor both knew that the general agency account was not Dillon's money, except as to his commissions? The fact that Dillon paid the interest on his renewals by his checks as general agent, strengthens this view, for he was in the habit of depositing his commissions in this account, record, page 27, answer 11; and he had a right to draw small sums, but could not draw a larger one.

Much force is given to the above views by the naive statement of Mr. O'Connor at the bottom of page 83, answer 17, where he says of the interview between him and Dillon, when the latter wished to overcheck his wife's account $12,000, that, "he also urged that he kept a valuable account with the bank, and, as he had never asked before for any loan, that he thought he was entitled to it." [See the same confession on middle of page 100, answer 32.]

What valuable account did he refer to? Evidently the general agency account. That O'Connor so understood it is plain from his 32d answer, page 100.

And yet the existence of an account in which Dillon had to his credit over $7,000, was urged, and conceded by O'Connor as a reason for overchecking another account, $12,000, wherein Dillon had nothing to his credit. Is not this unconscious slip of Mr. O'Connor, pregnant with meaning?

It is impossible to read Mr. O'Connor's answers, page 74, *answer* 8, *and his answers* 43–52, *on pages* 108, 109; *answer* 56, 57, *page* 110, *without being convinced that he knew all about the general agency account.*

He knew it from the uniform mode in which Dillon made his deposits with the bank. Answers 8, 9, page 27; answer 57, page 110; answer 59, page 111.

He also knew it from Dillon's remittances to the company.

Dillon remitted about twice a month, $5,000 at a time, by checks on the Central National Bank, drawn to the order of Jacob L. Greene, secretary of the company. Record, page 26, answer 6; page 111, answers 60–63; and during the three years of this account, from April 1st, 1871 to June, 1874, there were 68 of these checks, (record, page 61, answer 28,) amounting to over $300,000, all of which were paid by the bank. Page 111, answers 62, 63; page 112, answer 65.

Supplement this evidence with the fact that Mr. O'Connor personally knew Mr. Greene, the secretary of the company, having met him as early as 1871, as detailed by Mr. O'Connor, (record, page 76, answer 11; page 112, answer 64,) and with Mr. O'Connor's full knowledge as to the course of Dillon's remittances to the company, and Mr. O'Connor's knowledge in the premises is completely made out.

To break the force of Dillon's positive testimony that O'Connor knew all about the nature of the general agency account, the latter attempts to besmirch Dillon's character and evidence, by his answers 26–31, on pages 98–100. The attempt is a signal failure, and really corroborates Dillon.

But what of the discrepancies in Mr. O'Connor's evidence?

His answer 27 contradicts his answers 24 and 25, on page 105. On April 23d, 1872, the date of the second

renewal of the $12,000, he bought of Mr. Dillon ten shares of his wife's stock, then worth over $1000. First he swears he applied it in reduction of her note; then he swears he did not, because she then had in bank $732.83; whereas the account itself, on page 116, shows it then overdrawn $228.56. In answer 17, bottom of page 83, he swears he was averse to the $12,000 loan to Dillon, and told him to check for as small an amount as possible, and that he would report the application to the Board the next day.

On page 104, answers 19, 21, he admits that the only meetings of the Board after March 14th were on March 19th and 27th, and that he never made such a report, and that he personally had authority to discount paper. On page 100, answer 32, he swears that on December 9th, 1873, when the $10,000 note, now in litigation, was last discounted, there was no account on the books of the bank in the name of any person named Dillon, except the general agency account; and yet on pages 60, 61, that other account is given in full, and the last item in it is the entry of the last discount of this identical $10,000 note.

I single out these, a few specimens of the flat contradictions in Mr. O'Connor's evidence, and I ask, can there be more reckless swearing than this, and is such a witness to be relied upon, unless corroborated?

The extraordinary intimacy between O'Connor and Dillon gives great force to the latter's statement, that O'Connor knew all about the general agency account.

O'Connor speculated in stocks in Baltimore in Dillon's name, to avoid gossip. (Record, page 104, answer 17; record, page 107, answer 38.) Mr. O'Connor's

money, put up in New York to margin his stock speculations, was deposited in Dillon's name. (Record, page 108, answer 41.) In the months of October and November, 1873, O'Connor paid Dillon $3295, his part of the profits of O'Connor's stock gambling. Of this sum, only $2037.50 was applied in the reduction of the $12,000 note and interest, to $10,000, and $1257.50 was used to buy Mrs. Dillon ten shares of stock in the Central National Bank. (Record, page 97, answer 23;) Dillon's share was one fourth, (page 101, answer 2x; page 106, answer 31x; page 102, answer 8x.) In the fall of 1873, whilst these transactions were going on, Dillon had in his possession $28,000 of O'Connor's money, which he paid over to him. (Page 102, answer 8x; page 106, answer 30; page 107, answer 36.)

Later on in the winter of 1873–1874, Dillon had in his possession nearly $9000 of O'Connor's money, and paid it over to him. (Record, page 98, answer 26; page 108, answer 40.)

Even as early as April 23d, 1872, when the $12,000 note was renewed the second time, Mr. O'Connor bought on that day ten shares of stock in his bank, then owned by Mrs. Dillon, and paid over the proceeds to Mr. Dillon, without requiring a cent to be applied to the reduction of the $12,000 note. (Record, testimony on page 105.)

Mr. O'Connor's 32d answer, page 100, shows his original friendship for, and his confidence in, Mr. Dillon, and how and why he originally loaned him the $12,000, and how he defended this loan to his Board of Directors, as being perfectly secure. The latter part of this same answer, and his 32d answer, page 100, shows that

in April, 1874, they were not friends, and that O'Connor had then found out that Dillon had assigned his house on Madison avenue to Thomas Shields, and the bank was, therefore, likely to loose its $10,000, and he, therefore, determines to seize the company's money.

It is amusing, yet it is pitiable, to read (page 101, answer 32) how Mr. O'Connor tried to fortify himself to commit this fraud, by advice with counsel and the Comptroller of the Currency, on the "*only point I felt anxious to have their opinion on was that the note was signed A. H. Dillon, Jr., whilst the account was kept A. H. Dillon, Jr., general agent.*"

Was there ever a case in equity where a party has so convicted himself?

The bank account for the month of June will be found on page 129 of the record. (Exhibit J. O. C. No. 1.)

On June 1st, 1874, the $10,000 note of Dillon and wife is charged up in the general agency account, when there was not sufficient money there to pay it, and the account was thus overchecked, and yet the bank, on June 1st and 3d, pays other checks on this account, thus overdrawn.

Dillon is allowed and induced to deposit in, and check on, this account, until June 12th, inclusive; and all his checks up to the 12th are paid.

On June 10th, 1874, Dillon draws a check for $8000, in favor of Jacob L. Greene, secretary of the company, and sends it to Hartford; it gets back to Baltimore on June 14th, 1874, and is presented for payment; is refused payment, and is protested; *and after this occurrence*, for the first time, on June 14th, 1874, Dillon

is informed by the officers of the bank that the $10,000 note has been charged up to the general agency account. (Record, page 29, answers 11-14; page 24, answers 30, 31.)

All this deceit and concealment, Mr. O'Connor unblushingly confesses, (pages 112, 113, answers 71, 72,) and he now asks the highest tribunal in this land to sanction this trickery and fraud, so justly reprobated and punished by the decree of the Court below.

V.

Was the money in the Central National Bank the property of the Connecticut Mutual Life Insurance Company?

For the proof of this we rely upon the testimony of Mr. Orndorff, (record, page 35, and Exhibit W. W. O., page 120-122,) and Mr. Dillon's testimony, (record, page 29, answer 12.) Dillon owed the company on March 1st, 1874, (admissions, record, page 36,) $7,537.51.

Mr. Dillon received for account of the company, from March 1st, 1874, to June 12th, 1874, inclusive		$45,021 01
In checks and drafts	$38,356 90	
In cash	6,664 11	
		$45,021 01
Mr. Dillon deposited in bank, from March 1st, 1874, to June 12th, 1874		$44,727 61
In checks and drafts	$39,413 61	
In cash	5,314 00	
		$44,727 61

Mr. Dillon did not deposit from March 1st, 1874, to June 12th, 1874, all the company's money by $293.40.

It will probably be claimed that in these deposits of $44,727.61, the sum of $3,539.71 was not the company's money. This is partially true, the real amount of other money is $2,813.93.

If the Court will take, with Mr. Orndorff's 12th answer, (page 36,) his explanations, (answer 13, pages 37, 38,) and his account, (page 122,) it will be readily seen that $725.78 was the company's money, as follows:

March 25—Borrowed money	$35	00
" 31—Security Life Insurance Company	28	13
April 17—Dr. Steuart	20	00
" 29—Borrowed money	50	00
May 13—Knickerbocker Life Insurance Co.	592	65
Total	$725	78

Take the $725.78 from $3,539.71, and it leaves, as above, $2,813.93. Now suppose this latter sum was not originally the company's money, yet it was all paid out, at the dates above given, before June 12th, 1874, (record, pages 37, 38, answer 13; record, page 36, answer 12; record, page 122); and on June 12th, 1874, there is no pretense that there was any but the company's money in bank. This $2,813.93 having all been paid out before May 31st, 1874, would not affect the question before us, whether the rule in Clayton's case, or in 13 Chan. Div., above quoted, be taken as law, because on

March 1st, 1874, Dillon owed the company $7,537.51. We can presume that this sum, or most of it, was in bank before the deposit of $44,727.61 began. It is true there is no precise proof of what Dillon's balance in bank on March 1st, 1874, was. We know by the proof it was large; the balances on page 154 show this. If out of the $7,537.51, only $2,813.93 was in bank March 1st, 1874, that answers our purpose, and that, the Court can fairly assume for the purposes of this case.

But this presumption is not necessary for the case. The Court can start with May 31st, 1874, (admission, page 36,) when, as Mr. Orndorff proves, (answer 13, pages 37, 38,) every dollar which had been deposited, and did not belong to the company, had been checked out by Mr. Dillon, leaving all the money in bank the company's money.

Had Mr. Dillon, on May 31st, 1874, settled with the company, as he then owed it $7,428.74, it would have taken all the money in bank—$7,512.67—except $83.93; but Mr. Dillon did not fully settle with the company, either on May 31st, 1874, or on June 12, 1874.

Now it is admitted (record, page 36) that on May 31st, 1874, Dillon had on the close of that day, in bank, $7,512.67, and the same thing is shown in Exhibit J. O. C. No. 1. (Record, page 129.) If the Court will subtract from each other the balances with which said account begins, viz: $1,229.56 from $8,742.23, leaving, as above, $7,512.67, Exhibit J. O. C. No. 1, (record, page 129,) thus corrected, will be thus:

Dr.			Cr.	
1874.			1874.	
June 1—To Cash		$67 71	June 1—By Balance	$7,512 67
" 1— "	(Note)	10,000 00	" 1—By Cash	188 41
" 3— "		31 26	" 3— "	857 21
" 6— "		200 00	" 4— "	316 88
" 6— "		32 53	" 5— "	1,210 56
" 8— "		30 66	" 6— "	651 48
" 12— "		362 49	" 6— "	330 00
" 12—To Balance		1,000 86	" 8— "	257 80
			" 10— "	204 71
			" 11— "	60 93
			" 12— "	134 86
		$11,725 51		$11,725 51

1874.

May 31—Amount in bank		$7,512 67
June 1-12—Total deposits of company's money by Dillon	$4,212 84	
Less checks	724 65	
		$3,488 19
June 12—Total claim of company vs. the bank		$11,000 86

1874.

May 31—Amount due company by Dillon, (Record, page 36)	$7,428 74
June 1-12—Total receipts for company by Dillon. (Record, page 122)	4,940 24
June 12—Total amount due by Dillon to company	$12,368 98

So that, if Mr. Dillon had settled with the company on June 12th, 1874, he would have owed it $12,368.98, of which last sum, he had then in bank only $11,000.86, wherewith to pay this indebtedness of $12,368.98.

I submit therefore that the $11,000.86, proved to be in bank on the 12th day of June, 1874, was entirely the company's money, and no money of any other party was then in this account. So swears Mr. Dillon, answer 12, page 29.

VI.

Is the amount $11,000.86, for which the decree below was rendered, correct?

In the petition for a rehearing of the cause, filed below, (record, page 156,) it is claimed that the decree should not have been rendered for more than $9,518.18.

The answer to this petition, (record, page 157–160, is a full reply to all the allegations of this petition, and shows the falsity of the defendant's figures; and I ask the Court's special attention to this answer, as a conclusive argument of the question now under consideration.

On June 12th, 1874, Dillon owed the company $12,368.98, and had in bank, of the the company's money $11,000.86—the rest was in Dillon's pocket. But it said you must go back to May 31st, 1874, and that Dillon's account to the company for that month, (record, page 144,) shows that Dillon overpaid the company $1100.45, and only owed it $6,899.55. Dillon never overpaid the company; the $8,000 check credited in the May report, it was never paid by the bank or

Dillon, and is still unpaid, (record, page 29, answers 11–14–15.

The May and June reports, (record, pages 144–149, run into each other, and to understand them, and see how Dillon settled with the company, we must take them together. The following is a resume of both accounts.

Receipts for May, (record, page 144,) dividends	$14,919 24	
Interest	1,053 42	
Total May receipts		$15,972 66
Receipts for June, (record, page 145–9,) dividends	$14,668 42	
Interest	902 28	
Total June receipts		15,570 70
Total May and June receipts		$31,543 36

This sum of $31,543.36, Dillon settled with the company as follows:

May dividends, commissions and expenses, (record, page 144)	$9,073 11	
June dividends, commissions and expenses, (record, page 145–149.	6,918 73	
Amount in Central National Bank.	11,000 86	
Cash paid company by Dillon after July 18, 1874	4,550 66	
Total settlement for May and June 1874		$31,543 36

In order, therefore, to settle with the company for May and June, Mr. Dillon, in his May and June accounts, takes credit for the $11,000.86 in the Central National Bank, and thereby concedes it to be the company's money; he swears it was the company's money, (record, page 29, answer 12); he has never paid it over to the company; the company has never yet received it, and the bank still retains it; and it requires this sum to pay Dillon's debt to the company.

Why then may not the company follow this $11,000.86 and claim it as its own, upon every principle of equity jurisprudence?

We say it is our money; that Dillon now owes it to us; that the bank took it with full knowledge, and is therefore, as to it, a trustee *de son tort;* and that the bank can gain no right by its own wrong.

It cannot say to us, you must take the May account by itself, and thereby make Dillon's debt to the company $6,899.55, on May 31st, 1874, against $7,428.74, conceded to be due on that day. Record, page 36.

The May account is only of the business appertaining to the month of May; it only shows Dillon's debt on May 31st, 1874, to the company, for the premiums payable in May; it does not show his entire debt to the company, due May 31st, 1874. Any June premiums paid by anticipation, in May, would appear not in the May, but in the June account, and hence the correctness of the admission of Dillon's debt on May 31st, 1874, as $7,428.74; and it is respectfully submitted that the bank is concluded by the admission. But again, the May account with the credit of the unpaid protested check of June 10th, 1874, for $8,000, is all

fiction and book-keeping; the $8,000 credit, the over-payment of $1,100.45 are only on paper, they have no real existence.

Nothing was paid, nothing therefore was over-paid.

You must take the May and June accounts together, and the result is that Dillon owes to us the $11,000.86; he has conceded it to us, and it takes the entire sum to pay his debt to the company.

I have said above that the June account was not prepared until after July 18th, 1874.

The proof is that Dillon was in the habit of making out his monthly returns about the 20th of the following month.

The May account (record, page 144,) sets out the $8,000 check of June 10th, 1874, and was therefore prepared after June 10th, 1874.

In the June account, (record, page 149,) the entry opposite the figues $3,000.86, demonstrates that the June report was not made out until after July 18th, 1874; the words are, "*for which suit was brought for the company, July 18th.*" The bill in this case was filed July 18th, 1874.

There was no necessity to refer this case to a master, as all his work had been done by Mr. Orndorff. And the agreement that Exhibit W. W. O., (record, page 35) should be received as evidence in lieu of Mr. Dillon's cash-book, bank-book, check-books, and bank deposit tickets, shows this. Mr. O. had everything before him to state the account, and this with his testimony, clearly enabled the Court to reach and pass a final decree without any further reference. Orndorff proves the company's claim against Dillon, and how much of its

money, in checks and cash, went into the bank account; and both Orndorff and the bank officers prove Dillon's bank account, and the balance to his credit on June 12th, 1874.

VII.

The retention by the bank, and its refusal to pay over the $1,000.86, the difference between the bank's alleged claim of $10,000, and the $11,000.86, is referred to, as showing the animus and bad faith of the bank throughout all these transactions.

VIII.

The incorporation of the complainant is admitted. Record, page 45.

For the reasons above assigned, I respectfully ask for an affirmance of the decree below.

JOHN CARSON,
Solicitor for Appellee.